IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

CASE NO: 1552/2013

In the matter between:

ZWELIVELILE MANDLELIZWE DALIBHUNGA MANDELA Applicant

and

MAKAZIWE PUMLA MANDELA & 16 OTHERS Respondents

TAXATION REVIEW JUDGMENT

RUSI J

[1] On 03 July 2013, the applicant in this review successfully opposed an application for the rescission of this Court's order which it made in a burial dispute.[1] When the rescission application was brought, counsel on brief for the review applicant (as the first respondent in those proceedings), was instructed by Randall Titus & Associates (Randall Attorneys), a firm of attorneys situated in Cape Town. The first respondent in this review was the applicant in that rescission application.

[1] The order refusing rescission was made in the judgement of LP Pakade ADJP (as he then was) under case number 1552/13, delivered on 03 July 2013.

[2] On 16 February 2023, Zilwa Attorneys, a firm of attorneys situated in Mthatha, filed a notice in terms of Uniform Rule 70(3B), of its intention to tax a bill of costs on an attorney and client scale (the bill of costs or the bill). The basis of the bill was that Zilwa Attorneys performed professional work as local correspondent attorneys for Randall Attorneys at the request of one Mr Gary Colin Jansen (Mr Jansen) who was employed as a consultant at Randall Attorneys. Randall Attorneys and Mr Jansen objected to the bill of costs.

[3] The bill of costs contained 34 items which related to the alleged professional services that Zilwa Attorneys rendered on behalf of Randall Attorneys as local correspondent attorneys. In item 24 of the bill, Zilwa Attorneys claimed R426.00 for preparing a memorandum for counsel, and R426.00 in item 25 for preparing counsel's brief.

[4] On 19 February 2024 the Taxing Mistress appended her *allocatur* to the bill, amounting to R190 059.03. Of this amount, the total of R75 549.03 (including VAT) entailed the fees and disbursements claimed by Zilwa Attorneys for the services allegedly rendered by them as the local correspondent attorneys.

[5] Subsequent to the Taxing Mistress' *allocatur*, Randall Attorneys required her, by notice in terms of Rule 48(2) of the Uniform Rules of Court, to state a case for the decision of a judge regarding her ruling at taxation, that Randall Attorneys is liable for the bill of costs; as well as for the various items of the bill that she allowed. On 22 April 2024 the Taxing Mistress supplied her stated case to the parties in accordance with Rule 48(3).

[6] Zilwa Attorneys and Mr Jansen subsequently filed their respective written submissions as envisaged in Rule 48(5)(a). The Taxing Mistress filed her report in terms of Rule 48(5)(b) on 20 August 2024. This application served before me during September 2024 for review in terms of Rule 48(5)(c) of the Uniform Rules of Court.

[7] When the file was placed before me, it was disorderly, and the papers were not indexed and paginated. The history of the contested bill of costs was not readily discernible from the papers filed in the review. Even though the overarching contention by Zilwa Attorneys was that the bill related to their attorney and client costs following a mandate to act as correspondent attorneys for Randall Attorneys, there was no indication *ex facie* the papers filed of record, of information from which I would be able to glean such a mandate.

[8] On 17 September 2024, I issued a directive in terms of Rule 48(6) requesting the Taxing Mistress to provide the order of court that she gave effect to in making the decision sought to be reviewed. It was pursuant to this directive that the Taxing Mistress filed further information provided by Zilwa Attorneys in which it was explained that the bill of costs was drawn after Randall Attorneys requested that the statement of account presented by Zilwa Attorneys be placed before the Taxing Mistress. No further submissions were made by any of the parties after the receipt of the information provided by Zilwa Attorneys.

The taxation proceedings

[9] At the taxation proceedings, Randall Attorneys was represented by Mr Potelwa, Zilwa Attorneys by Mr Zilwa, and Mr Jansen by Mr Mvulana of Mvulana Attorneys. From the stated case submitted by the Taxing Mistress, it is apparent that the disputants of the bill of costs only made submissions regarding the issue of liability for the fees claimed by Zilwa Attorneys. They indicated that they would make no submissions regarding the rest of the items on the bill. In this regard, Randall Attorneys contented themselves with the notice of objection.

The objection to the bill of costs

[10] The review applicant filed its notice of objection on 27 February 2023 (the notice of objection). Items 1 and 2 of the bill were objected to on the ground that they are not recognized tariff items, alternatively, that they were not reasonably necessary. In respect of items 3 to 34, the applicant raised the following generic grounds of objection:

(i) The items do not follow the tariff, alternatively, they are not recognized tariff items.
(ii) It does not appear from the bill that the work claimed was actually done.
(iii) There are no file notes to justify the time claimed.
(iv) The action taken was not necessary and proper.
(v) The action and contentions are not supported by any file notes.
(vi) It is unclear whether the work performed was occasioned by over caution, negligence or mistake.
(vii) The attorney's excessive telephonic dialogue was unnecessary and/or unreasonable. Further and/or alternatively there are no file notes to support the telephone calls.

[11] Items 24 and 25 were objected to on the ground that they constituted an unnecessary duplication of costs and that R426.00 falls to be disallowed.

[12] In disputing the existence of a mandate to Zilwa Attorneys to act as local correspondent attorneys, Randall Attorneys relied on *Malcolm Lyons & Munro v Abro and Another,*[2] stating that since no evidence of a valid mandate was produced in the sense that the items were not specifically authorized, the Taxing Mistress erred in ruling that they were liable for the fees claimed by Zilwa Attorneys for alleged services rendered as correspondent attorneys.

[13] Randall Attorneys further contended that there was no court order attached to the bill and therefore, the Taxing Mistress was in no position to determine whether the bill

[2] [1991] 4 All SA 244 (W).

followed a court order. They further contended that counsel's invoice was not attached to the bill, and the disbursements claimed were not supported by vouchers.

[18] Mr Jansen's objection to the bill was twofold – in the first instance he stated that he never gave mandate to Zilwa Attorneys to perform any services for him and on his behalf. Furthermore, he has never been a director or a partner at Randall Attorneys, never received moneys from the third respondent in the main application and never gave indemnity to Mr Titus of Randall Attorneys in respect of any payment received from the third respondent in the main application or any party.

The notice to state a case

[19] In the notice requiring the taxing mistress to state a case as envisaged in Uniform Rule 48(1), Randall Attorneys make the following assertions:

(a) The Taxing Mistress *mero motu* made the ruling that they are liable for the fees claimed by Zilwa Attorneys for the professional services that the latter allegedly rendered, and disbursements incurred notwithstanding that she was not a judge or she did not sit as a court of law.

(b) Each one of the items that are set out in the notice of objection were objected to at the taxation, alternatively, they were allowed by the taxing mistress *mero motu*.

[20] The Taxing Mistress was further required in the notice to state a case, to include a finding of fact that she made regarding the items that were objected to, or which she allowed *mero motu* and which facts Randall Attorneys intended to challenge on the grounds stated in the notice of objection. She was further required to state any finding of fact that she made regarding the decision to tax the bill without having regard to the objections contained in the notice of objection.

The Taxing Mistress' stated case

[21] In her stated case, the Taxing Mistress states that it is incorrect that she *mero motu* made a ruling that Randall Attorneys is liable for the fees claimed by Zilwa Attorneys in the bill of costs. According to her, after the parties asked her to make a ruling on the issue of liability, she called for evidence of the services that Zilwa Attorneys allegedly rendered as correspondent attorneys on behalf of Randall Attorneys and such evidence was provided to her. The parties extensively argued the issue of liability for the fees claimed in the bill of costs. As regards the rest of the contended items in the bill of costs, the parties indicated that they stood by the objections they respectively filed.

[22] As far as the disputed items of the bill of costs are concerned, she states that no oral submissions were made at taxation, the parties having stated that they would stand by the respective notices of objections. She consequently made her ruling having had full regard to what was set out in the notices of objections filed by the disputants.

[23] The Taxing Mistress lists the following reasons as her basis for not upholding the objections filed in respect of items in the bill of costs. On perusal of the file, she was satisfied that the work that Randall Attorneys disputed was actually done. This was a high-profile matter which attracted a lot of attention and was brought as an urgent application. She was satisfied that it was a complex matter. During argument she was advised that the applicant in that application telephonically consulted with Zilwa attorneys and counsel for the drawing of the urgent application papers. She was further advised that Mr Jansen who represented Randall Attorneys had never set foot in Mthatha during consultation with the client, drawing of papers and appearance in court. He was also consulted telephonically. For these reasons and considering that the main attorneys were based in Cape town, the number of calls was justified in the circumstances. They were not unreasonable, unnecessary or excessive.

[24] She goes on to state that in as much as the file notes would be of assistance, she did not consider them necessary in the light of the documentary evidence that she

was supplied with coupled to the fact that the parties elected not to make any oral submissions on the disputed items.

[25] Regarding items 24 and 25, she did not consider them to be the same thing and thus a duplication of work. For the purposes of determining liability for the disbursements, she considered the documentary evidence that she was supplied with which included counsel's invoice.

The general principles of taxation

[26] The Taxing Mistress derives her powers to tax bills of costs for professional work done by an attorney from Rule 70(1) which 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.'

[27] Uniform Rule 70(3) sets out the taxing master's duty and discretion during taxation in the following terms:

> '[T]he Taxing Master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses."[3]

[3] See also, *Mouton v Martine* 1968 (4) SA 738 (T) at 742.

[28] It is trite that on review, the court will interfere with the decision of the taxing master/mistress where it finds that he/she has not exercised his/her discretion properly. It has been held that this will be the case where the taxing master/mistress was actuated by some improper motive; did not apply his/her mind to the matter; has disregarded factors or principles which were proper for him/her to consider, or considered others which were improper for him/her to consider; acted upon wrong principles or wrongly interpreted rules of law; or gave a ruling which no reasonable person would have given.[4]

[29] Learned author AC Cilliers[5] says of the taxing master's discretion:

> "The discretion vested in a Taxing Master is to allow (all) costs, charges and expenses as appear to him to have been necessary or proper, not those which may objectively attain such qualities. His opinion must relate to all costs reasonably incurred by the litigant, which imports a value judgment as to what is reasonable. Moreover, the words 'reasonable' and 'in the opinion of the Taxing Master' that occurred in the tariff appended to rule 70 imported a judgment not referable to objectively ascertainable qualities in the items of a bill in question. The discretion to decide what costs have been necessarily or properly incurred is given to the Taxing Master and not to the court."

[30] The discretion given to the taxing mistress requires of her to bring an objective mind to bear upon the task of taxation. In this regard, the taxing mistress must properly consider and assess all the relevant facts and circumstances relating to the particular item concerned, and the circumstances of the case as whole at the time that step listed in a particular item was taken. In *City of Cape Town v Arun Property Development (Pty) Ltd*[6] it was held:

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[4] *Preller v Jordaan and Another* 1957 (3) SA 201 at 203C-D.
[5] AC Cilliers, Law of Cost 3rd Edition, 1997 – Issue 28: 13.03.
[6] 2009 (5) SA 227 (C) 232.

'[17] The taxing master has discretion to allow, reduce or reject items in a bill of costs. She must exercise this discretion judicially in the sense that she must act reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case. Where the discretion is not so exercised, her decision will be subject to review. In addition, even where she has exercised her discretion properly, a court on review will be entitled to interfere where her decision is based on a misconception as to the facts and circumstances or as to the practice of the court.'

[31] In *Ocean Commodities Inc & Others v Standard Bank of SA Ltd & Others,*[7] Rabie CJ re-stated the test to be 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.

The submissions by Zilwa Attorneys

[32] In their written submissions to the stated case supplied by the Taxing Mistress, Zilwa Attorneys contends that the review is ill-founded, based on a wrong premise and an abuse of the process of court. They further state that the contention by Randall Attorneys that the taxing mistress *mero motu* decided the issue of liability for the bill of costs is without any basis. They emphasize that the parties agreed during taxation that the issue to be decided by her was that of liability for the bill. Zilwa Attorneys further states that since this was not a party and party bill of costs, the Taxing Mistress, in any event, had the powers to determine liability for the attorney and client costs.

[33] It is further contended by Zilwa Attorneys that it is equally incorrect that the Taxing Mistress *mero motu* allowed the items in the bill of costs whereas both parties requested her to use her discretion, with Randal Attorneys and Mr Jansen having indicated that they stood by their respective objections that were filed of record. The

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[7] 1984 (3) SA 15 (A) at 8F-G; see also *JD van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A); *Legal and General assurance Society Ltd v Lieberum NO and Another* 1968 1 SA 473A at 478G.

parties, so the submission continued, took the risk of not making any oral submissions before the Taxing Mistress. Therefore, contends Zilwa Attorneys, it is not available to Randall Attorneys to complain after the Taxing Mistress made findings that are not in their favour.

Mr Jansen's submissions

[34] The initial ground on which Mr Jansen objected to the bill of costs, namely that he never gave mandate to Zilwa Attorneys did not form part of the written submissions filed on his behalf in response to the stated case of the Taxing Mistress.

[35] It was instead submitted on behalf of Mr Jansen that the Taxing Mistress correctly ruled that Randall Attorneys is liable for the bill of costs. Furthermore, so the submission goes, the Taxing Mistress' ruling on the issue of liability for the bill of costs followed a full consideration of arguments that were made and documents that were placed before her. Therefore, so the argument continues, it is incorrect to suggest that the Taxing Mistress made the ruling *mero motu*.

[36] No written submissions were filed by Randall Attorneys pursuant to the stated case supplied by the taxing mistress.

Discussion

[37] The bill was taxed on an attorney and client basis. The starting point ought to be that the tariff which is applicable in the case of party and party taxation is not binding upon an attorney who claims fees under an attorney and client bill. However, the party and party tariff will be taken as a guide where there is no express or implied agreement to authorize higher charges.[8]

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[8] *Oshry and Lazar v Taxing Master and Another* 1947 (1) SA 657 (T) at 660; *Udwin v Cross* 1962 (2) SA 291 (T), at 293 A-B; Joubert Civil Procedure and Costs LAWSA, 2nd edition, Volume 3 Part 2 (Lexis Nexis Butterworths), p281 para 409.

[38] It is instructive to re-state the principles enunciated in *Ben McDonald Inc v Rudolph*[9] where it was held that 'such costs are taxed according to the tariff, but are generous where there is some leeway. Items not in the tariff may be included and so may amounts which would be reduced on taxation on a party and party basis.'[10]

[39] For convenience, I will deal with the contentions made by Randall Attorneys as set out in the objection under the rubrics of the competence of the Taxing Mistress to make the disputed ruling on liability for the bill and costs, and the correctness of the Taxing Mistress' exercise of her discretion, respectively.

The competence of the taxing master to rule on liability for costs

[40] As regards the contention that the Taxing Mistress usurped the function of a judge or court and fixed liability for costs where there was no court order to that effect, regard must be had to the provisions of Rule 70(8) which are as follows:

> 'Where, in the opinion of the taxing master, more than one attorney has necessarily been engaged in the performance of any of the services covered by the tariff, each such attorney shall be entitled to be remunerated on the basis set out in the tariff for the work necessarily done by him.'

[41] There was no bar in the Taxing Mistress making a determination on the costs claimed by Zilwa Attorneys despite the fact that there was no court order in which they were specifically awarded. It was a matter for her determination whether in the present case the costs claimed could be awarded. I am fortified in this view by the dictum of Seligson AJ in *Friedrich Kling v Continental Jewellery Manufacturers*[11] where it was stated that it is certainly not the function of the court making the cost order to make a

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[9] 1997 (4) SA 252 (T); see also *Cambridge Plan AG v Cambridge Diet (Pty) Ltd & others* 1990 (2) SA 574 (T) *and Aircraft Completions Centre (Pty) Ltd v Rossouw & others* 2004 (1) SA 123 (W).
[10] Id at 257G – 258F.
[11] 1993 (3) SA 76 (CPD); see also *Hills and others v Taxing Master and another* 1975 (1) SA 856 (D) at 865A-B; *cf Stuart-Lamb v Stuart-Lam* 1997(3) SA 140 (E) at 144E -G and the authorities referred to therein.

determination on the implications of performance of services by either a litigant's out-of-town attorney or by an attorney practicing at the seat of the court. This, said the court, was a matter to be determined by the Taxing Master in the exercise of the discretion given by Rule 70(8).[12]

[42] Randall Attorney's contention that the Taxing Mistress usurped the judge's or court's function of awarding costs when she ruled that they are liable for the costs claimed by Zilwa Attorneys cannot be sustained.

Did the Taxing master correctly exercise her discretion?

[43] Randall Attorneys makes a three faceted contention in this regard. Firstly, they contend that Zilwa attorneys had no valid mandate in that the services they performed were not specifically authorized, the costs and disbursements were not agreed to, and for this reason they were not entitled to the fees they claimed. Therefore, the Taxing Mistress erred in finding that Randall Attorneys was liable for the fees so claimed. Secondly, the fees and disbursements claimed by Zilwa Attorneys were not supported by vouchers, and there were no file notes. Thirdly, the costs claimed are not recognized by the tariff or were not reasonably incurred.

[44] The reliance on *Malcom Lyons* is misplaced. In that case, one of the issues before Kriegler J was whether the special power of attorney on which the attorneys relied in their bill of costs for claiming fees for the extra work alleged to have been done by them, covered such extra work, and whether the Taxing Master was correct in disallowing the amount claimed in the bill of costs. The learned Judge found that since there was no specific mandate in the power of attorney for the work that the attorney claimed to have done, and in light of the factors that the Taxing Master considered pertaining to whether such work was necessary at all, his discretion in disallowing the amount claimed in that regard was correctly exercised.

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[12] Id, at 88D-G.

[45] There does not appear, in the present case, to be any pertinent denial in the objection filed by Randall Attorneys of the fact that Zilwa Attorneys was at all requested by Jansen to perform work as a correspondent attorney for Randall Attorneys. That being said, the Taxing Mistress called for evidence that would satisfy her that such an instruction was indeed given to Zilwa Attorneys on behalf of Randall Attorneys. Such evidence was provided to her. The case of *Malcom* is no authority for the contention of Randall Attorneys in the present matter for it is distinguishable on the facts.

[46] Furthermore, in her stated case, the Taxing Mistress gives summary of her ruling from which it appears that both parties at the taxation proceedings made their contentions on the issue of Zilwa Attorneys' mandate or instructions to act as local correspondent attorneys. It is indeed rather confounding that a contention is made that the Taxing Mistress *mero motu* made a finding that Zilwa Attorneys were appointed as correspondent Attorneys by or on behalf of Randall Attorneys. I find no grounds on which to falter the decision of the taxing mistress on the issue of liability for the costs claimed.

[47] That there were no file notes to support the fees is of no consequence when regard is had to the fact that the Taxing Meistress called for documentary evidence of the work done which included counsel's invoice. Randall Attorneys does not dispute that such evidence was provided during taxation. Having received the evidence, the Taxing Mistress proceeded to make her determination based on it. This she was allowed to do in terms of Rule 70(2) which provides:

> 'At the taxation of any bill of costs the taxing master may call for such books, documents, papers or accounts as in his opinion are necessary to enable him properly to determine any matter arising from such taxation.'

[48] It was the duty of the Taxing Mistress, after all, to demand proof to her satisfaction that the services for which payment is demanded have actually been rendered. And, as held in *Gluckman v Winter and Another*, in this regard, the taxing

master must consider such evidence as may be reasonably necessary in order to determine whether a probability exists that the services were actually rendered.[13]

[49] On the score of the reasonableness of the costs incurred by Zilwa Attorneys, it is instructive to state that in *Van Rooyen v Commercial Union Assurance Company of SA Ltd*[14] it was held that what an honest, experienced and capable practitioner would consider what is reasonable in relation to a claim or defence, bearing in mind the requirement of efficient practice and the exigencies of litigation, should be taken into account by the taxing master.

[50] The Maxing Mistress had regard to the nature of the case and the fact that Randall's Attorneys was situated in Cape Town, the fact that it was submitted to her that Mr Jansen himself had never physically attended consultations with the client. She also had regard to the correspondents' evaluation of the matter when such consultations were held. This she would have done in order to gain an appreciation of what would be reasonable in the circumstances. Having done so, she found that the telephonic consultation for the duration stated and the amount allowed were reasonable.

[51] It bears mentioning, with regards to item 24 and 25 that there is, at least to my mind, a distinction between the drawing of a memorandum and preparation of the brief. In a memorandum the legal practitioner provides, inter alia, an analysis of legal principles and authorities, and their application to the facts of the case at hand. Randall Attorneys' objection that one of the two items ought to have been disallowed is misplaced. A brief is an instruction to counsel to perform specific work. Its preparation entails the collation of the information, documents and papers necessary for the prosecution of the proceedings. I am unable to agree with the contention that item 24 and 25 entailed a duplication of work.

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[13] 1931 AD 449 at 450; *Lubbe v Borman* 1938 CPD 211; *Maasdorp and Smit v Sullivan* 1964 (4) SA 2 (E) at 2H-3A.
[14] 1983 (2) SA 465 (O) at 468.

[52] I have no reason to interfere with the Taxing Mistress' exercise of the discretion vested in her in allowing the items that she allowed. It has not been shown that she was actuated by some improper motive; did not apply her mind to the matter; disregarded factors or principles which were proper for her to consider or considered others which were improper for her to consider; acted upon wrong principles or wrongly interpreted rules of law; or gave a ruling which no reasonable person would have given.

[53] I must lastly deal with the contention made by Zilwa Attorneys and on behalf of Mr Jansen that the contentions made by the review applicant on the Taxing Mistress' stated case were not made at the taxation proceedings. This much is confirmed by the Taxing Mistress in her stated case. A review is not an extra opportunity to a taxation hearing. As held in *Daywine Properties (Pty) Ltd v Murphy and Another,*[15] if a party opposing the taxation party who opposes taxation fails to object when before the Taxing Master, he cannot thereafter invoke the review taxation procedure provided by Rule 48 in a belated attempt to attack items which the Taxing Master allowed.[16]

[54] No effort appears to have been made during taxation, by the representative of Randall Attorneys, to make oral submissions or submit information that would support their objections to the items in the bill of costs. In fact, the Taxing Mistress' stated case makes it abundantly clear that during taxation, the parties knowingly opted to forego their right to make oral submissions of the contested items. In the case of Randall Attorneys, this election was made in the face of generic grounds of objections that were raised in respect of items 3 to 34. It is not open to Randal Attorneys to make the contention they make on review when they were not made before the Taxing Mistress.

[55] I make the finding that contrary to what the applicant contends, the Taxing Mistress did not act *mero motu* in any of the findings she made. She applied her mind to the submissions made to her and documents presented to support those submissions. I

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[15] 1991(3) SA 216 (D).
[16] Id, at 218E-F.

have no basis to find, either, that she was “clearly wrong.” There are no reasons for this Court to interfere with her exercise of her discretion. The application for review must fail.

[56] In the result, I make the following order:

1. The review is dismissed, with costs.

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L. RUSI

JUDGE OF THE HIGH COURT

Delivered on 22 April 2025

For the applicant:	Randall Titus & Associates
	c/o Potelwa & Co, Mthatha
For the respondents:	Zilwa Attorneys, Mthatha