

REPORTABLE (25)

Judgment No. S.C.
44/84 Civil Appeal No.
370/83

CONE TEXTILES (PRIVATE) LIMITED v (I) C. PETTIGREW (PRIVATE) LIMITED (2)
TEE DEPUTY REGISTRAR, HIGH COURT

SUPREME COURT OP ZIMBABWE,
BECK, JA, GUBBAY, JA & GOLDIN, AJA,
HARARE, MARCH 21 & APRIL 17, 1984.a

M.T. O'Meara for the appellant

A.P. de Bourbon, for the first respondent

GOLDIN, AJA: This is an appeal and a cross-appeal against a decision of the High Court in a review of taxation of costs in terms of Rule 314 of the High Court Rules,

The dispute relates to senior counsel's fees for the first day in arbitration proceedings. It is common cause that junior counsel's fees should be one half of his senior's fees. Fees marked and paid to senior counsel were \$9 000 in respect of the first day and refreshers of \$400 per day for 2nd to 16th day together with a fee of \$200 for conferences. His junior received one half of the total of \$15 200. (Notwithstanding the abolition of the division of the legal profession into a Bar and a Side Bar by the substitution of a "fused" system under which all are legal practitioners it is convenient to refer to senior and junior counsel on the basis of the situation which used to prevail).

The second respondent allowed a fee of -0000 for the first day thereby reducing senior counsel's fee for the first day by \$6 000 and left

the rest unaltered. On review DUMBUTSHENA, JP (as he was then) increased the fee to \$6 000. The appellant appeals against the increase while the first respondent cross appeals claiming that the fee of \$9 000 should have been allowed.

The question as to when a court is entitled to interfere with a taxing master's determination of fees has been the subject of numerous decisions since the beginning of this century. They fall into two main categories. 'Firstly that a court will only apply the common law grounds for interference on review. Secondly that if the court is 'clearly' or "distinctly" of the opinion that the taxing master was wrong it is the duty of the court to reverse or correct it.

I will refer to some of the cases which fall into the first category. In the case of Nourse Mines v Clarke, 1910 TPD 600 BRISTOWE, J said at 661:-

"I agree that if the Taxing Master had exercised his discretion this Court would not overrule it. The jurisdiction of the Court to overrule the discretion of another person or officer only arises where the discretion has been improperly exercised, that is, where the officer has been actus, led by some improper motive, or has not brought his mind to bear upon the question, or where he has adopted some principle which the Court considers unsound. If, therefore, the Taxing Master had considered the merits of this case, and decided that it was not reasonable to allow two counsel, I should not have interfered."

The learned judge equated the position of the Taxing Master with the position where a matter is left to the discretion or determination of a public officer. The approach of a court in those cases was set out in this country in Clan Transport Co. v Swift Transport Services 1956 (3) SA 386 (FC) where CLAYLEN, FJ held that a court will only interfere with the exercise of discretion where the finding was so grossly unreasonable that it indicates that he acted nala fide, or from improper motives or there was a failure to apply his mind to the matter. This

approach based on an examination of many decided cases is similar to the oft quoted test applied by IMGES ACJ in Shidiak v Union Government 1912 AD 575 at 53 where he said:-

"There are circumstances in which interference would be possible and right. If, for instance, such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong,"

This approach was adopted by GALGUT, J (as he was then) in City Deep Limited v Johannesburg City Council 1973 (2) SA 109 (WLD) at 113 where he said under the heading "Taxing Master¹s Discretion - generally" as follows:-

"It has always been accepted that in reviewing the ruling of a Taxing Master the Courts will not lightly disturb the discretion which he has, it will only be interfered with if he has exercised it improperly or has not brought his mind to bear on the question in issue or has acted on a wrong principle. See Nourse Mines Ltd. v Clarke, 1910 TPD at p. 661, The dicta of BRI STOWE, J, certainly set out the position very clearly,"

He went on to deal with "Counsel's fees - generally" and said-

"The same tests apply in regard to counsel's fees. The Court will not interfere with the quantum of fees which a Taxing Master has allowed counsel in a party and party bill of costs unless he has acted on a wrong principle or has

exercised his discretion in a wrong manner. See Wellworth's Bazaar v Chandlers Ltd and Others, 1947 (4) SA 453 (t) at p. 4599 and Duvos (Pty) Ltd. v Newcastle and Others, 1965 (4) SA 553 (N) at p. 553," . — -

Earlier cases which adopted this approach on review of taxation are mentioned by SUTTON JP in Van Harte v Rabinowitz and Minde and Another 1947 (4) SA 66 (CPD) at 368 —

"It has frequently been laid down that the Court will not interfere with the exercise of his discretion unless it is clear that he has exercised his discretion improperly or erred on a point, of principle. See Liquidators Benghait Ltd v Liquidators Sterling Trading Col (1922,WLD 177) Golombick v Atlas Insurance Co. Ltd. (1916, WLD 14); Adamson v Beckett (1929, CPD 19171 de Villiers v Estate Hunt (1940» CPD 518); Cash Wholesalers Ltd. v Natal Pharmaceutical Society (1937) HPD 418)."

The exercise of a wider power, or more correctly an additional ground, for interference by a court in a review of taxation, has been applied almost concurrently with the limited test based on the common law approach. These cases fall into the second category to which I referred.

In the case of Marais v Union Government 1911 TPD 407 CURLEWIS, J did not limit the court's jurisdiction to the test set out by BRISTOWS J in the Nourse Mines case, supra, and to the approach in Shidiack's case, supra. He said at 409J-

"I quite agree that the Court would be reluctant to interfere with the decision of the Taxing Officer; but it seems to me it is going too far to limit the jurisdiction of the Court to review the Taxing Officer's

decision to cases in which he has decided a matter of principle wrongly. It is quite within the province of this Court, where the Taxing Officer has decided that a certain affidavit or witness was not necessary, to review his decision and to determine whether he was right or wrong in so holding."

TINDALL, J clearly agreed with this additional ground for interference in the case of Colin v Pratt 1925 WLD where he said "that whatever may be the position when the question is merely one of quantum, if the Court is distinctly of opinion that the taxing master's decision is wrong it is the duty of the court to reverse it."

The additional principle upon which a court will interfere is descriptively stated by MILLIN, J in the case of Wellworth's Bazaar's Ltd. v Chandler's Ltd. and Others, supra-

"The law, as I conceive it to be, is that in general the discretion of a Taxing Master will not be disturbed unless it is found that he did not exercise a proper discretion, for example, by disregarding factors which were proper for him to consider, or, by giving a ruling which the Court can see no reasonable person would have given* That is the general principle. But that principle has had engrafted upon it something else, and that is this: There is a certain class of case where the point in issue is a point on which the Court is able to form as good an opinion as the Taxing Master and perhaps even a better opinion ...

So there has developed what I call a graft on the main principle.

The Court will feel it its duty to correct the Taxing Master and substitute its own opinion when the matter is one in which the Court is at least as well able to judge as the Taxing Master is.

The effect of the "graft on the main principle" was further explained by COLMAN, J in the case of Adamat Labs (Pty) Ltd. v General Electric Co. 1964 (3) SA 33 (TPD) at 66 as follows-

"It is true that a Taxing Master's exercise of his discretion is not lightly to be interfered with, and that in matters of quantum the court will seldom override his decision. But, on the authorities as I read them ... it seems to me that the court, if satisfied that the Taxing Master was clearly wrong, even on a matter involving degree, has jurisdiction to interfere, and a duty to do so."

In the case of Legal and General Ass. Society v Liebrum N.O. and Another 1968 (1) SA 473 (AD) POTGIETER JA summarised the position at 476:-

"It is clear from all these decisions that the Court's power of interference with the Taxing Master's ruling is not limited to the grounds stated in Shidiack's case, but that in certain cases the Court may also reverse his ruling
"if it is clearly of the view that he is wrong. The repealed Rules as well as the present Rules do not, in my view, confer a free discretion on the Taxing Master, but one which is subject to correction by the Court. The Court, therefore, has the power to correct the Taxing Master's ruling not only on the grounds stated in Shidiack's case but also when it is clearly satisfied that he was wrong. Of course, the Court will interfere on this ground only when it is in the same or in a better position than the Taxing Master to determine the point.(See also Noel Lancaster Sands (Pty) Ltd v Theron and Others 1975 (2) TPD 280.)

In my view the correct position is, therefore, that the Court has power to interfere with or alter a Taxing Master's ruling on two grounds. Firstly on the application of the common law rights on review which involve a finding that he was grossly unreasonable or acted improperly or failed to apply his mind to the matter or erred on a point of principle or law. In such a situation the court would be at large and entitled to substitute its opinion for that of the Taxing Master. It should not be overlooked that even when such grounds for interference exist it need not follow that the Taxing Master's decision must necessarily be set aside or altered. He may have arrived at the correct decision for a wrong or even improper reason.

Secondly regardless of the absence of any common law ground for interference the court has a duty to interfere if satisfied that the Taxing Master was clearly wrong in regard to some item. In such a case the court will substitute its own opinion for that of the Taxing Master even if it is a matter involving degree.

It is emphasised, however, that the court must be satisfied that the Taxing Master was clearly wrong and not merely that in his place it would have come to a different decision.

The relevant facts to which this approach is applicable are briefly as follows. The parties have been involved in disputes arising from a building contract for the erection of a factory and associated structures by the first respondent for the appellant. This is the seventeenth case before the superior courts of this country as a result of this contract. One dispute concerning the issue of an architect's certificate was referred to arbitration which commenced on 16th October 1978 and terminated

seven weeks and twenty two volumes of evidence later.

The arbitration award was followed by proceedings to set it aside (Cone Textiles Ltd v Ayres and Another 1980 (4) SA 728 (Z. AD)).

In September, 1980, the architect issued a final certificate* A dispute followed which was referred to arbitration which I will call the second arbitration. The first respondent was represented by senior counsel, junior counsel and an attorney.

The arbitration was heard by two arbitrators. The hearing was preceded by five pre-trial conferences during which thirty-six alleged defects in the construction and materials used by the first respondent were discussed with the result that about 45 issues emerged and these included issues which were the subject matter of the First Arbitration. The Second Arbitration took place on 23 and 27th November, 1981 and on 4th - 18th and on the 21st and 22nd December 1981.

The arbitrators awarded the first respondent \$92 860 after referring to 45 separate issues and awarded costs on the High Court scale including the costs of three legal practitioners.

Upon taxation of costs the second respondent heard both sides and enquired from other counsel what fees were charged by senior counsel. He disallowed \$6 000 of senior counsel's fees and this decision was taken on review before the High Court. His decision was attacked and considered by the court on two main grounds. Firstly that he had acted improperly in seeking the views, and thereby raising the likelihood of being influenced by the replies of other counsel at the Bar.

The details of this allegation were in dispute and the second respondent contended that it was a general enquiry which did not affect his

independent decision based on his experience and submissions made before him. The judge a, quo did not find his conduct was improper. Secondly it was alleged that the second respondent failed to apply his mind to the complexity of the case. He stated in his affidavit that having dealt with taxation of the First Arbitration bill of costs he "possessed a much greater awareness" of the work involved in the second arbitration. He also said:-

"I have accordingly assessed the complexity of these arbitration proceedings as being equivalent of a High Court opposed civil commercial trial lasting for the same number of days in which costs of two counsel were allowed (three legal practitioners) whilst in addition I have taken into account the exceptional number and volume of documents that had to be studied by counsel."

The learned judge was of the view that the second respondent failed to appreciate and give effect to the complexity of the dispute. There were 45 issues of which a significant number were canvassed in the first arbitration. It was essential for counsel to study the 22 volumes containing 2-212 pages. While most building disputes involve a number of issues without necessarily being particularly complex or difficult, there were complex: issues requiring more than usual concentration, application and study. The time required to read, understand and prepare for trial was also significantly longer than in the type of case with which the second respondent equated this one.

It is not clear whether or not the second respondent misdirected himself concerning his enquiries about fees charged

by counsel. I am not certain that he did so misdirect himself, I agree⁹ however, with the judge a quo that the fee of \$3 000 was totally inadequate and this inadequacy followed no doubt from the mistaken view that the case was of average difficulty as described by him. The second respondent was clearly wrong and the increase for the first day was fully justified (see Adamat Labs case, supra at 368).

For these reasons I would dismiss the appeal against the increase in senior counsels fees from \$3 000 to \$6 000.

The same considerations justify the dismissal of the cross appeal. The fee of \$9 000 can perhaps be justified on the basis of attorney and client costs which the successful party incurred to satisfy a desire to be represented by eminent counsel with a reputation for superior skill. Unsuccessful litigants should not be oppressed, however, by having to pay an excessive amount of costs merely to provide the successful litigant with a full indemnity (see Magola v Union and S.A. Insurance Co, Ltd 1978 (2) SA 154 at 155),

I turn to the question of costs on review and appeal.

In the court a quo there was no order as to costs. No reasons were given. In my view the general rule should have been applied that in the absence of good reason for the contrary costs should follow the result. The first respondent was substantially successful and had to come to court to obtain an increase in senior counsel's costs from \$3 000 to \$6 000 with the proportionate increase in respect of junior counsel.

In the proceedings before us the appeal and the cross-appeal concerning the sum of \$6 000 are dismissed.

The first respondent however succeeds in altering the order as to costs in the court a quo and his cross-appeal did not significantly.