

REPORTABLE (81)

YAKUB MAHOMED
v
(1) JOHN ARNOLD BREDENKAMP (2) TANYARADZWA
PRECIOUS MASHAYAMOMBE N.O

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKONI JA & BERE JA
HARARE: NOVEMBER 12, 2019 AND JULY 2, 2020

Ms J.B. Woods, for the appellant

D. Ochieng, for the first respondent

MAKONI JA: This is an appeal against the whole judgment of the High Court which set aside the decision of the taxing master, the second respondent, to allow an advocate's fees at taxation.

The facts of the matter are, to a large extent, common cause. They are as follows. The appellant sued the first respondent for the recovery of a debt under HC 8103/14. The first respondent counter claimed for damages for malicious prosecution. After a 3 day trial, the court found for the appellant and awarded him costs on a legal practitioner/client scale. The first respondent appealed against that decision and the appeal was resolved on the basis of a settlement that left the order of costs intact. There was a dispute over the appellant's costs claim. This obliged the appellant to tax the bill. To that end the parties appeared before the second respondent. Among other disputes, that are no longer relevant, the first respondent did

not accept item no 124 of the bill which was a claim for the recovery of US\$170 000.00 alleged to be a fee payable to the advocate who appeared in the three-day trial.

The second respondent dismissed the objection and allowed the recovery on the basis that the fee had been incurred. Aggrieved by the decision of the second respondent, the first respondent sought a review of that decision before the court *a quo*. His grounds for review, in the relevant part, were as follows.

“First respondent’s decision to allow Counsel’s fees as a disbursement in the total sum of US\$170 000.00 on the mere presentation of Counsel’s invoice by second respondent was grossly unreasonable as first respondent failed to apply her mind to the necessity or reasonableness of such fee.

The disbursement allowed in item 124 as counsel’s fee was grossly excessive, was not reasonably incurred and could not have been allowed had the first respondent applied her mind to the question.”

The issue that was before the court *a quo* was whether or not the second respondent had proceeded irregularly by failing to enquire into whether or not it was proper to allow the appellant to recover the alleged fee from the first respondent merely on the basis that it had been found to have been incurred. The court *a quo* found that the allegation that the second respondent ruled that the appellant was entitled to recover the alleged sum merely because it was paid and that she had no power to enquire into the reasonableness of the fees remained unchallenged throughout the proceedings before it.

It further found that failure to enquire into the reasonableness of the disbursement was an abrogation of the second respondent’s role. The second respondent committed a grave irregularity by failing to satisfy herself of the reasonableness of the disbursement.

The court *a quo* further discounted the appellant's arguments that the first respondent agreed that the fee was recoverable on the basis that the agreement produced was not signed by the first respondent and further that the issue was not raised at the taxation. It further discounted the argument that the fee was a contingency fee on the basis that it was not raised at taxation and that in any event the contingency fee agreement was not produced.

The appellant was dissatisfied with that judgment and appealed to this Court on the following grounds:

1. The Learned Judge misdirected himself in finding that second respondent was clearly wrong in her decision to allow Advocate Mpofu's fee.
2. The Learned Judge misdirected himself in finding he had the legal right to overturn the second respondent's decision to allow the fee.
3. The Learned Judge erred in failing to accept that respondent's legal practitioners had paid the fee directly to Advocate Mpofu and hence accepted the fee's reasonableness.
4. The Learned Judge erred in overturning the fee in the circumstances.

Mrs *Wood* contended that this was purely an academic exercise by the first respondent as the impugned fee was paid to counsel. The first respondent had accepted the reasonableness of the fees by making the payment. The fee was based on a contingency agreement. The High Court rules do not cater for fees charged on a contingency basis. One has to look at the regulations governing contingency fees agreements. The *onus* is on the losing party to show that the fee is unreasonable. It is not for the winning party to justify the fees.

Per contra Mr Ochieng submitted that the sum of US\$170 000.00 was paid after taxation and as a result of execution of the taxation order.

Regarding the contingency agreement, he submitted firstly that the agreement has never been exhibited. Secondly that if it exists, it is an agreement between the appellant and his legal practitioners. It had nothing to do with the first respondent. Thirdly that it was never produced before the second respondent. When the first respondent objected to the reasonableness of the bill, only a fee note was produced. This fact is uncontroverted. He further submitted that the second respondent failed to carry out an enquiry as to whether the fee was reasonable.

The issue for determination is whether the court *a quo* had the power and was correct in setting aside the decision of the second respondent on review.

Rule 307 provides:

“With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to this claim or defence and to ensure that all costs shall be borne by the party against whom such order has been awarded, the taxing officer 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 office to have been incurred or increased through over caution, negligence or mistake, or by payment of a special fee to another legal practitioner, or special charges and expenses to witnesses or other person or by other unusual expenses.”

In terms of the above rule, a taxing officer is expected to conduct an enquiry into the reasonableness of fees and disbursements that a successful litigant claims from his adversary. To discharge that obligation, the rule confers upon a taxing officer a discretion to allow costs, charges and expenses incurred by a party which appear to him to have been

necessary or proper for the attainment of justice or defending the rights of any party. Such taxation is made in consonance with an existing order of costs granted by a court which specifies the party to be indemnified and the extent of such indemnification in general terms. Once a bill of costs is taxed, a party obtains the right to execute for costs.

It follows that in exercising the discretion conferred upon him, a taxing officer may not allow the costs which have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to another legal practitioner, or special charges and expenses to witnesses or other persons or by other unusual expenses. Therefore, a taxing officer can only allow *bona fide* and necessary costs on every taxation.

In *Puwai Chiutsi Legal Practitioners v The Registrar of The High Court & Anor*¹ the court had this to say regarding the import of r 307 as to the powers of a taxing officer and the statutory framework within which such powers must be exercised:

“The taxing officer is enjoined to allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or defending the rights of any party. He must be guided by the tariff of legal practitioner’s fees prescribed in the High Court (Fees and Allowances) Rules, regard being had to any amendment to the tariff from time to time. (See Order 38) r 302.

The taxing officer’s powers of taxation emanate from the High Court Act, its rules, and the regulations which are promulgated by the Minister.”

Accordingly, the tax officer’s powers are regulated by law and may not be exercised outside the parameters stipulated by the relevant laws.

¹ HH 485/16

While allowing costs is the preserve of a taxing officer, r 314 provides that if a party is aggrieved by the decision of the taxing officer, made in terms of r 307, it may apply to the High Court for a review of such taxation.

The court may interfere with the decision made by a tax officer in certain circumstances. The principles applicable in review matters in terms of r 314 are the same as apply to reviews in general.

In Nourse *Mines v Clarke* 1910 T.P.D. 660 at p 661 which was quoted with approval in *Legal and General Society Ltd v Lieberum, NO and Another* 1968(1) SA 473 (A) at 447, BRISTOWE J said:

“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 actuated 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.”

At home, in *Cone Textiles (Private) Limited v Pettigrew (Private) Limited & Anor*² which was quoted by this Court in *ICL Zimbabwe Limited v The Taxing Master Supreme Court & Ors*³ it was stated as follows:

“The principles by which the Court is to be guided when it is asked to review the decisions of the Taxing Officer are well established. SQUIRES J set them out in *Williams v The Taxing Master supra* at 125, and they were repeated, although without reference to the decision in *Williams*, by GOLDIN AJA in the *Cone Textiles* case *supra* at 275 F-G. He set out two grounds:-

‘Firstly on the application of common law rights on review which involve a finding that he was grossly unreasonable 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 (*sic*). It should not be overlooked that even when such

² 1984 (1) ZLR 274 (SC)

³ SC 45/99

grounds for interference exist it need not follow that the Taxing Master's (*sic*) 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 (*sic*) 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 (*sic*) even if it is a matter involving degree.'

(See also *Ocean Commodities Inc v Standard Bank of SA Ltd* 1984 (3) SA 1 (A)). This second criterion has been called "a graft on the main principle". The Court allows itself a wider power to interfere in the decision of one of its own officers, because it is operating on familiar ground. It will be more hesitant to intervene in a discretionary decision by other public officials or tribunals."

Consequently, there are two instances in which a court may competently interfere with the decision of a taxing officer. Firstly, where a finding is made that the taxing officer's decision was grossly unreasonable or that he erred on a point of principle or law. Secondly, a court is entitled to interfere where the taxing officer was clearly wrong regarding some item.

In the recent case of *Zizhou v The Taxing Officer & Anor*⁴ the court made the following pertinent remarks at p3 of the judgment relating to interference with a taxing officer's discretion:

"The court is very slow to interfere with the exercise of the taxing officer's discretion. It will not readily do so unless it is satisfied that the taxing officer acted on some wrong principle or did not exercise his or her discretion at all."

In that case, the court set aside the bill of taxed costs on the basis that it was in contravention of the law. This was because the bill was erroneously drawn up and denominated

⁴ SC 7/20

in United States dollars at a time when the law demanded the exclusive use of the Zimbabwean dollar in domestic transactions.

As was correctly observed by the court *a quo*, what transpired before the second respondent is common cause. It is captured in para 14 of the first respondent's founding affidavit where it is stated:

“The applicant further took issue with item 124, where the second respondent sought to recover US\$170 000 which he said was paid as a fee to Mr Mpofo for the conduct of a three day trial. In answer to the applicant's challenge, the officer representing the first respondent simply produced an invoice appearing to originate from Mr Mpofo. On that basis alone, the first respondent approved the item, without enquiry into its reasonableness. In other words, she ruled that it was recoverable simply because it had been paid.”

This was not controverted by the appellant in his opposing affidavit. Instead he sought to justify the amount.

The first respondent's grounds for review attack this conduct of the second respondent which was to allow the disbursement on the basis that it had been paid. The issue that confronted the court *a quo* and still confronts this Court is whether the second respondent did what was required of her in terms of r 307. This is the nub of the matter. The account given by the first respondent in para 14, quoted above, clearly shows that she did not.

The second respondent, after it had been established that the fee had been accrued, did not enquire into whether it was recoverable from the first respondent. She further did not enquire whether it was necessary or proper.

All the other issues raised by the appellant that the first respondent accepted the reasonableness of the fee, that the *onus* lay on the first respondent to establish that the amount claimed was not reasonable and that there was a contingency agreement, are irrelevant for the determination of the sole issue before the court. Taking them into account in the determination of this matter would amount to converting this Court into a taxing authority. Those are the arguments that should have been presented before the second respondent to assist her to arrive at a correct decision. As was correctly observed by the court *a quo*, the contingency agreement was not produced before the taxing officer neither was it produced before it.

Regarding the issue of onus, proper interpretation of r 307 yield the result that once the judgment debtor, at taxation, establishes a *prima facie* basis for objecting to an item, on the bill of costs, the *onus* shifts to the judgment creditor to establish the reasonableness and propriety of each item that it claims. This is in view of the provisions of r 307 that the judgment creditor is entitled to recover only that which the taxing officer is persuaded to allow. It is the judgment creditor who seeks indemnity to the extent that it is permissible and not the judgment debtor who seeks absolution to the extent that it may be justified. The judgment creditor therefore bears the *onus*.

There was clearly a basis for the court *a quo* to interfere with the discretion exercised by the second respondent in arriving at a decision to allow the impugned item. She did not bring her mind to bear to the task that was before her which was to assess whether the claim was necessary or proper for the attainment of justice.

The appeal has no merit and ought to be dismissed.

The first respondent prayed for costs on a higher scale on the basis that the appeal appears to be an insincere bid to delay the recovery, by the first respondent, of the monies paid to the appellant as a result of the flawed proceedings before the second respondent. He also attacked the insincere manner in which this appeal has been framed.

I am persuaded by the arguments advanced by the first respondent to award a special order of costs. Right from the onset the appellant steered away from the nub of the matter which was an attack on the conduct of the second respondent. He raised peripheral issues in the hope of pulling wool over the eyes of the respondent and the court. Costs on a punitive scale are warranted.

In the result I make the following order:

1. The appeal is dismissed.
2. The appellant is to pay the first respondent costs on a legal practitioner and client scale.

GWAUNZA DCJ: I agree

BERE JA: I agree

Venturas & Samukange, appellant's legal practitioners

Atherstone & Cook, 1st respondent's legal practitioners