BENNY CHOTO
versus
C.B.Z. AND ANOTHER

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 21 October 2005
and 8 November 2006

Opposed application

Mr *Chibwana*, for the applicant
Mr *Chadyiwa*, for the respondent

GUVAVA J: The facts of this matter are common cause and may be summarized as follows:- The parties appeared before a Judge in chambers on 17 June 2004 for a pre- trial conference. The respondent's legal practitioner was not available on that date and made arrangements for counsel to appear with client. The matter was resolved on that date and the court made an award of costs against the applicant. At taxation the applicant did not contest any of the fees claimed by the respondent save for a claim for $300 000 (old currency) which was for counsels fees. It was submitted by the applicant that the respondent was not entitled to claim these fees as they were at a higher rate. The taxing officer after considering the submissions made by both sides confirmed the award in favor of the respondent and allowed the amount claimed. The applicant now seeks a review of the decision made by the Taxing Master in terms of the Rule 314 of the High Court Rules.

It is a well established principle of our law that a court may only review a taxing master's discretion where it is shown that he did not exercise his discretion properly, or where he has adopted the wrong principle.

(See *Bedford Pharmaceuticals Limited v SA Pharmacy Board and*

The Taxing Master 1947 (1) SA 291 and *Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor* 1984(1) ZLR 274). In *Wellworths Bazaars Limited v Chandlers Ltd* 1947 (4) SA 453 MILLIN J stated at p457 as follows:

> "The law as I can conceive it to be is that in general the discretion of the taxing master will not be disturbed unless it is found that he did not exercise a proper discretion, or for example, by disregarding factors which were proper for him to consider or by giving a ruling which the court can see no other reasonable person would have given."

In the founding affidavit, the applicant submitted that this court should interfere with the discretion of the taxing master on the grounds that the fee was incurred due to over caution on the part of the first respondents legal practitioners, or that the taxing master applied the wrong principle as such fee amounts to a special fee and therefore ought to have been taxed in terms of the prescribed party and party costs tariff.

It is apparent from the Heads of Argument and submissions made at the hearing that the applicant has not sought to persist in the argument that the respondent was over cautious. In my view it was proper to abandon that argument as it was not in dispute that the respondent had in fact failed to secure the services of another legal practitioner. The respondent's legal practitioner was not available on the date of the pre trial conference and thus sought the assistance of counsel to represent the client. The respondent's legal practitioner explained that he had initially approached two other firms of legal practitioners to assist his clients on that day to no avail. This explanation was not denied by the applicants counsel as can be clearly seen from the applicants answering affidavit. Thus the sole issue to be determined is whether the fees paid to the respondents' counsel were reasonable.

Where a legal practitioner obtains the services of counsel to deal with a case, the legal practitioner must pay out as a disbursement the fees charged by such counsel. The disbursements which are allowed are dealt with in Order 38 Rule 308, of the High Court Rules, 1971 which provide as follows:-

"308 Services rendered, work done and disbursements

(1) A taxing officer may tax all bills of costs for services (other than conveyancing) actually rendered by a legal practitioner or by a notary public in his capacity as such, including disbursements made, whether in connection with litigation or not, and whether the work was done before or after the date on which the rules came into operation.

(2) In the taxation of costs as between party and party in respect of work done in connection with judicial proceedings, a taxing officer shall be guided as far as possible by the tariff of legal practitioners' fees prescribed in the High Court (Fees and Allowances) Rules, 1994.

(3).....

(4) In taxing any costs under the subrule, a taxing officer shall –

(a) allow disbursements made when they are reasonable, and reasonably incurred; and

(b).....

In his report the taxing officer stated that he found the disbursement claimed to be fair and reasonable and within the range charged by other junior counsel. The taxing officer's decision to allow a disbursement is clearly discretionary. The approach adopted by the taxing officer in determining this case is beyond reproach. He applied the proper principle as set out in the rules and found the disbursement reasonable.

In any event, disbursements on the respondent's bill of costs relate to the actual amount which the legal practitioner will have paid out to counsel and the respondent does not have a choice in the amount charged by counsel. In this case the taxing officer found that the amount charged was reasonable and reasonably incurred and therefore allowed the payment.

It however seemed to me that the issue which was weighing in the minds of the parties before me was whether there is at law, a distinction between an "attorney" and "an advocate", the applicant's argument being that all legal practitioners must now charge fees in accordance with the prescribed tariff, as there is no longer a distinction. In deciding this issue it is necessary to examine the Legal Practitioner Act, 1981 (the Act). In terms of section 2 of the Legal Practitioners Act, as amended the terms advocate and attorney were repealed and a new encompassing term "legal practitioner" was introduced for all legal practitioners. This new definition was introduced through Statutory Instrument 277/81 on 5 June 1981. The applicant has submitted that by repealing these two words it was the intention of the legislator to do away with the distinction between attorneys and advocates. He relied on the case of *TA Holdings Limited v Maceys Consolidated (Pvt) Ltd & Anor* 1988 (2) ZLR 453 where the Supreme Court pointed out that the law had been amended to change the terminology applicable to all legal practitioners.

In my view however the change in terminology did not in any way affect the basic differences between the two types of legal practitioners. The definition provision in the Act states that "another legal practitioner means a legal practitioner who is instructed by a legal practitioner not of the same association or firm of legal practitioner." From this perspective the Act recognizes that there are legal practitioners who represent clients by virtue of being instructed

by another legal practitioner. I am also fortified in this view by the fact that the main objective of the amendment was to avail affordable legal representation to all litigants in the High Court and Supreme Court. Prior to the amendment only advocates had audience in the High Court and Supreme Court and this meant that the cost of litigation was very high. The objective was therefore to place all legal practitioners on the same level without distinction in relation to their ability to appear in the superior courts and not to take away one's right to practice as an advocate.

It is also accepted that fees charged by legal practitioners who have been so instructed are generally regulated from the bar from which they operate. These fees are not determined by any tariff. That this distinction has been maintained by the legislator may be gleaned from the provisions of the High Court (Fees and Allowances) (Amendment) Rules 2003 published in statutory Instrument 195 /2003 which provides as follows:

> "8 When another Legal Practitioner is instructed he or she shall not be required to adhere to this tariff but shall charge such over all fee as the taxing officer considers fair and reasonable in the circumstances:
> Provided that this paragraph shall not apply where a legal Practitioner of record is instructed by a country legal Practitioner."

In my view therefore there is a recognition by the legislature that there is a class of legal practitioners who are not bound by the tariff set out in the Rules. The only class of such legal practitioners who are not bound by the tariffs are those who have been instructed by another legal practitioner. Therefore, although the distinction in terms of terminology has been removed, once a legal practitioner has been instructed by another, then that legal practitioner is not bound by the tariff as prescribed.

In my view therefore the applicant has not established a basis upon which this court may interfere with the decision of the taxing master.

With relation to costs it was argued by the respondents counsel that the application was frivolous and vexatious and that on that basis the applicant should pay costs on a higher scale. I am however not persuaded by this submission. The issue relating to the quantification of counsel fees has been a problem for a long time. The amendment to the Legal Practitioners Act which sought to use the same terminology for all legal practitioners by removing the terms “advocate” and “attorney” seems to have added to this confusion. In my view therefore this application was not frivolous as it sought lay to rest some of the confusion.

Accordingly I make the following order:

1. The application is hereby dismissed.
2. There shall be no order as to costs.

Messers IEG Musimbe & Partners, applicant’s legal practitioners
Messers Costa & Madzonga, 1st respondent’s legal practitioners