ZIMBABWE BANKING CORPORATION LIMITED
versus
TRUST FINANCE LIMITED
and
THE REGISTRAR, HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 18 May and 20 December 2006

Opposed Application

Advocate Matinenga, for the applicant
Mr *A. Moyo*, for the 1st respondent

MAVANGIRA J: This is an application for a review of taxation. The founding affidavit was deposed to by Simon Sadomba who stated that he is a "legal practitioner.....within the firm *Gill Godlonton and Gerrans* applicant's legal practitioners of record." The first respondent challenged the deponent's capacity and authority to depose to an affidavit on behalf of the applicant. In his answering affidavit, Sadomba then stated.

> "In my founding affidavit, I omitted to state that I had been authorised by the applicant to depose to that affidavit. I confirm having been authorised by applicant to depose to that affidavit and also this replying affidavit in my capacity as legal practitioner for applicant."

The deponent acted for the applicant in the litigation giving rise to this application. Although the case is not quite in point, it was stated in *Eskom v Soweto City Council*, 1992 (2) SA 703 at 705E.

> "The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney."

It was held in *Thorne v Retail Traders Inquiry Bureau & Anor*, 1936 TPD 310 that where an application is made by an agent on behalf of a principal, a statement in the petition that the applicant is acting in his capacity as agent

for the principal in question is a sufficient allegation that he is authorised to make the application, and he may sign the petition in his own name without qualification.

In *Griffiths & Inglis v Southern Cape Blasters* 1972 (4) SA 249 at 252 F-G, COBETT J stated:-

> "In the present case the founding affidavit makes no express mention of authorisation by the company acting through its board of directors. The question of authority has been challenged in the opposing affidavit, and thus the onus is upon the applicant to show that the application has been authorised by the directors of the company. In as much as no contrary evidence has been placed before the court by the respondent, the "minimum evidence", to use the words of WATERMERYER J, in *Mell's case*, will suffice."

In *Mall* (*Cape*) (*Pty*) *Limited v Merino Ko-Operative Bpk* 1957 (2) SA 347 (C) it was held:-

> "The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf."

In *Air Zimbabwe Corporation & Ors v The Zimbabwe Revenue Authority* HH-96-2003 it was held that the deponent to the applicant's affidavit had authority to act for and on behalf of the applicants after the court took into account the prior dealings between the parties and it was further stated:-

> "I may in passing observe that is often that litigants take objection to the other party's *locus standi* to institute proceedings. I do not think that it is proper for any litigant to do so especially where, from prior dealings, he should be aware that the challenge to his adversary's *locus standi* will not succeed."

In *Eastview Gardens Residents Association v Zimbabwe Reinsurance Corporation Limited* HH 174-2003 PARADZA J at page 9 of the cyclostyled judgment stated:

> "In the case of *Direct Response (Pvt) Ltd v Shepherd* 1993(2) ZLR 218(H) ADAM J considered the circumstances under which a litigant may successfully challenge the authority of the person who purports to act for another person, in that case a company. He concluded that where a deponent does not state that he or she is duly authorised to depose to that affidavit on behalf of others the court will not readily conclude that such person had no authority to so depose to an affidavit. The court should consider each case on its own merits in arriving at a conclusion. WATERMEYER J in the case of *Mall (Cape)(Pty) Ltd v Merino Ko-operasie Bkp* 1957(2) SA 347(C), stated that in the case of an artificial person coming before the Courts like a company or co-operative company, *albeit* an association as in the case of the applicant –
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> > "There is judicial precedent for holding that that objection may be taken **if there is nothing before the court** to show that the applicant has duly authorised institution of motion proceedings. Unlike an individual an artificial person can only function through its agent and it only takes decisions in the passing of resolutions **in the manner provided by its Constitution .....**The best evidence that the proceedings have been properly authorised would be to provide by an affidavit made by an official by the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigant and not some unauthorised person on its behalf. (my emphasis)"

I agree with the applicants' counsel's submission that it is trite that a legal practitioner is his client's agent. See paragraph 4 of his heads of argument. I do not therefore consider the omission in the founding affidavit of the allegation that the deponent was "authorised", to be fatal, particularly also, in view of the history or background to this application. This same legal practitioner acted for the applicant in the proceedings which subsequently led to the taxation now sought to be reviewed and in which the issue of his authority was not an issue. I am satisfied that the deponent's averment in the founding affidavit is sufficient in the circumstances of this matter, to

show his authority to depose thereto and therefore find that the deponent was duly authorised by the applicant as he states.

The respondent also raised another preliminary point which I now deal with. It is contended that the application does not comply with Rules 257 and 314 of this court's rules 257 and 314 of this court's rules. I have no hesitation in agreeing with the applicant's submission that whilst Rule 257 falls under Order 33 which deals with reviews generally, it is not referred to or incorporated in any way in Rule 314. Rule 314 provides;

> "314 Review of taxation
> 1. A party aggrieved by the decision of a taxing officer may apply to court within four weeks after the taxation to review such taxation. The application shall be by court application to the taxing officer and to the opposite party, if such opposing party was present at the taxation or if the court decides that such opposite party should be represented.
> 2. The court application shall specify the items forming the subject of the grievance."

Rule 257 requires that:-

> "The notice shall state shortly and clearly, the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for."

The review of taxation thus clearly and separately provided for in the Rules. The time limits and format applicable are clearly and separately stated. It is, in my view, clear that Rule 257 has no application in reviews of taxation and that the stated ground would not be a sound and justifiable reason for finding that the application cannot be heard by this court.

In the result, I find against the respondent in respect of both preliminary issues. This application is therefore properly before this court.

Merits

It is common cause between the parties that the law governing interference with a Taxing Master's ruling is as set out in *Cone Textiles*

(*Private*) *Limited v Pettigrew* (*Private*) *Limited & Anor* 1984 (1) ZLR 274 (SC) at 278 as follows:-

> "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 common law rights on review which involve a finding that he was grossly unreasonable or erred on a point of principle or law. It should not be overlooked that even when such grounds for inference 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 the wrong or 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.
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> It is emphasized, 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 dispute between the parties emanates from the interpretation placed by the Taxing Master on the words in my ruling of 4 August 2005 in the earlier matter involving these same parties' matter in which the defendant was awarded the "costs of this date's hearing and should properly bear the defendant's said costs on the higher scale." (emphasis added)

In *Carlis v Hay* 1903 TS 317 at 318 cited by the defendant's legal practitioner in heads of argument INNES CJ stated:-

> "Such unnecessary costs as have been or may be incurred, owing to a party to a suit applying for or causing the postponement or delay of the trial or hearing which costs would not have been incurred but for such delay."

It is the defendant's contention that each and every item on the bill of costs is consequent upon and incidental to the applicant's application for a postponement, which application the court heard on 27 July 2005 leading to the ruling already referred to above.

The 1st respondent's legal practitioner submitted in heads of argument that on a generous interpretation the applicants' purported grounds for

review could be extracted from paragraphs 11 to 14 of the founding affidavit. In my view these stated paragraphs, in compliance with rule 314 (2) specify the items forming the subject of the grievance.

The applicant states in the founding affidavit that it is aggrieved by the Assistant Taxing Officer's decision to allow costs reflected in items 1 to 11 and 17 to 24 of the bill of costs on the ground that these were incurred before and after 27 July 2005 and were not in the contemplation of the judge when the ruling of 4 August 2005 was made. The deponent to the founding affidavit further states that the applicant was not accorded an opportunity to address the Assistant Taxing Officer on the nature and grounds of its queries. The following startling statement is then made:-

> "The Assistant Taxing Officer simply took a ruling from somebody else without affording the parties an opportunity to address that person on the issue, which was a serious misdirection on her part."

I say "startling" in view of the undisputed statement in the 1st respondent's opposing affidavit that Mr Sadomba, who deposed the applicants' affidavit was not present as the taxation of 6 September 2005. In fact Mr Sadomba in his answering affidavit carefully avoids discussing the events of 6 September 2005 and seeks to create the impression that the taxation was adjourned to and continued on 9 September yet that is the date on which the Assistant Taxing Officer gave her determination of the items on the bill of costs. It is also undisputed that on the first day of the taxation on 6 September 2005 he sent a clerk from his firm to attend and that all the contents of his affidavit in relation to that date are therefore based on hearsay.

However, even assuming that he had personal knowledge of same, in my perusal of items 1 to 11 on the bill of costs, it appears that all the items claimed were in preparation of the hearing of 27 July 2005, particularly as the argument before the court when the applicant sought a postponement was whether or not a contested provisional sentence matter could be set down on, and or postponed to the unopposed or the opposed roll.

With regards to items 18 to 24, although Mr *Matinenga* had no instructions to concede in relation to them, he was not in a position to make any submission justifying why they should not have been allowed. A ruling having been handed down, the 1st respondent's legal practitioners necessarily had to make inquiries with a view to uplifting a copy, I have no hesitation therefore in finding that the Assistant Taxing Officer was justified in allowing these items as well.

The applicants' legal practitioners general conduct in his handling of this matter and specifically in his depositions in the founding affidavit leaves a lot to be desired. He should be hesitant, if not the last person to purport or attempt to throw stones at the 1st respondent's legal practitioners, as he does in his answering affidavit at pages 33 and 34 of the record. He borders on conduct that would earn the applicant an award of costs on the higher scale and even possibly against himself *de bonis propriis*. He however, only borders thereon. In my view his conduct is not of the level as in *Nyandoro v Sithole & Ors* 1999 (2) ZLR 353 where a legal practitioner was visited with an order of costs *de bonis propriis* for arrogant and impolite language used in reference to the opposing practitioner. I am unable to grant the 1st respondent costs at the level indicated in its heads of argument as being the appropriate level, by reason of the applicant's legal practitioner's language in reference to the 1st respondent's legal practitioner. While costs will follow the result I am unable to grant the first respondent costs at the level sought in heads of argument.

For the above reasons it is ordered as follows:-

The application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Kantor & Immerman, 1st respondent's legal practitioners