DONALD TARIRO MANGENJE
versus
GAYLORD MANDIZVIDZA
and
THE CLERK OF COURT

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 21 January 2023 & 19 July 2023

Opposed Application – Review of Taxation in the Magistrates Court

Mr *H Mukonoweshuro*, for the applicant
Ms *V Muzambi*, for the 1st respondent

MUSITHU J: This matter was placed before this court in terms of Order 32 r 5 (5) of the Magistrates Court (Civil) Rules, 2019 (the Rules). It is a spin-off from a matter that was determined by the court *a quo*, in which the applicant herein was the defendant and the first respondent herein was plaintiff. The matter concerned some claims that were made by the first respondent against the applicant in the court *a quo*, in connection with a lease agreement that subsisted between the parties. The court found in favour of the first respondent and ordered the applicant to pay costs of suit on the legal practitioner and client scale. The first respondent's legal practitioners prepared a bill of costs for taxation. In preparing the bill, they applied the Law Society of Zimbabwe legal practitioner and client tariff (the Law Society Tariff). It is the application of that tariff to the bill of costs that found the applicant's complaint.

The parties appeared for taxation before the second respondent on 7 April 2022. The applicant objected to the application of the Law Society Tariff, which had been invoked in the computation of the bill of costs. The second respondent rejected the applicant's objection and proceeded to apply the Law Society Tariff in taxing the bill.

Submissions before the court *a quo* and the decision of the court

Aggrieved by the second respondent's decision, the applicant approached the court *a quo* for the review of that assessment in terms of Order 32 r 5(1)(b) and (c) of the Rules. That provision states that:

"***5. Review of costs and taxation***
(1) Any party having an interest may, within seven days after he or she has knowledge thereof, bring before a magistrate for review—
(*a*) ……;
(*b*) the assessment by the clerk of the court of any costs and expenses;
(*c*) the taxation by the clerk of the court of any costs awarded in any action or matter"

The applicant's contention in the court *a quo* was that the second respondent should have applied the tariff referred to in s 43 of the Magistrates Court Act[1] (the Act). The applicant argued that the Act and the Rules did not provide for the application of the Law Society tariff in the taxation of costs in the court *a quo*. That tariff was different from the legal practitioner and client tariff referred to in the Act and the Rules.

The application for review was opposed by the first respondent. In his opposition, the first respondent averred that Note 1 of the Law Society tariff made that tariff so broad in scope that it applied to legal practitioner and client fees in all civil litigation, including in the court *a quo*. The first respondent also argued that Order 32 r 2(1) allowed a taxing officer, *"in exceptional cases and for good and sufficient reasons to depart from any of the provisions of table A of the second schedule where strict adherence to such provisions would be inequitable."* It was also submitted that it would be inequitable to apply the party and party tariff because the scales of fees provided in table A of the second schedule of the Rules would not be sufficient to cover all the fees incurred by the first respondent due to inflation.

Further reference was also made to Order 32 r 2(3) and s 43 (2) of the Act which it was argued, gave the second respondent the discretion to invoke the Law Society tariff in the interests of justice.

The court *a quo* found in favour of the first respondent herein. The learned Magistrate analysed s 43 of the Act and Order 32 r 2(1), and made the following remarks:

> "It is the court's view that the above mentioned sections are both referring to party to party scale and the judgment of this court awarded costs on a higher scale and the clerk of court is given a discretion to give other scales which are not provided for in table A of the second schedule and in this case he used the Law Society tariffs. As pointed out by the legal practitioner for the 1st respondent Section 43 of the Magistrates Court Act should be read together with Order 32 Rule 2(1) of the Magistrates Court Rules….."

Having restated the provisions of Order 32 r 2(1), the learned magistrate determined that the decision of the second respondent could not be faulted. He reasoned that it would

[1] [*Chapter 7:10*]

constitute an injustice to the first respondent were the bill to be taxed by applying the party and party scale.

The submissions before this court

Mr *Mukonoweshuro* for the applicant submitted that the Magistrates Court is a creature of statute whose powers are restricted under the Act. There was no provision for the application of the Law Society tariff in the Act or the rules. On the contrary, r 72(7) of the High Court Rules, 2021, made specific provision for the application of the Law Society tariff. The fact that the Rules did not make specific reference to the Law Society Tariff showed that the intention of the law maker was not to make that tariff apply to a taxation of costs in the lower court. Counsel argued that the fact that s 43(2) of the Act provided that the scale referred to in s 43(1) of the Act also applied to the taxation of costs as between legal practitioner and client effectively meant that the two types of costs had to be treated in the same manner.

In reply Ms *Muzambi* for the first respondent submitted that s 43(2) of the Act accorded the second respondent some latitude to allow additional costs and charges for services reasonably performed by a legal practitioner, and for which no remuneration was prescribed as between party and party. Counsel further submitted that the reference to two different scales in the law meant that the two types of costs had to be treated differently. There were certain services that were rendered that justified the invoking of the Law Society Tariff. The second respondent had therefore exercised his discretion properly.

In his brief response, Mr *Mukonoweshuro* submitted that even assuming that the respondent had any discretion to exercise, that discretion had been exercised unreasonably. The second respondent had taxed the entire bill of costs by applying the Law Society tariff, which was impermissible under the current law. He further submitted that circumstances would probably have been different had the second respondent, in the exercise of his discretion, indicated those parts of the bill that justified the application of a higher tariff.

The analysis

In resolving the issue before the court, it is critical to evaluate the relevant provisions of the law that bear upon the taxation of costs in the court *a quo*. The starting point is subsections (1) and (2) of s43 of the Act. They read as follows:

"**43 Costs**

> (1) The stamps, fees, costs and charges in connection with any civil proceedings in magistrates courts shall, as between party and party, be payable in accordance with the scales prescribed in rules.
> (2) As between legal practitioner and client, the same scales as provided in subsection (1) shall apply; but the clerk of the court may in his discretion allow, at rates based so far as may be upon such scales, additional costs and charges for services reasonably performed by the legal practitioner at the request of the client for which no remuneration is prescribed as between party and party." (Underlining for emphasis).

The Magistrates Court may make an order of costs on the party and party scale, or on the legal practitioner and client scale at the conclusion of civil proceedings before it. From a reading of s 43 above, such costs shall be payable in accordance with the scales provided in the rules. In terms of s 43(2), the same scales as would apply to an order of costs as between party and party shall also apply to an order of costs as between legal practitioner and client. The clerk of court however has a discretion to allow, *"at rates based so far as may be upon such scales"*, additional costs and charges for services reasonably performed by a legal practitioner at the request of the client. That discretion is exercised in those instances where no remuneration is prescribed as between party and party in the scales prescribed in the rules.

Section 43(2) of the Act must be read together with r 32(2) of the rules which states as follows:

> "**2. Costs which may be allowed on taxation**
> (1) The scale of fees to be taken by legal practitioners as between party and party shall be that set out in Table A of the Second Schedule, in addition to necessary expenses:
> Provided that the taxing officer, may in exceptional cases and for good and sufficient reason depart from any of the provisions of Table A of the Second Schedule where strict adherence to such provisions would be inequitable.
> (2) Such fees shall be allowable whether the work has been done by the legal practitioner or by his or her clerk, but shall be allowable only in so far as the work to which they have been allocated has in fact and necessarily been done.
> (3) The clerk of the court shall on every taxation allow all such costs, charges and expenses as appear to him or her 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 clerk of the court to have been incurred or increased through over caution, negligence or mistake." (Underlining for emphasis)

These two sections need some interrogation. Section 43(2) refers to stamps, fees, costs and charges in connection with any civil proceedings in the Magistrates Court. The court *a quo* granted an order of costs on the legal practitioner and client scale. Section 43(2) refers to costs *"as between legal practitioner and client"*. Costs *"as between legal practitioner and client"*, and what was awarded by the court a *quo* as *"legal practitioner-client costs"* are not necessarily the same. The first category may be concerned with those

costs that arise from the relationship between a legal practitioner and own client for work that would have been performed on behalf of the client. A dispute may arise between the legal practitioner and own client necessitating the taxation of fees that are due to the legal practitioner for the services rendered.

The second category is concerned with costs that are awarded by the court in favour of a successful party on a legal practitioner and client scale. These costs are also often referred to as attorney and client costs or costs on the high scale or costs on the punitive scale. Such costs, which are punitive in nature, are intended as some form of reimbursement to the successful party for the full amount of costs that the successful party has had to pay to their legal practitioner in the prosecution of litigation against the unsuccessful party.

It does appear from a reading of s 43(2) that what is envisaged under that law is the first category of costs. However, a restrictive interpretation of that section would lead to the absurd result that the Magistrates Court cannot make an award of costs on the legal practitioner and client scale against an unsuccessful party. In practical terms, the distinction between the two sets of costs is rather superficial. Authors Herbstein & Van Winsen[2], have had the following to say after quoting several South Africa authorities on the same subject:

> "It has also been held that the term 'own client' is a misnomer, and that the words 'attorney and own client costs' have a technical meaning. Furthermore, it has been held that an order for costs on the attorney-and-own-client basis is not generically different from an order for taxation as between attorney and client."

The same authors cited the case of *Aircraft Completions Centre (Pty) Ltd* v *Rossouw*[3], where the court concluded that as a matter of law, there is no difference between an order to pay costs as between attorney and client and costs *"taxed as between attorney and own client"*. It follows that as a matter of law, there is no difference between an order of costs to be taxed *"as between attorney and own client"* and *"attorney and client costs"*.

From a proper reading of s 43(1) and (2) of the Act, the scales to be applied in the taxation of costs as between party and party, as well as legal practitioner and client scale shall be those prescribed in the rules. The scale so prescribed is set out in Table A of the Second Schedule to the rules. It will be noted that just like s 43(2) of the Act, Order 32 r 2 (1) permits a taxing officer *"in exceptional cases and for good and sufficient reason depart from any provision of Table A of the Second Schedule where strict adherence to such provisions would be inequitable."*

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[2] The Civil Practice of the High Courts of South Africa Fifth Edition at page 975
[3] 2004 (1) SA 123 (W)

In essence, both s 43(2) and o 32 r 2(1) permit the taxing officer to exercise some discretion in order to depart from the scales provided in the rules. In the case of s 43(2), it is intended to cater for those cases where services are reasonably performed by the legal practitioner at the request of the client for which no remuneration is prescribed as between party and party. In the case of o 32 r 2(1) that discretion is exercised in exceptional cases and for good reason where such adherence to the provisions of Table A of the Second Schedule would be inequitable.

From a reading of the two provisions, it would appear that the exercise of discretion is a bit restricted in the case of s 43(2). This is because that section makes specific reference to those instances where no remuneration was prescribed as between party and party. However in the case of o 32 r 2(1), the exercise of discretion appears a bit unrestricted. One only needs demonstrate that a strict adherence to the tariff of legal practitioners fees set out in Table A would be inequitable. There is therefore some inconsistence between the two provisions which calls for some regularization.

Table A of the second schedule is titled "Tariff of Legal Practitioners' Fees. Paragraphs 1 and 2 of the preamble to Table A are instructive as they give context in as far as the application of the tariff is concerned. These provide as follows:

> **"TARIFF OF LEGAL PRACTITIONERS' FEES**
> 1. In the taxation of party and party bills of costs, this tariff shall be adhered to save that the taxing officer may in exceptional cases and for good and sufficient reason depart from any of the provisions of this tariff where strict adherence to such provisions would be inequitable.
> 2. In the taxation of practitioner and client bills of costs the taxing officer shall be guided by this tariff but shall have regard to all the circumstances of the case, and, where the costs are payable by the practitioner's own client out of funds belonging entirely to the client, to the following matters—
> (*a*) the complexity of the matter or the difficulty or novelty of the questions raise; and
> (*b*) the place where, the time at which and the circumstances in which the work has been done; and
> (*c*) where money or property is involved, its amount or value; and
> (*d*) the importance of the matter to the client." (Underlining for emphasis).

Table A has four parts. Part I of Table A deals with undefended actions for liquidated claims initiated by summons, civil imprisonment and garnishee proceedings. Part II deals with defended actions, unliquidated claims, applications and all matters including *ex parte* not falling under Part I. Part II is divided into five sections. Section 'A' deals with attendances. Formal attendances can be done by the legal practitioner himself or by an employee of the legal practitioner. Section 'B' deals with attendance at court, while section 'C' deals with drafting of process, pleadings and other documents which have a bearing on litigation. Section 'D' is concerned with copying or typing of documents, while section 'E' is

concerned with travelling expenses. Part III is concerned with witness's expenses, while part IV is concerned with the interpreters' fees.

The critical issue that arises for determination *in casu* can therefore be paraphrased as follows. In the exercise of the discretion endowed upon him by s 43(2) of the Act and Order 32 r 2(1) of the Rules, can the second respondent apply the Law Society Tariff? It was not disputed by counsel for the respondent that the entire bill of costs was taxed in terms of the Law Society Tariff. That was the first misdirection. From a reading of s 43(2) of the Act, o 32 r 2(1) and paragraphs 1 and 2 of the preamble to Table A, it is only in exceptional circumstances that a taxing officer has room to disregard the scales provided in Table A of the Second Schedule.

Further, from a reading of the law, in the exercise of his discretion, the taxing officer does not act *mero motu*. The taxing officer acts at the instigation of a party who must show that there exists a justification for seeking such departure from the scales or the tariff provided in the rules. That this is the intention of the law maker is clear from the wording of the said provisions. Section 43(2) of the Act states that *"the same scales as provided in subsection (1) shall apply….."*. Order 32 r 2 states that *"the scale of fees to be taken by legal practitioners as between party and party shall be that set out in Table A….."*. As already noted, para 1 of the preamble provides that *"this tariff shall be adhered to…"*. Para 2 states that in the taxation of practitioner and client bills of costs, *"the taxing officer shall be guided by this tariff…"*. The law on the interpretation of legislative instruments is a well beaten path. Where the language used in a statute is clear and unambiguous, the words ought to be given their ordinary grammatical meaning.[4] The starting point in the taxation of costs in the Magistrates Court is therefore the tariff of fees set out in Table A of the Second Schedule .

There is no ambiguity in the construction of s 43(2), o 32 r (2)(1), and paragraphs 1 and 2 of the preamble to Table A, which would justify the calling forth of other known rules of interpretation of statutes. The second respondent ought to have exercised his discretion in respect of those exceptional circumstances based on good and sufficient reasons or where no remuneration was prescribed as between party and party. There was no justification for the second respondent to depart from the Table A tariff and applying the Law Society tariff wholesale.

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[4] *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Ano SC*-3/20 and *Endeavour Foundation and Anor* v *Commissioner of Taxes* 1995 (1) ZLR 339 (S) at p 356F-G

Section 43(2) of the Act permits the exercise of discretion in order to *"allow, at rates based so far as may be upon such scales, additional costs and charges for services reasonably performed by the legal practitioner at the request of the client…"*. The further condition is that no remuneration must have been prescribed as between party and party. Order 32 r (1) permits a departure from the tariff in exceptional cases and for good and sufficient reason where strict adherence to such provisions would be inequitable. Both the Act and the rules do not state the scales or the tariff to be applied in such circumstances. However, s 43 (2) refers to *"rates based so far as may be upon such scales"*. In other words such additional costs and charges must be based as far as is possible on rates closely related to the scales already prescribed in the rules. The same principle would obtain in my view to the departure from the tariff permitted by Order 32 r (2)(1) as read with paragraphs 1 and 2 of the preamble to table A.

The Magistrates Court is a creature of statute. It must act within the confines of the law that establishes it. Caution must therefore be exercised not to impute powers in that court beyond what is specifically permitted by law. The magistrates' court cannot arrogate to itself, authority that it is not reposed with under the law. It is different from the High Court which enjoys inherent jurisdiction. The High Court does anything that the law does not forbid. Section 176 of the Constitution permits to protect and regulate its own processes. Had it been the intention of the lawmaker that the Law Society tariff should apply to taxation of costs in the Magistrates Court, then the law would have expressly said so.

By way of contrast, the High Court Rules are clear as regards the treatment of costs depending on the scale at which they would have been awarded. Rule 72 (5) provides that 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 specified in the High Court (Fees and Allowances) Rules. As regards taxation of costs on the legal practitioner and own client scale, r 72 (7) states as follows:

> "(7) In the taxation of costs in respect of work done in connection with any matter not referred to in subrule (2), including the taxation of costs as between a legal practitioner and his or her own client in respect of work done in connection with judicial proceedings, a taxing officer shall be guided as far as possible by any tariff by the Law Society of Zimbabwe or recommended by the Council of the Society under the Legal Practitioners Act [*Chapter 27:07*]." (Underlining for emphasis)

Subrule (2) states that every taxing officer in his or her taxation shall act in accordance with such instructions as may from time to time be given by the court for that

purpose. The specific reference to the application of the Law Society tariff in the High Court rules was intended to obviate difficulties that may arise in circumstances such as those presented by the present matter.

The rules of the Magistrates Court are subsidiary legislation, having been promulgated through Statutory Instrument 11 of 2019. They must be construed in harmony with the principal Act. As already observed, the circumstances under which the second respondent can depart from applying the scales of fees set out in the rules are clearly spelt out in s 43(2) of the Act, o32 r (2)(1), as read with paragraphs 1 and 2 of the preamble to Table A. What makes the second respondent's decision even more indefensible is that he proceeded to tax the entire bill of costs on the basis of the Law Society tariff without confining himself to those exceptional circumstances alluded to in the law under which he was supposedly acting.

In his written submissions, the first respondent's argued that in applying the Law Society tariff, the second respondent followed precedent which showed that it is permissible to invoke such tariff in the manner he did. The fact that the second respondent has applied the Law Society tariff in the past does not make that practice law. A practice does not become law where there is a clear legislative pronouncement on that particular subject in respect of which that argument is conjured. A copy of this judgment must therefore be brought to the attention of the Chief Magistrate so that the officials responsible for taxing bills of costs are properly guided.

The purpose of penalising a litigant through an award of costs on the legal practitioner and client scale has been the subject of legal discourse since time immemorial. The subject does not require any reiteration herein. It would be reckless of a court to depart from the law that provides for the taxation of such costs merely because adherence to such law would not infuse the kind of pain that the Law Society tariff would achieve.

In view of the foregoing, the court determines that the second respondent erred in applying the Law Society tariff in the taxation of the bill of costs between the applicant and the first respondent. The decision of the second respondent must therefore be set aside.

Resultantly, it is ordered as follows:

1. The bill of costs dated 7 April 2022 taxed by the Clerk of Court in case number 5770/16 is hereby set aside.
2. The Clerk of Court is hereby directed to tax the same bill of costs afresh by applying the tariff and scales set out in Table A of the Second Schedule to the Magistrates Court (Civil) Rules, 2019.
3. The Registrar shall serve a copy of this judgment on the Chief Magistrate.
4. Each party shall bear its own costs of suit.

H Mukonoweshuro & Partners, applicant's legal practitioners
V Nyemba & Associates, first respondent's legal practitioners