

REPORTABLE (87)

(1) CHRISTMAS MAZARIRE
v
(1) TAXING OFFICER (2) OLD MUTUAL (PRIVATE) LIMITED

**SUPREME COURT OF ZIMBABWE
MWAYERA JA
HARARE 23 FEBRUARY 2022**

No appearance for the applicant

N. Madya, for the second respondent

No appearance for the first respondent

IN CHAMBERS

**Judgment No. SC 87/23
Chamber Application No. SC 01/22**

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MWAYERA JA

INTRODUCTION

1. This is an opposed application for review of taxation proceedings made in terms of Rule 56(2) as read with Rule 73 of the Supreme Court Rules, 2018 and Rule 72 of the High Court Rules, 2021. On 23 February 2022 after considering written submissions by the applicant and both written and oral submissions by the second respondent's counsel *Mr. Madya*, I delivered an *ex-tempore* judgment dismissing the application with costs. The applicant elected not to appear physically but opted in terms of s 29(4) of the Supreme Court Act [*Chapter 7:13*], to file written submissions. He has requested for written reasons for the decision. These are the reasons.

FACTUAL BACKGROUND

2. The applicant was awarded costs in case number SC 105/20 on 17 July 2020. The first respondent is the taxing officer who is also the Registrar of the Supreme Court and is cited in official capacity. The second respondent is a company duly incorporated in terms of Zimbabwean law and is the party ordered to pay costs to the applicant. The applicant and the second respondent had a legal dispute, emanating from retrenchment and termination of the applicant's employment contract.

3. On 6 October 2021, the applicant having obtained an order for costs, instituted proceedings for commencement of taxation of his claim for costs. The taxation proceedings did not take off until December 2021 when the application was in compliance with the prevailing practice. Initially, the applicant sought to rely on the wrong tariff and also included items 1 – 121 which took place before the Labour Court and were not relevant to the costs awarded by this Court in SC 105/20. On 16 December 2021 the taxation proceedings took place and they were concluded. It is the decision that was made thereat by the first respondent that forms the subject of this review application. The first respondent disregarded the following items:

Items [1] to [256] relating to claims of monetary value in compensation for actual time and effort by the applicant as a litigant in person. The computed amount for the actual time is US\$746.53 man hours or unit hours.

Items [1] to [138] mostly comprise claims for disbursements made by the applicant to his erstwhile legal practitioners (Messrs Kantor and Immerman and Messrs Matizanadzo and Warhurst). These costs had been awarded against the applicant in the Labour Court of Zimbabwe under judgment number LC/H/679/16

handed down on 04 November 2016. That judgment was set aside by an order of this Court under judgment number SC 105/20 handed down on 17 July 2020.

4. It is evident from the first respondent's report that each item was properly analysed and an explanation for disallowing the item was proffered. The first respondent identified three issues on each item. Firstly, that the applicant was claiming costs for the time spent in prosecuting his appeal. Secondly, the applicant was claiming costs incurred at the Labour Court and lastly, the applicant sought costs in United States dollars (USD) instead of the equivalent in Zimbabwean Local Currency (ZWL).
5. The first respondent in respect of the first issue found that the High Court (Fees and Allowances) (Amendment) Rules, 2020 was the governing instrument for the fees recoverable on taxation of costs. She held that Schedule 1 thereto was reserved specifically for legal practitioners or employees of a legal practitioner. She further found that the applicant was neither of these and thus disallowed the fees so claimed.
6. As regards the second claim for costs for proceedings that occurred before the Labour Court, the first respondent disallowed the costs on the basis that such costs ought to be claimed in the relevant court.
7. In respect of the last claim, the applicant insisted on costs in United States dollars and declined to provide Zimbabwean Local currency account details to facilitate the second respondent's payment of the equivalent amount in local currency.

8. In the exercise of her discretion the first respondent disallowed the items leading to the present application.

GROUNDS OF REVIEW

9. The grounds of review discerned from the applicant's papers are formulated as follows:

“GROUND OF OBJECTION

The applicant seeks to raise the following grounds of objection to the determination made by the taxing officer.

1. Notwithstanding the provisions of s 85 of the Constitution of Zimbabwe Amendment (No. 2) Act 2013 (the Constitution and section 6 and 34 (3) of the of the Supreme Court Act [Chapter 7:13]), it appears that there are no specific statutory provisions concerning basic practice and procedure under a litigant in person (self-represented litigant) as in the applicant's case may claim and recover costs relating to time and effort (physical and mental activity) in judicial proceedings, when costs are awarded to such a party by a court of competent jurisdiction.
2. First respondent did not advert to explicit “points of dispute” arising at/during the taxation proceedings. This is despite applicant having formerly made submissions on these “points of dispute” and providing (on an apt document) for first respondent to annotate his decision.
3. Regardless of applicant referring first respondent to the provisions of section 85 of the Constitution, s 6 of the Supreme Court Act [Chapter 7:13], Rule 73 of the Rules of the Supreme Court, 2018 and Rule 72 of the High Court Rules, 2021, including citing apposite authorities concerning claim of costs by a litigant in person. First respondent disregarded applicant's pleadings.
4. At/during reconvened taxation proceedings on 18 November 2021, first respondent declined applicant's request for him (taxing officer) to put his decision in writing. Such action or conduct was/is contrary to the provisions of s 68(2) of the Constitution and s 3 of the Administrative Justice Act [Chapter 10:28]. First respondent's reasons for the determination remained, locked in his mind.”
5. By negating the whole of the applicant's claim of costs relating time and effort (physical and mental activity) as litigant in person when prosecuting the appeal under SC 9/17 first respondent acted irrationally and unreasonably.
6. First respondent's determination is discriminatory in nature hence inconsistent with provisions of s 56(3) of the Constitution.
7. If first respondent's determination is not reviewed, applicant shall suffer irreparable financial prejudice. Such prejudice manifested in costs under Civil Appeal SC 1019/17, oral submissions at the hearing anew of the matter in dispute under case LC/H/REV/125/15 before the Labour Court of Zimbabwe on 09 June 2021 and Judgment LC/H/154/21 handed down on

29 September 2021. Costs thereunder have been amended against second respondent.

8. Furthermore applicant is exposed to potential significant financial prejudice when defending and enforcing his fundamental rights under another related case presently before the Labour Court (case number LC/H/1536/21) thereof, second respondent seeks leave to appeal the whole judgment referenced in para 7 above. The matter is pending determination.” (sic)

ISSUE FOR DETERMINATION

10. The issue that falls for determination in this application is whether or not the taxation of the applicant’s bill of costs was properly done.

THE LAW

11. It is a trite principle of law that a party who is aggrieved by the taxation officer’s determination may make an application for review of the taxing proceedings as provided for by r 56 of the Supreme Court Rules, 2018 which reads as follows:

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“56. Taxation

- (1) Where costs are allowed, they shall be taxed by a registrar and legal practitioners’ fees shall be charged and taxed in accordance with the relevant provisions of the tariff for the time being used by the High Court of Zimbabwe.
- (2) Any party aggrieved by taxation shall give notice of review to the registrar and the opposite party within 15 days of the taxation, setting out grounds of his or her grounds of objection.
- (3) The registrar shall make a report in writing setting forth any relevant facts found by him and stating his or her reasons for any decision. A copy of such report shall be given to a Judge and shall be served on the parties to the taxation.
- (4) Thereafter the registrar shall fix a date for hearing of the review by the Judge.
- (5) The Judge may make such order on the review as to him or she seems just.”

12. It is important to relate to the basic definition of taxation. Taxation is a process that is carried out when a party disputes costs levied by a legal practitioner. The disputed costs are evaluated and measured by a taxing officer in order to reach a just balance between the services rendered and costs levied by the legal practitioner. The taxing

officer is empowered to exercise his discretion in coming up with a taxed bill for the parties.

13. Where a party is aggrieved by the taxing officer's decision, they are entitled to seek a review. It is settled that not every review warrants interference. The courts have over the years spelt out the principles to be applied when deciding on whether or not to interfere with a taxing officer's ruling. In the case of *Cone Textiles (Private) Limited v C Pettigrew(Private) Limited 1984(1) ZLR 274 at 275F*, it was stated as follows:

“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 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...

And further at 278G – 279B:

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. **Judgment No. SC 87/23 Chamber Application No. SC 01/22** 6
Firstly, on the application of the 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. 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 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.” (my emphasis).

14. It is worth noting that notwithstanding a party's right to seek recourse in terms of the rules set out above, the position within and without this jurisdiction is fairly settled that the court will not readily interfere with the exercise of the Taxing Officer's

discretion unless it is satisfied that the Taxing Officer acted on some wrong principle and or failed to exercise his or her discretion properly. See the case of *Zizhou v The Taxing Officer and Anor* SC 7/20 at p7 in which the Court held that:

“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.”

15. Similarly, the South African jurisdiction follows the same principle as set out in both case law and rules of procedure. The same tenets have been clearly set out by scholars Cilliers, Loots and Nel, in Herbstein and Van Winsler, *The Civil Practice of the High Courts of South Africa* 5th Edition (Cape Town) *Juta and Company Ltd, 2009* Volume 2 at p. 1002 which states the following concerning the reluctance of the courts to interfere with the exercise of the taxing master’s discretion:

“Where by rule of court the costs to be allowed on taxation are left to the discretion of the taxing master, the court will not interfere with this discretion in allowing or disallowing certain items even if the court exercising an original discretion would have disallowed or allowed them, unless the taxing master had acted upon a wrong principle or has not really exercised discretion at all.

In *Preller v Jordan* it was held that such interference will not take place ‘unless it is found that he [The taxing master] has not exercised his discretion properly, as for example, where he has been actuated by some improper motive, or has not applied his mind to the matter, or has disregarded factors or principles which were proper for him to consider or considered others which it was improper for him to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.’

See also the case of *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, N.O and Another* 1968 (1) SA 473.

16. An examination of the law entitling a party to seek review of the principles set out in case law shows that the review of a Taxing Officer's decision is not granted for the mere asking. There are two main grounds upon which the court may interfere with the Taxing Officer's decision. The first ground is based on the common law principle wherein a court will interfere with the taxing officer's discretion on review where the finding is proved or shown to be grossly unreasonable. Further, where the Taxing Officer acted *mala fide*, or from an ulterior or improper motive, and that there was a failure to apply his mind to the matter.
17. The second ground upon which interference with a Taxing officer's decision is warranted is when the court is clearly satisfied that the Taxing Officer was wrong in her decision and that she acted on a wrong principle and misinterpreted the rules and the law.

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APPLICATION OF THE LAW TO THE FACTS

18. In the present case the first respondent disallowed specific items and outlined her reasons for such disallowance. It is common cause that the applicant is a self-actor and was self-acting in respect of the matter for which the taxing officer assessed the bill of costs. The applicant's claim for the costs of time spent prosecuting the matter is a right exclusively reserved for those in the legal profession. The first respondent properly found that it would be improper to award the costs claimed by the applicant who was not a legal practitioner or an employee in a legal firm. Considering the applicant's status as a self-actor, his argument that he aptly, skillfully and diligently prosecuted his matter does not elevate his status to that of a legal practitioner entitled to costs for services rendered.

19. Furthermore, the applicant's reference to s 85 and s 65 of the Constitution in review grounds is misplaced and does not entitle him to claim for costs as a legal practitioner. There is a concession in his founding affidavit that there is no law that allows self-actors to claim costs on the time spent on their own matters and alleged opportunity costs.
20. In the circumstances one cannot say the determination made by the taxing officer was irrational. The issue of such costs is regulated by the law. The Taxing Officer made a proper decision in compliance with the law.
21. In respect of items on costs incurred in the Labour Court, these predated the appeal whose judgment the taxing officer was concerned with. **Judgment No. SC 87/23**
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It is settled that costs for attendance in a particular court are determined and taxed in the relevant court. The taxing officer's report is clear on the reasons for the disallowance of costs for items incurred in the Labour Court. The reasoning which is sound and correct finds favour with this Court.
22. Lastly, with respect to the denomination of the bill of costs in United States dollars, the first respondent requested the applicant to provide the equivalent in local currency since the second respondent wanted to pay in that currency. The applicant however was adamant on the costs being denominated in United States dollars only. The first respondent cannot be faulted for seeking to endorse the equivalent local currency value of the costs, since the second respondent elected to pay in that currency. In the case of *Zizhou (supra)*, it was spelt out that tariffs were to be denominated in the local

currency as this is how it is set out in Statutory Instrument 142 of 2019 which governs fees and costs. The court pronounced that:

“In light of the prevailing legal position at the time the bill was taxed, its denomination in United States dollars was in contravention of the law. The first respondent therefore erred in passing under his hand a bill that contravened the law. Accordingly, and on this basis alone the bill cannot stand. It is the settled position of law that anything alone in direct conflict with a statute is a nullity.”

23. The first respondent did not disallow costs for being denominated in United States dollars but sought to endorse the equivalent local currency value to facilitate payment as opted for by the second respondent. *In casu*, according to the first respondent, the applicant refused to have the bill endorsed in local currency because he wanted payment in United States dollars.
24. In the circumstances the first respondent cannot be said to have improperly exercised her discretion. When she disallowed specified items, she explained with clarity the basis of the disallowances. **Judgment No. SC 87/23
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25. It is important to highlight that a bill of costs determined by a Taxing Officer must be necessitated by the need to achieve justice such that only *bona fide* and necessary costs are allowed. The Taxing Officers in the exercise of their discretion and power as regulated by law, take into account all costs, charges and expenses so as to strike a just balance.
26. In this case, the first respondent acted within the confines of the law. She procedurally and properly disallowed items that did not qualify to be taxed. The first respondent having correctly exercised her discretion, there is no basis for interference with her findings. The applicant has not satisfied the common law grounds warranting review

nor has he proved that the first respondent acted on a wrong principle or misinterpreted the law.

27. Having found no basis for interference with the taxing officer's decision the application for review must fail. Regarding costs, they follow the result.

28. It is for these reasons that I dismissed the application with costs.

Wintertons, 2nd respondent's legal practitioners