

REPORTABLE (84)

TENDAI BONDE
v
**(1) NATIONAL FOODS LIMITED (2) REGISTRAR OF
SUPREME COURT N.O.**

**SUPREME COURT OF ZIMBABWE
HARARE: 16 JULY 2024 & 2 SEPTEMBER 2024**

The applicant in person

Ms *N. Katsande*, for the first respondent

No appearance for the second respondent

IN CHAMBERS

MATHONSI JA: This application is a two in one. It is an opposed application for the review of taxation of a bill of costs by the second respondent made in terms of r 56 (2) of the Supreme Court Rules, 2018 (“the Rules”). In opposing the application, the first respondent also filed a counter-application seeking a review of the same taxation and a removal of certain items of the bill allowed by the second respondent.

THE FACTS

In case number SCB 30/23 the present applicant, self-representing, applied for condonation of his non-compliance with the Rules and leave to appeal to this Court. By judgment delivered on 26 January 2024, the Court granted the application which had been opposed by the

first respondent. It ordered the first respondent to pay the applicant's costs on a party and party scale.

Subsequent to that the applicant prepared and submitted for taxation by the second respondent, a bill of costs with 45 items denominated in United States Dollars in the first column. The bill also contained two more columns, one showing a conversion rate of 13.5743 throughout and the last column showing each item in ZIG currency after conversion.

The second respondent taxed the bill in question on 7 June 2024 in the presence of the parties' legal practitioners. This time around the applicant had the luxury of being represented by the law firm of Gunje Legal Practice. In the course of taxation quite a number of items claimed by the applicant were disallowed by the second respondent. As a result a total sum of ZIG 25 293, 64 of the total of ZIG 35 957, 73 claimed as disbursements, was taxed off the bill.

THE MAIN APPLICATION

The applicant was disgruntled by that turn of events and launched this application for review. The grounds for review are set out in para 6 of the founding affidavit thus:

“6. The grounds for review are that:

- (a) Second respondent acted unlawfully when refusing to award disbursements even though such implements were supported by receipts.
- (b) Second respondent Registrar committed an irregularity when converting to a then non-existent ZIG certain expenses that were made in United States of America dollars at the material time.
- (c) Second respondent acted unlawfully when making a deduction of ZIG 25 293, 64 thereby reviewing its (sic) own decision.”

The applicant complains bitterly about the removal of items 3, 7, 11, 20, 24, 28, 31, 35 and 43 from the bill. These were costs of scanning and/or photocopying documents which the

applicant sought to recover from the first respondent. The second respondent disallowed those charges as being unnecessarily incurred because the applicant should have utilised the IECMS computer hub at the Registrar's office which provides those services to litigants for free. The applicant argues that at the time he incurred those expenses in April 2023 the hub was not in existence, which is disputed by the second respondent.

The applicant surprisingly also takes issue with the conversion of claims made in United States Dollars into local currency. In his view, doing so has resulted in prejudice to himself because he incurred the costs in foreign currency at a time when the ZIG currency did not exist. He says that he "actually depleted (his) foreign currency reserves" and has "to replenish the reserves". The applicant makes this submission notwithstanding the fact that it is him or his legal practitioner who submitted the bill of costs in both foreign and local currencies.

Finally, the applicant makes what appears to be an argument borne out of a misunderstanding of what taxation is all about. At paras 11 and 12 of his founding affidavit, he says:

"Made an unlawful deduction of ZIG 25 293, 64

11. I was represented at the taxation. My representative has failed to explain the reasons and circumstances impacting on the deduction stated above. I am advised, which advises I accept, that once the registrar had taxed and allowed ZIG 35 957, 73, the registrar had no jurisdiction to vary the figure. All that (the) registrar could do was to add tax and not to 'tax off.'
12. The notion one gets is that the registrar reviewed his/her own taxation something that is not provided for under the rules."

The first respondent has opposed the application on the basis that it has no merit. Although a preliminary point was taken in the opposing affidavit that the three days *dies inducae*

given in the application to oppose it was incorrect and that it rendered the application fatally defective, the point was not pursued in argument. It was actually abandoned and rightly so.

On the merits, the first respondent takes the view that there is no basis for interfering with the second respondent's exercise of discretion in allowing certain items and disallowing others. The first respondent reiterates that the scanning costs incurred by the applicant were unnecessary expenditure given that the IECMS hub providing free services came into existence on 1 May 2022.

On the conversion of the bill into local currency, the first respondent maintains that this was done by the applicant's legal practitioners. For that reason, the applicant is bound by the actions of his legal practitioners and is not at liberty to disown what was done on his behalf.

THE COUNTER APPLICATION

The first respondent filed a counter application which is strongly contested by the applicant. It is argued that items 1 and 15 on the bill of costs should have been disallowed because the applicant was claiming costs of consulting legal practitioners prior to his filing an application and consulting legal practitioners on a notice of opposition served on him.

According to the first respondent, as the applicant was not legally represented in SCB 30/23, he is not entitled to claim costs for legal services. Allowing those charges was therefore clearly wrong, so the argument goes, and an improper exercise of discretion on the part of the second respondent.

The applicant opposes the counter application on the basis that it is fatally defective in that the notice of application is not dated and that even though it was served on him through the

IECMS, he was not physically served with a copy. The applicant also makes the technical argument that it was wrong to cite the first respondent as the applicant and himself as a respondent in the counter application and that the first respondent should have cited the specific rule of the Supreme Court Rules under which the counter application is made.

None of these preliminary points ought to detain me as they have no merit. They are probably informed by the applicant's lack of legal advice.

On the merits, the applicant opposes the counter application on the basis that the Constitution of Zimbabwe protects his right to legal representation which right is unlimited. It is the applicant's view that "self-actors are entitled to disbursements in the currency they settled the costs."

THE SECOND RESPONDENT'S REPORT

The second respondent submitted a report in terms of r 56 (3) of the Rules in response to the applications for review. Excerpts of the report are reproduced below:

- “3. The applicant having been awarded costs on the ordinary scale on 26 January 2024 under Judgment number SC 09/24, filed a notice of taxation on 17 April 2023 (sic) and attached a Bill of Costs and Disbursements which was denominated in United States dollars. The taxation proceedings were concluded on 7 June 2024. Pursuant to the conduct of the taxation, the Registrar issued the final Bill of Costs and Disbursements due to the applicant denominated in ZIG on 29 May 2024.
4. Self-actors are not regulated by any tariff hence they can only recover disbursements. Disbursements refer to the expenses incurred by one party that are recoverable from the opposing party as part of the awarded cost. These disbursements typically include various out-of-pocket expenses that are reasonably incurred during the course of litigation.
5. Generally, the successful party in litigation may be entitled to seek reimbursement for reasonable and necessary disbursements from the losing party as part of the overall costs awarded by the court. Indeed, there are certain exceptions and limitations to the recoverability of disbursements in party to party costs. Generally the costs that are

- considered reasonable and necessary for the proper conduct of the litigation are more likely to be recoverable. This means that any excessive or unnecessary expenses may not be reimbursed by the opposing party.
6. Secondly, in some cases the court may exercise its discretion to disallow or reduce the recoverability of disbursements. This may occur if the Registrar determines that the expenses were unreasonably incurred, disproportionate to the issue at hand, or if there was any misconduct or improper behaviour on the part of the party seeking reimbursement. During taxation of the bill in question, some items were accepted wholly or in part and others were declined.
 7. The Registrar disregarded all expenses in relation to the scanning and copying of documents. It was in the Registrar's opinion that there are numerous digital applications at the disposal of the applicant at the court which cost nothing to use and scan documents. Although the internet hub at the High Court was constructed in 2024, the Supreme Court registry has housed an e-filing centre which provides scanning and uploading facilities at no cost to litigants since the inception of the IECMS in May 2022. Further, it is no longer necessary to photocopy pleadings into several copies because once a document is filed onto the IECMS and approved by the Registrar, all the parties linked to the case have access to it and service of all pleadings on the other party is now through IECMS. At any rate, it was found that the amount of US \$5.00 per page for scanning was unreasonable. Hence, it was taxed off because it failed to pass the test. Every item has to pass the test of whether or not it is reasonable and it was necessarily incurred. Moreover, on proof of disbursements, some items were supported by invoices as opposed to receipts which serve as proof of payment, acknowledging that the payment has been received.
 8. As a self-actor, the applicant is incapable of claiming costs relating to rights exclusively reserved for legal practitioners. As such some costs relating to drafting of heads of arguments were disallowed as such costs are exclusively reserved for legal practitioners.
 9. After determining the allowable costs, the Registrar made deductions totalling ZW \$25 293.64. According to r 56 (1) of the Rules, when costs are allowed, they must be taxed according to the prevailing tariff used by the High Court of Zimbabwe at the time of taxation...
 10. The Taxing Officer has discretion in awarding costs denominated in the equivalent currency such as the United States Dollar. In carrying out taxation the Registrar is confined to denominating the sum total bill of costs in local currency. The local currency and legal tender in Zimbabwe is the ZIG and as such the Registrar denominated the taxed Bill of Costs and Disbursements in the local currency.....” (The underlining is for emphasis)

The second respondent accordingly defended the taxation and the deductions made on the applicant's bill.

THE LAW

It is trite that the procedure for the review of the taxation of costs exists to prevent an injustice against a litigant liable to pay costs as a result of an injudicious exercise of discretion by a Taxing Officer. The procedure is certainly not designed to subject a bill of costs to a second round of taxation in the hope of obtaining a lower charge. See *Gao and Another v The Taxing Master & Anor* SC 131/22.

The Court will not interfere with a ruling made by the Taxing Officer in every case where its view of the matter in dispute is at variance with that of the Taxing Officer. It will only interfere when satisfied that the Taxing Officer was clearly wrong or that the latter's view of the matter differs so materially from that of the Court that it vitiates the ruling. See *Ocean Commodities Inc & Ors v Standard Bank of SA Limited & Ors* 1984 (3) SA 15 (A) at 18 E-G.

Generally, the Court is very reluctant to interfere with the exercise of the Taxing Officer's discretion except on certain well-known grounds. See *Herbstein and Van Winsen, The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5 ed, Vol 2 at p 1002. In fact the well-known principles that the Courts have regard to in reviewing any decision of a Taxing Officer were enunciated in *ICL Zimbabwe Limited v The Taxing Master, Supreme Court & Anor, Mwatsaka v ICL Zimbabwe Limited & Anor* SC 45/99 at pp 2-3 thus:-

“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.... He set out two grounds:-

‘Firstly on the application of common law right 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 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 grounds 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 Limited* 1984 (3) SA 15 (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.’”

What is clear therefore in our law is that when taxing a bill of costs, the Taxing Officer is engaged in the exercise of a discretion to allow or disallow certain items. The Court will not interfere with that exercise of discretion unless it finds that the Taxing Officer has not exercised the discretion properly.

An improper exercise of the discretion may occur when the Officer has been actuated by some improper motive, or has not applied his or her mind to the matter or has disregarded factors or principles which ought to have been considered or acted upon a wrong principle or wrongly interpreted rules or gave a ruling which no reasonable person would have given. See *Preller v Jordaan* 1957 (3) SA 201 (O) at 203 C-E.

EXAMINATION

It should be noted from the very outset that the costs awarded to the applicant were party and party costs due to a self- representing litigant and not costs of a litigant represented by a legal practitioner in the proceedings.

The second respondent has correctly stated that self-representing litigants are not regulated by any tariff of fees. They are not entitled to recover costs which are exclusively reserved for legal practitioners. Indeed self-representing litigants can only recover disbursements incurred in the course of litigation. The costs awarded to the applicant could not, by any stretch of the imagination, encompass legal fees charged by a legal practitioner.

In item 1 of the bill of costs, the applicant included a fee for “consulting lawyers (60 minutes)” in the sum of US\$300.00 which was converted to ZIG4 071.00. The second respondent allowed that item of expenditure allegedly incurred on 26 February 2023. In item 15 of the bill of costs, the applicant again included a fee for “consulting lawyers on notice of opposition” in the sum of US\$300.00 which was again converted to ZIG4 071.00. Again the second respondent allowed that item of expenditure allegedly incurred on 26 April 2023.

In the second respondent’s own words at para 4 of her report, non-represented litigants “can only recover disbursements” and, at para 8, the applicant could not claim costs “relating to rights exclusively reserved for legal practitioners.” The applicant could not, having elected to represent himself, surreptitiously sneak to a legal practitioner and consult before and after filing an application in person. He could not be allowed to claim such costs for legal services.

The second respondent was clearly wrong in allowing items 1 and 15 of the bill of costs. Significantly, the second respondent has not rendered any explanation on what informed the decision to allow those two charges. What is however clear is that allowing those items contradicts the principles set out in the report submitted in terms of r 46 (3). The misdirection is so gross, it calls for interference with the exercise of discretion. Items 1 and 15 should be disallowed.

Regarding the applicant's complaint against the second respondent's refusal to allow items 3, 4, 11, 20, 24, 28, 31, 35 and 43, all those items relate to either scanning or photocopying documents. The second respondent has explained satisfactorily that the costs on those items were unnecessarily incurred because since the inception of the digital IECMS on 1 May 2022, the Registrar's office has been hosting an e-filing Centre at the Court houses.

Scanning and uploading documents is rendered for free even for self-representing litigants. Those are some of the services which the Judicial Service Commission is passionate about and underscore the beauty and advantage of its flagship IECMS. The second respondent has explained that since the inception of the IECMS it is no longer necessary to photocopy pleadings. See para 7 of the report. This is so because, once a document is uploaded onto the system, it becomes available to all the parties linked to the case.

Accordingly, the second respondent cannot be faulted for disallowing the items involving what was demonstrably unnecessary scanning and photocopy of documents. Doing so was a proper exercise of discretion. There is no basis whatsoever for interference.

I have said that part of the applicant's complaint against the taxation appears to arise out of misunderstanding of the procedure for taxation and the use of technical expressions like "taxed off." He seeks to argue that once items have been listed on the bill of costs, the second respondent has no right to tinker with those items but can only calculate and add Value Added Tax.

What is lost to the applicant is that the bill of costs is generated by himself as the litigant seeking to recover costs from the other party. In its original form, the bill is just the successful litigants wish-list which the second respondent scrutinizes item by item to check if the

itemized charges are justifiable or if they meet the test of reasonableness. During the process of taxation, the author of the bill is usually required to justify each item before the Taxing Officer.

If the Taxing Officer is satisfied with the explanation for the charge, he or she allows the item and moves on to the next item. If not satisfied, he or she disallows the item of expenditure. When undertaking that exercise, the Taxing Officer is imbued with a wide discretion to either allow or disallow a charge. It is that exercise of discretion which the Court is slow to interfere with unless improperly exercised.

At the end of the exercise, the second respondent adds up all the disallowed items and deducts them from the total of the original bill at the bottom column provided in the bill and marked “taxed off”. In this case, a total of ZIG25 293.64 was disallowed by the second respondent as the unnecessary scanning and photocopying expenses. It was then “taxed off” or deducted from the bill leaving only ZIG10 664.09 which was the total allowed. In view of what I have said about items 1 and 15 of the bill, those should now be deducted further from the total.

Finally, the applicant questioned the conversion of the United States Dollars to the local currency. The second respondent is correct that she has to allow for settlement of the bill in the prevailing local currency. However, in my view that is academic and of no moment at all. This is because it is the applicant or his legal practitioner who submitted for taxation, a bill denominated in a converted currency. He is not allowed to reprobate and approbate that act.

DISPOSITION

In taxing the bill of costs submitted by the applicant, the second respondent applied the correct principles and properly exercised her discretion except in respect of items 1 and 15 of

the bill relating to charges for consulting legal practitioners. The applicant was not entitled to recover those charges because he was a self-representing litigant in the matter in which he was awarded costs by the Court.

A self-representing litigant, with no benefit of legal counsel throughout the proceedings, cannot go behind the scenes and consult legal practitioners who do not feature anywhere in the Court proceedings, for a fee and later seek to recover the costs of such legal service from the losing party. Allowing those legal costs in a bill of costs is clearly wrong.

Regarding costs, there is no reason why they should not follow the result in the usual way.

In the result, it is ordered that:

1. The applicant's main application be and is hereby dismissed with costs.
2. The first respondent's counter application be and is hereby granted with costs.
3. The decision of the second respondent to allow items 1 and 15 of the bill costs is set aside.
4. Items 1 and 15 of the bill of costs are disallowed.

Maguchu & Muchada Business Attorneys, 1st respondents' legal practitioners