

CHRISTIAN BROTHERS COLLEGE**Versus****NOKUTHULA MPFULILI**
(in her capacity as Taxing Officer of the
High Court)**And****NDABEZINHLE MAZIBUKO**IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 1 NOVEMBER 2019 & 20 FEBRUARY 2020**Opposed Application***Advocate L. Nkomo* for the applicant
S. Chamunorwa for the 2nd respondent

MOYO J: This is an application for review of the taxing officer's decision in assessing costs in HC 31/14.

The gist of the application is premised on the issues stated in paragraphs 4 and 5 of the founding affidavit which reads thus:

“This is an application in terms of Order 38 Rule 314 for the review of the decision of the taxing officer in relation to the taxation of the bills of costs in the matter HC 31/14 ...”

Paragraph 5 reads thus:

“This application is premised on the grounds that the taxing officer misdirected herself on a point of law by subjecting advocate's fees detailed in the said bills of costs to taxation in terms of the tariff of fees as prescribed by the High Court fees tariff SI 12/2011 and dialing to regard such fees as disbursements actually and reasonably incurred by the applicant in that matter.”

The 2nd respondent in his opposition states that there is no anomaly in the taxing officer's assessment of the fees due and in paragraphs 6 and 7 responds to the issue raised that the tariff

was misapplied. In paragraph 6, which is quite long and I would therefore not quote verbatim, the gist of 2nd respondent's argument is that the advocate's fees are just as good as a legal practitioner instructed by another legal practitioner and that they are therefore not disbursements. He further stated that the advocate just appeared to argue the matter on papers already drawn by applicant's legal practitioners. He further argues that it does not make sense therefore that the advocate's fees are more than that of the legal practitioner. He further stated that the costs were awarded against him on a party and party scale and that therefore it does not make sense for applicant to recover costs against him as at the legal practitioner and client scale. In paragraph 7 he states thus:

“I submit that the Advocate's fees were previously regarded as a disbursement when there was a divided bar and since independence, the bar was fused. There is no longer room for such an approach because in terms of the law, there is no side bar on Advocates.”

It would appear from the issues raised by both parties that what should be determined is whether the taxing master was correct in assessing an advocate's fees as legal fees per the High Court tariff, or whether she should have treated them as disbursements actually and reasonably incurred by the applicant, which disbursement if so found, would be refunded as a whole and not subjected to the party and party tariff.

The order that was originally sought in the draft was that the advocate's fees in the detailed bills of costs be declared as disbursements actually and reasonably incurred in the matter and that the disbursements fall outside the scope of the High Court party and party tariff of fees.

At the hearing of the matter, counsel for the applicant sought an amendment to the draft order so that the taxed bill of costs is set aside and is instead remitted back to the taxing officer for a taxation in terms of Rule 311 (a) which caters for the taxing officer allowing as party and party costs in any matter where another legal practitioner is employed, the reasonable fee consequent upon such employment. The Supreme Court case of *ICL Zim Ltd vs The Taxing Master and Others* SC-45-99 is precedent for the legal position that in regard to Rule 311 this provision in the High Court Rules does allow taxing of counsel's (another legal practitioner's)

fees as disbursements but that the onus is on the person seeking to have them taxed off to show that they were not reasonably incurred. This is at page 9 of the cyclostyled judgment. In principle therefore per the Supreme Court decision Rule 311 (a) provides for what the applicant seeks subject to challenge by the respondent on the reasonableness and justification thereof. However, Rule 311 (b) gives the guidelines that the taxing officer must follow in order to either allow or disallow such fees. Applicant's contention that the fees are due as claimed and respondent's contention that the fees are not warranted, should have been tabulated to the taxing officer whose input is not before this court in this application for the court to be satisfied that due consideration was taken of the provision of Rule 311 (b). The bill of costs does not explain how \$700 claimed as advocate's fees were disallowed and a sum of \$240 substituted. In other words, it is not clear if the taxing office exercised her discretion in terms of Rule 311 or not and if so how. Whilst 2nd respondent's counsel argued that the amended relief sought is not supported by the founding affidavit, I believe it goes without saying that the dispute here is whether or not the taxation was done in accordance with the law and Rule 311 even without having been specifically mentioned therein, is the law relating to the exercise of the discretion by the taxing officer. I am therefore persuaded to allow the application for an amendment of the relief sought as I am of the view that it still addresses the dispute as alleged by the parties, that is to say whether or not the advocate's fees were properly disallowed and if so what criteria was used to disallow them? I hold the view that setting aside the taxed bill of costs and allowing for a new taxation to be conducted, with the proper submissions being placed before the taxing officer is fair in the circumstances, given the fact that 2nd respondent also opposes the application on the basis that there was no justification for such fees from the facts of the case. Therefore both parties need to present meaningful submissions before the taxing officer so that the interests of justice with regard to this bill of costs be served.

It is for these reasons that I will grant the relief as amended. I will not award either party costs as clearly both of them do have an arguable case to be presented to the taxing officer within the purview of Rule 311. It is for these reasons that I will make the following order:-

1. The bill of costs in HC 31/14 is hereby set aside.

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2. The matter is hereby remitted back to the 1st respondent being the taxing officer for a taxation to be conducted with full regard for the provisions of Rule 311 in relation to the advocate's fees claimed therein.
3. Each party shall bear its own costs.

Merrs Webb, Low & Barry incorporating Ben Baron & Partners, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 2nd respondent's legal practitioners