

JOTINA GANYATA
versus
VIMBAI MAGURA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 3 November 2021

CIVIL REVIEW

ZISENGWE J: This matter originates from the Bikita Magistrates Court and involves a dispute over the manner in which the taxation of costs was conducted in the Magistrates Court. The matter was referred to this court ostensibly in terms of Order 32 Rule 5(5) of the Magistrate Court (Civil) Rules, 2018 (the Rules).

Order 32 Rule 5 (4) (3) of the Rules, entitles a party to civil proceedings before the Magistrates Court, who is dissatisfied with the decision of a Magistrates regarding any item of taxation which was the subject of an objection before the Clerk of Court in his capacity as taxing officer to have the matter referred to a Judge of the High Court for determination.

A precis of events leading to the present referral will be given below, suffice it to state that the parties to the dispute will be referred to for ease of reference as plaintiff and defendant.

The plaintiff initially instituted two civil claims for the recovery of certain sums of money as damages arising from certain delicts allegedly perpetrated by defendant on her. The two actions were later combined under one case. Both claims were resisted by the defendant and at the conclusion of the trial the Magistrate dismissed with costs both claims for lack of evidence.

In the wake of this finding the matter was referred for the taxation of the defendant's bill of costs.

In the interim, however, the plaintiff appealed against the dismissal of her claims.

On 24 July, 2020 the Clerk of Court wrote to the Magistrate requesting her (i.e. the magistrate) to conduct the taxation given what he perceived as the apparent complexity of the issues that fell for consideration in such taxation. For the sake of completeness, it is necessary to reproduce the said letter. It reads as follows:

Re: Notice of taxation: Vimbai Magura vs Jotina Ganyata: Case No. CG 20-1/19

The above matter refers.

The taxation has some legal issues and technicalities I find difficult and these are:

- i. There is need for clarity on the scale to be used as the judgment was stating that there were legal costs. Some of the costs are billed in United States dollars and some in Zimbabwe dollars.*
- ii. A ruling is needed to be made by a magistrate on the implication of the filed application for condonation for the late filing of Heads of argument to the taxation. As the condonation papers were filed soon after the applicant (Vimbai Magura) had filed her notice of taxation.*
- iii. The absence of the other lawyer without any form of communication.*
- iv. There is a general dilly dally (sic) from the handling I had with this case. I am struggling to see why there are so many delays in putting the matter to rest.*
- v. When I was doing the appeal record preparations, I went through the record of proceedings where at some point I encountered a statement where the Plaintiff (Jotina Ganyata) was refusing to answer questions put to her during trial, saying that she did not want to say anything only her lawyer had to give the answers. Taxation also involves questions and answers. Will have problems with these parties. Hence considering the impression once portrayed before a magistrate and the complexity of the taxation, I weighed and concluded that it is best that the taxation be referred to a magistrate.*

The Magistrate acceded to the request and proceeded to conduct the taxation proceedings in the course of which she approved the defendant's bill of costs. She gave a brief ruling wherein she *inter alia* castigated plaintiff's lawyers for their failure to attend the taxation hearing.

Ultimately, regarding taxation the Magistrate concluded as follows:-

“After consideration of all the submissions and the papers, the total amount which has been approved after taxation are –

- (i) RTGs \$231 588.30*
- (ii) USD \$ 2 870.00*

Aggrieved by the turn of events, the plaintiff through her legal practitioners Mutendi, Mudisi and Shumba legal practitioners on 27 July, 2020 wrote to the Magistrate complaining about her (i.e. Magistrate) having presided over the taxation proceedings. They expressed the view that such a course of action *inter alia* flouted Order 32 Rule (3) of the Rules as the Clerk of Court is specifically designated as the Taxing Officer and therefore that the taxation proceedings were null and void. The second half of the letter to the magistrate reads as follows:

Therefore, our client’s contentions in this matter are as follows:

- (1) That the taxation done on 24 July 2020 was done by a magistrate and not the clerk of court. Such is against the rules of procedure.*
- (2) That the magistrate proceeded with the taxation in spite of a request done by Jotina Ganyata to defer the proceedings to another date since Jotina’s lawyer was attending a funeral hence unavailable for taxation.*
- (3) That the taxation was done by the magistrate only and the other party’s lawyer without any active participation by Jotina Ganyata.*
- (4) The magistrate erred by turning a blind eye to Table A of the second Schedule in the computation of the costs eventually awarded to the other party.*
- (5) The magistrate turned a blind eye to party costs which were the costs permissible to be awarded to the other party.*

The plaintiff’s legal practitioners concluded the letter as follows:

May the Honourable court therefore consider either

- (a) Referring the matter to a clerk of court for taxation to start afresh or*
- (b) Refer the matter to a judge to make a determination on the contentions raised hereinabove.*

The Magistrate’s reaction to the same was to refer the record of proceedings to this court for determination ostensibly in terms of Order 32 Rule 5(5) as aforesaid.

The chain of events culminating in the purported referral of the matter to this court is afflicted by a number of material errors. Here is why. First and foremost, I find myself constrained to deal with the role played by the magistrate in presiding over the taxation proceedings.

Constrained because there is no substantive application before me specifically to review and set aside those taxation proceedings. Be that as it may, a reading of order 32 in general and Order 32 rule 3 (3) in particular reveals that taxation of costs is the sole responsibility of the clerk of court. This provision reads:

Costs which may be allowed on taxation

(1) ...

(2) ...

(3) *The **clerk of 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 the defending of 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 court to have been incurred or increased through over caution, negligence or mistake.*

This provision therefore unambiguously assigns the role of presiding over taxation proceedings to the clerk of court. I say the above mindful of the fact the magistrate is generally empowered to perform any of the clerk of court's functions. Order 3 Rule 3 of the rules however specifically precludes a magistrate from performing taxation functions. The said provision reads:

3. Magistrate may perform clerk's functions

*Any act **other than taxation** which is required to be done by the clerk of the court may if the clerk of the court is not available be done by a magistrate. (emphasis mine)*

The deferment by the clerk of court to the magistrate of those taxation proceedings not only constituted an abdication of duty on the former's part (no matter how well intentioned such deferment was) but was also a grave procedural error. The magistrate for her part should have declined the invitation by the clerk of court to preside over the taxation proceedings and accepting the same was a lapse of judgment on her part. The Rules do not make a distinction between simple and complex taxation matters.

The second error stems from an apparent misinterpretation by the magistrate and the plaintiff's legal practitioners of the true purpose of the referral of a contention to a judge as contemplated under this Order. The real purpose of such a referral under Order 32 Rule 5 (3) can be gleaned from the sequence procedures laid out under the rule 5 of Order 32 which is as follows. Firstly, the clerk of court, as discussed above, is mandated with presiding over the taxation proceedings. Any party who may be aggrieved by the outcome of the taxation process or part thereof may within the stipulated period institute a review before a magistrate, (see subrule (1) of

Rule 5). The magistrate is then required to render decision on the issue which is the subject of the review. Thereafter, any party dissatisfied with the decision of the magistrate regarding any taxation item which was objected to before the clerk of court may request the magistrate to state a case for the decision of a judge, which stated case must embody all the relevant findings of fact by the magistrate, (subrule 3). The parties are at liberty to file their contentions for the consideration of the judge.

Thereafter the magistrate is required to submit his or her report together with the contentions by the parties to a judge for determination. It is no doubt a procedure *sui generis*. What is clear however is that a Judge can only be called upon to make a determination under Order 32 Rule 5(5) where a party is dissatisfied with a Magistrate's review decision under sub rule (3) regarding any item or part of an item which was objected to before the Clerk of Court. This sub rule in my view is inapplicable in circumstances such as the present where the major bone of contention is the very question of the Magistrate presiding over taxation proceedings nor is it applicable where the challenge is on some procedural irregularity allegedly committed in the course of the taxation proceedings. Such complaints may very well constitute grounds of review in a review application which clearly is not the case in the present matter.

Sub rule 1 circumscribes the issues arising from a taxation which may ultimately end up being referred to a judge (if not satisfactorily resolved by the magistrate's review). The said sub rule provides as follows:

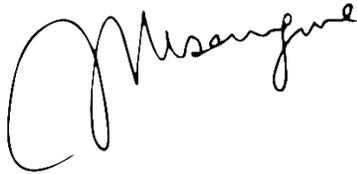
5. Review of costs and taxation

(1) Any party having an interest may, within seven days after he or she has knowledge thereof, bring before a magistrate for review—

- (a) the costs and expenses claimed in any undefended action;
- (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;
- (d) the taxation by the clerk of the court of any fees or charges of the messenger.

The plaintiff finds herself in a self-created quandary in that although the relief she seeks by way of this contention namely the setting aside of the taxation proceedings for want of jurisdiction on the part of the magistrate appears merited, she elected the wrong avenue in pursuit of the same. She did not bring an application for judicial review in terms of section 27 of the High Court Act, Chapter 7:06 as one would have expected her to do. The primary relief she seeks falls

outside the ambit of the areas of contention set out in Rule 5 (1) (a) – (d) which in the course of things have led to the record being placed before a judge for determination in terms of Rule 5 (5) of Order 32 of the rules. The corollary is that I cannot in the context of the facts of this case purport to exercise powers outside those that are specifically conferred under Order 32 Rule 5 and ultimately therefore, there being no formal review application before me to set aside the taxation proceedings the record will and is hereby returned to the Magistrates Court.

A handwritten signature in black ink, appearing to read 'Zisengwe', written in a cursive style.

ZISENGWE J.

Mutendi, Mudisi and Shumba, applicant's legal practitioners
Mapendere and Partners, respondent's legal practitioners