

PUWAYI CHIUTSI LEGAL PRACTITIONERS
versus
THE REGISTRAR OF THE HIGH COURT
and
THE TAXING OFFICER

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 18 May 2016, 17 August 2016

Unopposed Application

G R J Chigudu, for applicant
No appearance for respondent

CHIGUMBA J: This application came before me on the unopposed roll for an order that the respondents refund the applicant the sum of USD\$4 641-40 and pay costs of suit on a higher scale in the event that they oppose the granting of the order. A report was filed on behalf of the first respondent in which the court was advised that the respondents would abide by the decision of the court. None of the respondents had any interest in the matter, except that guidance was sought from the court on the correct legal position. The court dismissed the application with costs and stated that its reasons for so doing would follow. These are the reasons:

On 26 February 2016, a court application for a refund was filed of record, by Mr Puwayi Chiutsi, the applicant's sole partner. He averred that a bill of costs in case number HC7370-11 had been taxed by the second respondent, who had raised a taxing fee of USD\$4 641-40. The taxation was subsequently set aside on review in case number HC9821-14 on 11 November 2014. The parties resolved the matter and the bill was withdrawn. On 6 January 2015 applicant wrote a letter to the respondents seeking a refund of the taxing fee, because the bill of costs had been set aside on review, and the parties had subsequently settled the matter. The respondents

having refused to refund the taxing fee, we have now been asked to guide the parties on the correct legal position.

The issue that arises for determination is whether a taxing fee which was deducted at the instance of the Registrar of this court, by the taxing officer, is refundable in any circumstances, and or more particularly, in these circumstances where the bill of costs which was taxed was subsequently set aside on review and the parties reached an amicable settlement? The applicant submitted that the court should be guided by the case of *PT Sigauke v ES Muswerakuenda & The Taxing Officer & Deputy Sheriff Harare*¹ as authority for the proposition that a taxing fee is refundable. The respondents' opinion was that a taxing fee is not refundable because its basis is not dependent on execution. They referred the applicant to SI 426-1992 which stipulates that any bill of costs which is taxed by the registrar or the taxing master shall be subject to a taxing fee. When the matter was initially set down on the unopposed roll, on 27 April 2016, the applicant was directed to serve a copy of its application of the Attorney General. It did so 4 May 2016, and subsequently filed supplementary heads of argument on 10 May 2016 in which it submitted that in terms of s 8 of the State Liabilities Act [*Chapter 8:14*] the court was precluded from taking any notice of failure to comply with s 6, on its own. At the time that the file came before me on 18 May 2016, no response had been filed by the Civil Division of the Attorney General's Office.

The taxation of a Bill of Costs is provided for in terms of Order 38 r 307 of the Rules of the High Court 1971, as follows:

“ORDER 38

TAXATION OF COSTS AND REVIEW OF TAXATION

307. Costs allowed

With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all costs shall be borne by the party against whom such order has been awarded, the taxing officer shall on every taxation allow all such costs, charges and expenses as appear to him 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 taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to another legal practitioner, or special charges and expenses to witnesses or other persons or by other unusual expenses.” (my underlining for emphasis)

¹ HC93-05

The taxing officer is enjoined to allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or defending the rights of any party. He must be guided by the tariff of legal practitioner's fees prescribed in the High Court (Fees and Allowances) Rules, regard being had to any amendment to the tariff from time to time. (See Order 38) r 302.)

Section 57 of the High Court Act, 1981[*Chapter 7:06*] provides that:

“The Minister may make regulations providing for the fees which shall be payable in respect of instruments, services or other matters received, issued, provided or otherwise dealt with by the registrar or Sheriff or any other officer to the High Court in the course of his duties or in the office of such office.”

The High Court (Fees) (Civil Cases) Regulations 1992², were promulgated by the Minister on the basis of the authority given to him to do so by s 57 of the High Court Act. The regulations provided the appropriate fee for all fees in respect of instruments, services or other matters received, issued, provided or otherwise dealt with by the Registrar or Sheriff or any other officer of the High Court in the course of his duties. The regulations stipulated that any prescribed fee was payable, in peremptory terms. Neither the quantum of the fee or the requirement to pay is discretionary. The schedule set out in SI 426 of 1992 was substituted by SI 50 of 2009. It is common cause that the taxing fee set out in SI 50 of 2009 (number 8) is USD\$20-00 for each USD\$100-00 allowed or part thereof. There is nothing in these rules which provides for the refund of a taxing fee.

The case of *Sigauke v Muswerakuenda supra*, which the applicant seeks to rely on, concerned an urgent chamber application for stay of execution of a writ of execution that had been issued when judgment was obtained in respect on non -payment of a taxed bill of costs. My reading of that case is that the court referred to the remedy in its rules that provided for an application for review of a taxed bill of costs. It expressed its opinion that the applicant could have applied for a review of the bill of costs in terms of the rules, and that, had he done so, the filing of the application for review would have automatically suspended the writ of execution. The court said that;-

² Statutory Instrument 426 of 1992

“The taxation was done on the 11th October 2005. A week has since passed and yet apart from seeking stay of execution the applicant has not proffered any evidence that he is pursuing any remedies in terms of the rules. Had the applicant sought a review of the taxation proceedings, then the review would have acted as an automatic stay of execution”.

Nowhere in that judgment does the court state that the taxing fee is refundable. For the sake of completeness, the following cases all dealt with the issue of costs, their taxation, the suspension of writs of execution which were issued in respect of taxed bill of costs ³. Despite diligent research, I was unable to unearth a single case in which an application of this nature was brought to this court.

The bill of costs which was taxed in case number HC 7370-11 was reviewed in case number HC9821-14 on 11 November 2014. According to the applicant’s averments in the founding affidavit, the taxation was set aside on review and the parties subsequently agreed to set aside the bill of costs. None of these averments, in my view establish a basis on which the taxation fee ought to be refunded to the applicant. It is clear that the reason why the taxing fee is due and payable is in recognition of the work done by the Registrar of scrutinizing the bill of costs, applying the relevant prescribed rate of fees, allowing or disallowing some items claimed, calculating the amount allowed, and other issues incidental to the setting up of the date of taxation and notice to the parties and so forth. The taxing fee is designed to put a value on the service provided by the taxing officer, and once the service has been provided the fee must be paid. (my underlining for emphasis)

It is my view that if it was the intention of the legislature that the fee for the taxing officer’s services be refundable then the regulations as read with the rules of this court, would have expressly provided for such an eventuality. If services were rendered in the taxation of the bill of costs, are those services to be provided for free because the bill of costs was set aside or suspended on review? I think not. If the order which was granted on review expressly provided for the refund of the taxing fee to the applicant, then such order should have been attached to the application. As it is, on the papers filed of record, there is no basis on which the court can make a finding that the applicant is entitled to a refund. If the parties withdrew the bill of costs by consent, surely their agreement should have provided for the question of the taxing fee. In the

³ ABC Bank Limited v Mackie Diamonds BVA & Anor HH928-15; Tetrad Holdings Ltd v Master of the High Court & 2 Ors HH 898-15; Delta Corporation Ltd v ZIMRA HH621-15; Elliot Rodgers v P. Chiutsi HH 222-15

absence of cogent evidence of entitlement to a refund of the taxing fee through a court order or some other legal instrument, then the inescapable conclusion is that the fee is not refundable.

It is this court's view that the applicant has failed to establish a legal basis for the refund. If the prescribed fee for issuing of a summons is USD\$5-00 in terms of item 1 of the High Court (Fees) (Civil Cases) (Amendment) Regulations 2009 (number 8), in my view a litigant cannot claim a refund of that fee on the basis that the summons was set aside on review or suspended by agreement, or even that it was withdrawn. That fee is in payment for the services provided by the office that issues the summons, and is payable by each litigant on the issue of the summons. The payment or refund of the fee is not dependant on the success or failure of the litigation. The same applies to the taxing fee which is prescribed as payment for the services of the taxing officer. Once the services are rendered, the fee becomes due and payable at the prescribed rate, and is not ordinarily refundable. It would be against public policy for monies which constitute revenue which is due to the Fiscus to be subject to the vicissitudes of the outcome of litigation. Win or lose, the fee is payable once a bill of costs is taxed.

For the avoidance of doubt, we also hold the view that a litigant wishing to apply for a refund of such a fee is bound to adhere to the provisions of s 6 of the State Liabilities Act [*Chapter 8:14*] which provides that:-

“6 Notice to be given of intention to institute proceedings against State and officials in respect of certain claims

(1) Subject to this Act, no legal proceedings in respect of any claim for—

(a) money, whether arising out of contract, delict or otherwise; or

(b) ...

(i) the State; or

(ii) the President, a Vice-President or any Minister or Deputy Minister in his official capacity; or

(iii) any officer or employee of the State in his official capacity; unless notice in writing of the intention to bring the claim has been served in accordance with subsection (2) at least sixty days before the institution of the proceedings.”

The taxing officer's powers of taxation emanate from the High Court Act, its rules, and the regulations which are promulgated by the Minister. Surely the Minister ought to have been cited as a party to these proceedings. The taxing fee is levied on his authority. It goes into the government's consolidated coffers. Any refund of this fee would involve officials of the state. The State Liabilities Act demands sixty day's notice before the institution of proceedings. This renders this application fatally defective for failure to comply with s 6. It has not been suggested

that the Registrar of the High Court and the Taxing Officer benefitted in their personal capacities from the taxing fee. On what basis were they then cited if not in their official capacities as agents of the state. The Act announces itself to be '*An Act to impose liabilities upon the State in respect of acts of its employees*'. It follows that the applicant ought to have followed its directives regarding the citation of state officials, and given them the requisite notice. In the event that the state officials are not cited properly or given the requisite notice, how would an order for the refund of the taxing fee be enforced against them when they are not party to the proceedings?

For these reasons, the application be and is hereby dismissed with costs.

P Chiutsi Legal Practitioners, applicant's legal practitioners
In default, Respondents