

REPORTABLE (61)

DAIRIBOARD ZIMBABWE (PRIVATE) LIMITED
v
(1) THE TAXING MASTER N. O. (2) RICHARD GANGIRA

SUPREME COURT OF ZIMBABWE
HARARE: 24 MAY & 9 JULY 2024

T. Mupamhadzi, for the applicant

No appearance for the first respondent

S. T. Mutema, for the second respondent

IN CHAMBERS

MAVANGIRA JA:

1. This is an opposed chamber application for the review of a taxation conducted by the first respondent.

FACTUAL BACKGROUND

2. The applicant is a company duly registered in terms of the laws of Zimbabwe. The first respondent is the Registrar of the Supreme Court of Zimbabwe. The second respondent is an individual as named in the citation above.

3. On 7 February 2024, this Court granted an application for condonation and extension of time in which to file an application for leave to appeal, in favour of the second respondent. The order was granted in default of the applicant which had failed to file a notice of opposition. The order was granted with no order as to costs. On 13 February, 2024, the order was

amended by the addition of an award of costs on the attorney and client scale. The second respondent thereafter issued a notice of taxation in which he sought the sum of US\$8 484.00. The taxation hearing was scheduled for 4 April 2024. No notice of the taxation was given to the applicant, purportedly by virtue of r 72 (16) of the High Court Rules, 2021. The taxation exercise resulted in the second respondent being allowed legal costs in the sum of US7 661.00.

THIS APPLICATION

4. The applicant thereafter filed this chamber application for review of the taxation, in terms of r 56 (2) of the Supreme Court Rules, 2018, (the Rules), on the basis that the Registrar, in her capacity as the Taxing Officer, “erred in allowing a 50% premium on the taxed costs awarded to the second respondent’s legal practitioner when the work which was billed for by the legal practitioner did not fall within the 4 categories which may justify charging a premium as provided for in Part 1, Note 2, as read together with Note 5 and Note 6 of the Law Society General Tariff of Fees for Legal Practitioners, 2021.” The applicant seeks an order in the following terms:

“IT IS ORDERED THAT:

1. The application for review be and is hereby granted with costs.
 2. The taxed bill dated 4 April 2024 by the 1st respondent be and is hereby set aside partially and in particular:
 - 2.1 The premium charged on the legal costs allowed by the Taxing Master on the 4th of April 2024 in the sum of USD2 856.00 be and is hereby disallowed.
 3. The 2nd respondent is to pay the applicant’s costs of this review if he opposes this application.”
5. The second respondent filed a notice of opposition and an opposing affidavit in which he raised three preliminary points. The first is that the applicant is barred and consequently

has no right of audience while the bar is still operational. It contended that the bar that operated against it when it defaulted in filing a notice of opposition to the second respondent's application for condonation and extension of time, is still operational. Secondly, that the relief sought is incompetent because "one cannot seek for the success of the application for review without seeking for the setting aside of the order which pronounced the bar." The second respondent contended that the relief sought ought to have been preceded by a prayer for the upliftment of the bar before seeking review. Thirdly, that the applicant has no cause of action because review of taxation issues is limited to issues that the applicant would have challenged before the Taxing Officer. As the applicant was absent from the taxation because of the bar operating against it, it never challenged the premium taxation. The second respondent contended that r 56 of the Rules does not state what constitutes reviewable issues in taxation. This therefore means that there is a *casus omissus* in the Rules and r 72 (28) (b) of the High Court Rules, which states that only issues objected to at taxation can be challenged on review, becomes applicable.

PRELIMINARY POINTS

6. At the commencement of the proceedings, Mr *Mutema*, for the second respondent, submitted that the second respondent was only raising two preliminary points. The first was that the applicant was barred. On this point, he submitted that the order in terms of which the taxed costs were awarded, was granted in the applicant's default by reason of its failure to file opposing papers. The applicant was thus barred and remained so barred. It thus cannot enjoy any audience with this Court.
7. The second preliminary point raised was that as the applicant was not present during taxation, he could not, in a review, competently challenge the award for premium. He persisted in the argument that there is a *lacuna* in r 56 of the Rules, thereby necessitating

reliance on the High Court Rules, 2021. In particular, r 72 (28) (b) of the High Court Rules, makes it clear that the applicant has no right of audience before the court because it is only allowed to raise issue on matters that it objected to, during the taxation proceedings. As it was not present during the taxation because of the bar operating against it, r 72 (28) (b) effectively strips it of any right to make an application for review.

8. *Per contra*, Mr *Mupamhadzi*, for the applicant, submitted that the applicant is not barred. He contended that the applicant has a valid cause of action which he is not barred from enforcing. He also submitted that r 56 (2) in terms of which the application is brought, does not place any qualification on who may apply for review. Furthermore, by providing that “any party” may make the application, the rule does not create any *lacuna* at all. To the contrary, it is clear that it allows any party to apply for review if aggrieved by the taxing officer’s decision. He disputed the cogency and validity of the preliminary points raised as well as the submissions made in respect thereof by Mr *Mutema*.
9. Counsel further submitted that the application is properly before the court as the awarding of premium by the first respondent in favour of the second respondent is not backed by law and is thus reviewable.

ANALYSIS OF PRELIMINARY POINTS

10. Taxation under the Supreme Court Rules is governed by r 56 which provides:

“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 the taxation shall give notice of review to the registrar and to the opposite party within 15 days of the taxation, setting out 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 her seems just.”
(The underlining is added)

11. A reading of r 56, in conjunction with the tenets of the golden rule of interpretation, does not admit of any ambiguity or absurdity as to the nature or characteristic of a party who the law “permits” to harbour aggrievement and give notice of review. In subrule (2) a remedy is afforded to “any party aggrieved by the taxation.” No ambiguity or absurdity arises therefrom and no justification appears *ex facie* the rule for resorting to the High Court Rules. Any party means exactly that.

12. Rule 73 of the Supreme Court Rules reads:

“73. Application of High Court Rules

In any matter not dealt with in these rules, the practice and procedure of the Supreme Court shall, subject to any direction to the contrary by the court or a judge, follow, as closely as may be, the practice and procedure of the High Court in terms of the High Court Act [*Chapter 7:06*] and the High Court Rules.”

The rule clearly stipulates that recourse to the practice and procedure of the High Court in terms of the High Court Act and the High Court Rules is resorted to in any matter not dealt with in the Supreme Court Rules. The matter at hand is dealt with in the Supreme Court Rules. In terms thereof, any party aggrieved by a taxation that has been done is afforded the remedy of seeking a review of the same. That is the remedy that the applicant seeks in this application. No cause exists, nor has any been established for perceiving a *lacuna* in the rule.

13. I mention in passing that during the proceedings, and in answer to a question by the court, Mr *Mutema* initially submitted that a party in the applicant's position has the remedy of review available to it in circumstances where the Registrar does not follow the relevant rules or tariff in a taxation. At a later stage during the proceedings, he changed position and submitted that because of r 72 (28) (b) of the High Court Rules, a party in the applicant's position is deprived of the remedy of review.
14. Rule 72 (28) (b) in relevant part reads as follows:

“(28) The court application shall-

(a) ...

(b) Contain the allegation that each such item or part thereof was objected to at the taxation by the dissatisfied party, or that it was disallowed on his or her own initiative by the taxing officer.”

Rule (28) (2) (b) follows after, *inter alia*, r 26 which reads:

“(26) A party aggrieved by the decision of a taxing officer may apply to court within fourteen days after the taxation to review such taxation. The application shall be by court application to the taxing officer and to the opposite party, if such opposite party was present at the taxation or if the court decides that such opposite party should be represented.”

It is clear that the qualification in the High Court Rules is absent in the Rules. In the High Court Rules, an aggrieved party ought to have been present at the taxation in order to competently apply for review of a taxation. In the Rules, there is no such qualification. To import such a qualification into the Rules would be to effectively amend r 56 (2) in a situation where there is no justification for doing so because the matter is dealt with in clear terms in the Rules and the rule itself is clear. Importing such a qualification would not be the same as resorting to or falling back on the High Court Rules, which is only permissible in the circumstances clearly stated in the Rules. There being no *lacuna* in the Rules, in my view, resorting to the High Court Rules would be impermissible.

15. It is my considered view that any bar that may have operated against the applicant by reason of its failure to file opposing papers to the second respondent's application would not apply to bar it from making the instant application. That is as it should be. A party required to fork out money to pay taxed costs should not be deprived of the right to challenge the decision of the taxing officer where the rules allow such a challenge. Holding otherwise would defeat the time honoured *audi alteram partem* rule. One may mention that the wording of r 56 puts the Registrar completely in charge of the process of taxation. In that regard, even though they are silent on who should participate, the Registrar is encouraged to ensure that a party against whom costs are sought, is served with the notice of taxation and allowed to participate. Such an approach will ensure that justice and fairness prevail.
16. In the result, I dismiss the preliminary points raised and find that the application is properly before the Court.

THE MERITS

17. On the merits, Mr. *Mupamhadzi* submitted that para 13 of the applicant's founding affidavit is of paramount importance in this matter as it sets out the cause of its complaint. Paragraphs 12 and 13 of the founding affidavit read:

“12. The 1st respondent is thus mandated to insure that the taxed bill is consistent with the Court order as well as the applicable provisions of the Law Society Tariffs as the case may be.

13. The applicant is aggrieved and takes objection to the taxed bill of costs on the grounds that the taxing officer **erred and grossly misdirected** himself by allowing a 50% premium on the taxed amount in circumstances which did not justify and or legally warrant the charging of premium **in that**:

13.1. The work which was billed for by the legal practitioner **did not fall within the 4 categories** which may justify charging a premium as provided for in Part 1, Note 2, as read together with Note 5 and Note 6 of the Law Society General Tariff of Fees for Legal Practitioners, 2021.” (The emphasis is added)

18. The Law Society of Zimbabwe General Tariff of Fees for Legal Practitioners (USD) With Effect from April 2021” provides as follows under Part 1 in Note 2:

“The recommended ranges are to be regarded as the ordinary fees chargeable for work of the type described. If one or more of the following five special criteria are present then the rate customarily selected by the legal practitioner within his or her experience category may be increased by premiums where appropriate, in accordance with Notes 5 and 6. The criteria which would place a matter outside the ordinary and justify a higher rate occur where:

- 2.1. the matter is complex or the questions raised are difficult or novel;
- 2.2. specialised knowledge, skill and/or responsibility are required the legal practitioner (sic)
- 2.3. the place where or the circumstances in which the business is transacted are unusual or difficult;
- 2.4. the amount or value of the money or property involved is particularly high; and/or
- 2.5. the matter is of particular importance to the client.”

Note 5 is an explanatory note regarding the purposes of the hourly fees recommended in the tariff, giving examples of how it applies to legal practitioners with varying levels of experience and also taking into account the varying circumstances and resultant entitlements depending on the applicable factors. Note 6 sets out, in a Table, the “maximum premiums which may be added to a legal practitioner’s customary rate for the type of work involved as a result of the existence of special criteria.

19. Counsel submitted that the granting of a premium in favour of the second respondent was an irregularity because the circumstances upon which a party would be entitled to a premium, as itemised in Part 1, Note 2 did not exist. It was his argument that the matter in which the award of costs was made, a simple interlocutory chamber application for condonation and extension of time, was not a complex matter and neither did it raise any novel or difficult question. It did not require specialised knowledge or skill. The amount involved in the main dispute is not very high and the matter could not be said to be of such importance to the second respondent as to warrant a premium being charged or allowed.

He submitted that the granting of premium is not a matter of discretion but the first respondent has to be satisfied that it is in accordance with, and is supported by law. To the contrary, none of the prescribed requirements was met and therein lay her gross misdirection on the law.

20. Relying on *Mazarire v Taxing Officer & Anor* SC 87/23 and authorities cited therein, counsel submitted that the authorities are clear on the applicable principles that guide a court on whether or not to interfere with a taxing officer's ruling or determination. There are two grounds, so he submitted. 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. 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. However, 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.
21. It was also Mr *Mupamhadzi's* submission that the applicant was alive to the fact that it did not have a right of audience in the taxation. He submitted that it was not challenging the *quantum* granted but only a part of what was granted, in particular, the premium. Therefore, if the application succeeds, it would mean that the taxing officer's decision would still stand but would exclude the premium as the second respondent was not entitled to charge it.
22. In response, besides repeating his submissions on the preliminary points, Mr *Mutema* submitted that the application must fail because in its founding affidavit the applicant does not specifically identify the condition precedent in terms of which premium is to be justified, which condition was not met in the taxing process, and furthermore does not also

state why it is so alleged. The founding affidavit is criticised for merely making a general averment that premium was allowed in circumstances which do not justify its award.

23. Counsel also submitted that Note 2 of the General Tariff of Fees for Legal Practitioners specifies that premium can competently be charged in the following circumstances:

- (a) where the matter is complex;
- (b) where the matter requires specialised knowledge;
- (c) where the amount of money which is the subject matter of the dispute is high;
and
- (d) where the matter is of particular importance to the client.

He further submitted that the Tariff also specifies the number of years for which a particular percentage will be charged as premium. None of the requirements, he argued, was specifically identified in the application for review as having been breached and no particularisation of the fact which establishes the breach was pleaded in the founding affidavit. This left the court and the respondent in the dark regarding the specific issue to be responded to. In any event, the subject matter of the whole dispute is of paramount importance to the second respondent, not only because he was awarded costs, but also because it pertains to his livelihood as the dispute relates to his dismissal from employment and also to the nature of damages which were awarded to him by the Labour Court. The amount of money involved, in the form of his entire package for the duration of his employment with the applicant, which is in excess of USD 41 000.00, is high. He argued that the application, having no leg to stand on, must therefore fail.

24. Paragraphs 12 and 13 of the founding affidavit are captured in para 17 above. The quoted content of the two paras, vindicate Mr *Mutema* in his contention that the applicant does not identify which of the conditions listed in Note 2 that was or were not met and thereby disentitled the second respondent's legal practitioner from being awarded a premium. It is

only in Mr *Mupamhadzi*'s oral submissions that the detail was then purported to be given. Even then, such "detail" was generalised with counsel pointing to all the listed conditions as not having been established. As rightly submitted by Mr *Mutema*, in making submissions in this respect of the Part 1, Note 2, allegedly unestablished conditions, Mr *Mupamhadzi* was now leading evidence from the bar. His arguments were thus not founded on the pleading. Furthermore, until then, the second respondent was not aware exactly what it is that was being challenged.

25. In the given circumstances, the Registrar's Report dated 7 May 2024 does not assist the applicant's case or clothe it with any validity. In any event, the Registrar, as stated in her report, was not even "officially served" with the application. In addition, her comments on how the taxation was handled were made in the dark, considering that the founding affidavit did not make specific allegations as to the unmet conditions. The Registrar's report indicates that she considered the issue of specialised knowledge by the legal practitioner, this being one of the conditions listed in Part 1, Note 2. This is captured at para 23 above in item (b). However, the founding affidavit does not identify this as the unmet condition giving rise to the applicant's complaint. To that extent, it does not assist the applicant's case. To the contrary, it shows that the Registrar was alive to that being a justifiable cause for the awarding of a premium.

26. The law is clear that an applicant's case stands or falls on its founding affidavit. In *casu*, the second respondent was not placed in the position of knowing what specific allegations to respond to in his opposing papers; let alone enable it to decide whether to oppose the application or not. This is such a trite and basic tenet that it becomes unnecessary to expend any further endeavour at going beyond this finding. The applicant having failed to establish its case in its founding affidavit, it cannot be salvaged by oral submissions that

purport to do so. For that reason, the application is incapable of a successful result. There has not been established any reason for departing from the general rule that costs follow the result.

27. In the circumstances, it is ordered as follows:

“The application be and is hereby dismissed with costs.”

Matsikidze Attorneys, applicant’s legal practitioners

Stanislaus & Associates Law Firm, 2nd respondent’s legal practitioners