JOHN ARNOLD BREDENKAMP
versus
TANYARADZWA PRECIOUS MASHAYAMOMBE N.O
and
YAKUB MAHOMED

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 3 April 2018 & 30 April 2019

Court Application for Review : Taxation
Reasons for judgment

D Ochieng, for the applicant
J Wood, for the 2nd respondent

PHIRI J: This is a court application for review in which judgment was granted in favour of the applicant.

Judgment was given as follows:

1. The decision of the first respondent in the taxation of the bill of costs in case number HC 8103/14 to allow the recovery of the disbursement listed in that bill as item 124 is set aside; and the recovery of the disbursement from the applicant is hereby disallowed.
2. The second respondent still draws a revised bill of costs to reflect the adjustments contemplated by paragraph 2 of this Order, as well as those adjustments imposed by the decisions of the first respondent that are unaffected by this order.
3. The second respondent shall pay the Applicant's costs of suit.

Applicant's cause of action

The applicant's cause of action in this review was outlined in the founding affidavit of one Tawanda Nyamusoka and was made in terms of Order 38 r 314 of the High Court Rules, 1971.

Applicant averred that he was aggrieved by

"a) The second respondent's decision to allow the levying of a premium on legal practitioners' fees; and

b) The second respondent's decision to allow the levying of premium on the Bill of Costs based solely on the alleged volume of work was grossly unreasonable and constituted a failure to apply the relevant criteria, as this matter does not fit in the criteria justifying the levying of premium.

(i) first respondent's decision to allow counsel's fees as a disbursement in the total sum of $170 000.00 on the mere presentation of counsel's invoice by second respondent was grossly unreasonable as first respondent failed to apply her mind to the necessity of reasonableness of such fee.

(ii) the disbursement allowed in item 124 as counsel's fee was grossly excessive, was not reasonably incurred and could not have been allowed had the first respondent applied her mind to the question."

Applicant's founding affidavit

Applicant's case for review was supported by an affidavit deposed by one Tawanda Nyamusoka for and on behalf of the applicant.

It was contended that the basis of challenging the taxed bill of costs in case number HC 8103/14 was that of:

"(a) the first respondent's decision to allow the levying of a premium on the fees of the first respondent's legal practitioners and

(b) the allowing of item 124 of the Bill of Costs."

It was submitted, in this regard, that the first respondent (the taxing officer) acted unreasonably by allowing a premium based merely on the volume of work, "without enquiring into its reasonableness."

Secondly applicant averred that the sum allowed in item 124 of the Bill of Costs as counsel's fees was "absurdly disproportionate to:

(i) the volume of work done;

(ii) the complexity of work done; and

(iii) the fair and reasonable fees chargeable by one of the standing of the practitioner engagement for the task."

The Bill of Costs in issue was attached to the founding papers for this application.

Applicant contended that essentially this was a debt collection matter which consumed 3 days for trial.

Item 124 of the Taxed Bill

Applicant took issue with item 124 wherein second respondent sought to recover $170 000 which he said was paid as a fee to Mr *Mpofu* for the conduct of a three day trial.

Applicant averred that at the taxation a challenge was made as regards this item and second respondent simply produced an invoice appearing to originate from Mr *Mpofu*. Applicant averred that the second respondent simply approved the item without enquiry into its reasonableness.

Applicant submitted that the ruling, by second respondent that this figure was recoverable as it had been paid was not enough.

Applicant averred that the taxing officer failed to inquire whether the claim was "necessary and proper" as the Rules would require and accordingly item 124 should have been disallowed.

Similarly applicant contended that there was no correction between the amount for the fee and the work said to have been done. It was argued that;

> "At the highest hourly rate chargeable in accordance with the Law Society Tariff, the fee would equate to 540 hours, or nearly 70 full business days. That amounts to over three calendar months at the highest hourly rate in terms of the tariff. However, the fee is said to relate to a three day trial and the drafting of submissions."

Similarly it was submitted, on behalf of the applicant that the fee in dispute is wildly out of keeping with the level of fees generally charged by Advocates.

To this end applicant also revealed that *Advocate Matinenga* who has been an Advocate since 1996 was paid a fee of $10 000.00 for his representing the applicant.

Applicant contended that the fee in item 124 of the taxed bill is "widely out of keeping with the level of fees charged generally by Advocates."

It was submitted, by the deponent to the founding affidavit that;

> "I am aware that the practice is for the counsel briefed on trial to charge a "first day fee" which covers the cost of all conferences and preparation ahead of the trial as well as attendance on the first day. The second and subsequent days are then charged at a lower rate called a "refresiter." At present first day fees range from $15000.00 for a junior advocate up to about $5000.00 for s senior one."

Applicant then moved for an order disallowing both the premium and the disbursement in item 124. Applicant also sought an order that first respondent draws a revised bill reflecting both the adjustments imposed by the second respondent and those required in terms of the order sought.

Second Respondent's Response

In opposition to the applicant's present application the second respondent made several submissions.

Second respondent submitted that in terms of the agreement, annexed as Annexure "D" there was an agreement that the applicant was going to pay a particular amount in legal expenses and "that took into account arrangements I had with those who represented me." (See para 1.7 of second respondent's opposing affidavit).

The respondent alleged that this agreement was e-mailed to the applicant and was not disputed.

Contingency fee

Second respondent contented that, "… counsel and I concluded a contingency agreement entitling counsel to just over 4% of the sum recovered. I am aware that counsel was entitled to charge up to 25% and was in all truth prepared to pay him more than double the percentage agree upon…"

Applicant submitted that this matter was both "complex and convoluted" and, "was subject to many technical objections. I flew in senior counsel from South Africa who tried his luck unsuccessfully. I have been to a dozen lawyers with no success including many senior advocates. There were even criminal proceedings. The disbursement paid to counsel is in reality nothing …" (para 2 … of opposing affidavit).

Applicant further submitted that the premium charged is competent.

Applicant further pointed out that what was paid to counsel was a disbursement. It was a reasonable disbursement and that the first respondent acted lawfully in allowing that disbursement.

Second respondent submitted that the validity of the fee is in the circumstances not a matter to be dealt with by this court. He also averred that the practice in so fat as charges are raised are irrelevant. He also disputed the mount applicant paid to his legal practitioners and prayed that the application for review be dismissed with costs at a higher scale.

This court's findings in request of the issues raised.

It is a cardinal rule in applications of this nature that a mater rises or falls on the basis of the founding or opposing papers filed of record.

This court gave its decision based on submissions made by the parties in both the papers filed of record, the parties' heads of argument and submission made in arguments for and on behalf of the parties.

This court also proceeded to decide this matter on the presumption that parties had reached a settlement in relation to the issue of the premium that was allowed in the disputed Bill of Costs.

Similarly the parties appeared to have agreed that the practitioner appeared for the second respondents was lawfully holding himself as an advocate.

Again at the hearing of this matter it appeared that the preliminary issued raised by second respondent to the effect that the present proceedings had been by operation of law became frozen, and that, heads of argument had been improperly filed, appeared not to have been taken any further.

The parties raised argument in respect of one salient issue alone. The issue related to the applicant's objection to the "first respondent's decision to allow the recovery of $170 000 as counsels fee for appearing for a three (3) day trial. This was item 124 of the Taxed Bill of Costs.

The applicant contended that at the taxation in issue the first respondent ruled that the second respondent was entitled to recover the aforesaid sum merely because it was paid and failed to inquire whether that fee was reasonable.

Applicant states that he "took issue with item 124, where the second respondent sought to recover $170 which he said was paid as a fee to Mr *Mpofu* for the conduct of a three day trial.

The officer appearing on behalf of the second respondent, "in answer to the applicant's challenge….simply produced an invoice appearing from Mr *Mpofu."*

Item 124 of the Bill of Costs stated;

"To *Advocate Mpofu* fees for appearing."

Applicant submitted that;

> "At the Taxation the first respondent ruled that the second respondent was entitled to recover the sum merely because it was paid. She took the view that she had no power to inquire into the reasonableness of the fees, and did not do so."

It is the view of this court that this allegation of the said conduct of the first respondent (Taxing Master) remained unchallenged throughout the present proceedings. This court holds that clearly the first respondent misdirected herself in allowing this fee in these circumstances. Order 39 Rule 307 of the High Court Rules 1971 states;

> "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 person or by other unusual expenses."

This court therefore agrees with the submission made for and on behalf of the applicant that;

> "……..the whole purpose of taxation ……is to conduct an enquiry into the reasonableness of the fees and disbursements that a successful litigant claims from his adversary by effectively saying…….
>
> > "As long as the disbursement was in fact paid, then it must be reasonable."…… The refusal to enquire into the reasonableness of the disbursement was an abrogation of her role (i.e. first respondent)."

See *Preller* v *Jordan & Anor* 1957 (3) SA 201 (0) at 203 C-E.

Also as was stated in the case of *Zellco Cellular* v *Netone Cellular (Pvt) Ltd* 2010 (1) ZLR 164 (H) at 169 E.

> "Every party to a *lis* has the right to have costs claimed by the successful party rested as to their reasonableness by a taxing officer."

This court is in agreement with the applicant's submission that in the Taxation process the reasonableness of counsel's fees may be taxed off or reduced where the party challenging them can show them to have been inflated or otherwise unreasonable.

The general trend wherein counsel's fees from the *de facto* bar, should merely be accepted as a disbursement should in this court's view, be discouraged. It is necessary, in this court's view that the practice of counsel raising a first day fee and a subsequent refresher fee should be encouraged and possibly even provided for in regulations.

It may be necessary that the law society and the *de facto* bar, should jointly make a concerted effort to ensure that litigants are protected from possible inflated or unreasonable fees. A copy of this judgment should in this regard be made available to the Law Society.

The present case is a demonstration of the possible alarming discrepancy that potentially exists where "junior counsel" in a three day trial has raised a fee far in excess of what "senior counsel" raised.

This Court is in agreement with the applicant's submission that "it is only to the extent that counsel's fees are reasonable that they are recoverable from an unsuccessful litigant. See *Choto* v *Commecial Bank of Zimbabwe* 2006 ZLR 277 (H) at 280. This court also holds that first respondent committed a grave irregularity by failing to satisfy herself.

This court does not accept the second respondent's arguments, which appear to have been raised *esi post facto* namely

(a) That the fee raised is not spread over three days as alleged.

(b) That the applicant agreed that the second respondent could recover this fee or disbursement from him.

The purported agreement annexed as "D" at pp 110 to 114 is not signed.

Similarly there is no suggestion that this issue was raised at the Taxation in issue nor in the Bill of Taxed Costs under discussion.

(c) That the fee was a contingency fee. This court accepts that this issue was never raised at the Taxation. If it was then it should have been so provided in terms of the legal practitioners (contingency fee agreements) Regulations, 2014 – statutory Instrument 154 of 2014.

In terms of s 6 (1) of the aforesaid regulations, a contingency fee agreement should be in writing. No such agreement appears to have been produced at the taxation and or in subsequent papers filed of record in the present application.

In any event this court agrees with the applicant's submission that;

> "….a contingency fee paid to a practitioner whom the paying attorney regards as counsel would amount to a special fee to another legal practitioner" as contemplated by r 307. No such costs are allowable in terms of the rules.

In the final analysis this Court accepts that the first respondent was clearly wrong in failing to undertake an enquiry "triggered by the applicant's challenge to the reasonableness of this inordinate disbursement."

The first respondent failed to assess the reasonableness of the fee in respect of criteria raised by the applicants such as the level of experience of the practitioner concerned, the time actually taken on the task and the novelty of the undertaking. See *Pretorius* v *Santam Bpk* 200 (2) SA 858 (T) at 866 C-D.

Also the overall guiding principles, namely Market realities with regard to the charging of fees as observed in the remarks made by the Constitutional court of South Africa, in *Camps Bay Rate payers and Residents Association and Anor* v *Harrison and Anor* 2011 (4) SA 42 (CC) at para (10);

> 'No matter the complexity of the issues, we can find no justification in a country whose disparities are gross and poverty is rife, to countenance appellate advocates charging hundreds of thousands of rands to argue on appeal.'

This Court was accordingly satisfied that applicant established that the first respondent failed to undertake an enquiry as regard the reasonableness of item 124 of the taxed bill of costs in lieu of the challenge made by the applicant.

This was the basis of this court upholding the application for review in terms of rule 314 of the High Court Rules 1971 and giving the following order that;

(a) The decision of the first respondent in the taxation of the Bill of costs in case Number HC 8103 to allow the recovery of the disbursements from the applicant is hereby disallowed.

(b) The second respondent shall draw a revised bill of costs to reflect the adjustments contemplated by paragraph (a) of this order.

(c) The second respondent is to pay costs of suit.

Atherstone & Cook, applicant's legal practitioners
Messrs Venturas & Samukange, respondent's legal practitioners