ZIMBUILD PROPERTY INVESTMENTS (PVT) LTD

versus

MHURAI RAVIRO CHOVUNOITA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 21 May & 3 June 2024

B. Balamanja; for the plaintiff

ST. Farai and with him A.S Madzima; for the defendant

Taxation of bill of costs

ZISENGWE J: The taxing officer referred to me for determination three points arising from the taxation of the defendant's bill of costs. He did so in terms of rule 72 (25) of the High court Rules, 2021 ("the rules"), whose predecessor was Order 39 rule 313 under the old rules (i.e., the 1971 rules). I make reference to the old High Court rules because the taxation commenced under those rules, suffice to say that rule 109 of the rules provides that any proceedings commenced under the old rules are to continue in terms of the new rules. It reads:

> **"109**. The rules specified in the Second Schedule are repealed:
>
> Provided that anything validly commenced or done in terms of any provision of the repealed rules prior to the coming into force of these rules shall be deemed to have been validly commenced or done, as the case may be, in accordance with the equivalent provision of these rules."

The points referred to me by the taxing officer are the following:

a) Whether or not to allow counsel's fee note for the sum of US$60 000 or its equivalent in RTGs.

b) Whether or not to allow correspondent legal practitioner fees in the sum of US$1 500 or its equivalent in RTGs
c) Whether or not to allow counsel's fees in the sum of US$20 000 on two occasions.

The Background

On 14 February 2020 the plaintiff sued out of this court summons against the defendant seeking an order for specific performance or alternatively the payment of damages for breach of contract in the sum of $4 560 000. In terms of the former, the plaintiff averred that the defendant had reneged on his undertaking under an agreement to avail his farm (Lot 16 of lot 10A, Chicago, Kwekwe) to the plaintiff to subside and develop into residential stands. According to the plaintiff it was a term of the agreement that upon the completion of the project the plaintiff would share the proceeds of thereof in such a manner that the plaintiff would get 14 residential stands. According to the averments contained in the plaintiff's declaration, it (i.e. plaintiff) stood to realise a profit of $4 560 000 from the 14 stands.

The defendant entered appearance to defend and soon thereafter, with the assistance of an advocate thereby engaged, excepted to the summons and simultaneously raised two special pleas, namely absence of *locus standi* on the part of the plaintiff or alternatively absence of jurisdiction on the part of the court.

The plaintiff soon withdrew its summons and tendered wasted costs. This was immediately followed by the defendant filing a notice of taxation of his bill of costs. Save for those referred to herein before the rest of the items on the bill of taxation were uncontested.

The US$60 000 counsel's fee note.

The plaintiff's position.

Despite the defendant's insistence to the contrary, the plaintiff objected to the taxing officer allowing the US$60 000 fee note by the advocate who was instructed by the defendant's attorneys to defend the main action. The plaintiff's quest for the exclusion of the US$60 000 was predicated on the following:

a) That at the material time the Zimbabwe dollar was decreed by Statutory Instrument 142 of 2019 (as read with Statutory Instrument 33/2019) to be the sole legal tender for all domestic transactions.
b) That the US$60 000 was unreasonably excessive in the circumstances and was at marked variance with costs ordinarily levied by other advocates handling similar matters.
c) That the US$60 000 was not properly substantiated in that no breakdown of the work done by counsel was tendered.
d) That the engagement of an advocate was unnecessary given that the matter could not be deemed to be complex.
e) That assuming that the fee note was deemed reasonable, that there was no evidence to show that the disbursements were actually and reasonably incurred by the defendant.

The plaintiff initially contended that as a general principle advocate fees are not claimable where costs are awarded on a party to party basis. This leg of the argument was soon abandoned and counsel conceded that the claim for the recovery for disbursements made to an advocate are independent of the tariff or scale awarded.

The Defendant's position

Although the defendant initially insisted on recovering the entire amount of US$60 000, the defendant through counsel made a concession on the amount and submitted that at best only the sum of US$ 20 000 could be recovered. This was on account of the fact that the defendant had only been able to attach two cash receipts from the Chambers advocates of Zimbabwe in favour of Advocate R Mabwe. The first receipt is for US$5000 and is dated 8 April 2020 and the second one is for US$15 000 dated 23 April 2020.

Be that as it may, the defendant insists that the disbursements to counsel should be allowed (albeit in the reduced amount) as same were reasonably incurred in the circumstances. It was averred in this regard that the engagement of an advocate was necessary to ward off a suit wherein he stood to lose 14 residential stands in a prime location of Kwekwe. In the latter regard the defendant strove to show that the 14 stands were of considerable value given their grand location in a much sought-after area of Kwekwe.

As far as the currency is concerned, it was averred on defendant's behalf that Statutory Instrument 85/2020 relaxed the law which hitherto decreed the Zimbabwe currency as the exclusive legal tender for domestic transactions. It is to the latter inquiry that I naturally turn to first. This is on account of the fact that should it be found that the engagement of counsel on United States of America dollars (US$) terms was tainted by some illegality in the sense of it having contravened an express statutory enactment, which was in existence then would amount to a *fait accompli* against the defendant's quest to recover the amounts in question.

Statutory Instrument 142/2019 which came into operation on 24 June 2019 expressly decreed in Section 2 (2) that the Zimbabwe dollar was from the aforementioned date to be the sole legal tender on Zimbabwe in all domestic transactions. It also specifically decreed that with effect from that date at the United States dollar alongside other foreign currencies whatsoever were no longer legal tender in Zimbabwe for local transactions.

This position was however relaxed by the Statutory Instrument 85/2020 which came into operation on 29 March 2020. This Statutory Instrument permitted payment of domestic transactions to be made in foreign currency.

The chronology of events in this matter *vis-a vis* these two Statutory Instruments makes for some interesting reading. This is because according to the defendant's bill of costs, the exception which was prepared for filing by Advocate Mabwe was prepared on 12 March 2020 and filed with the court the very next day. This was a few days before the coming into existence of Statutory instrument 85/2020. However, all other relevant events took place *after* its promulgation. Most importantly, the fee note by counsel was generated on 2 April 2020 and so too was the disbursement of the two sums of money to counsel (on 8 and 23 April 2020, respectively). Needless to say, the filing of the bill of taxation (which was done on 26 November 2020) also came after its promulgation.

The crisp question for determination in this regard is which date should be considered in determining whether or not to allow the amount claimed in respect of the work done by counsel. Is it the date when the work (or at least part of it) was done or is it when the fee note was generated or disbursements made?

The plaintiff relied to a great extent on the case of *Zizhou* v *Taxing officer & Anor* SC -7-20 for the general position that anything done in direct conflict with a statute is a nullity and more

specifically for the position that a bill denominated in United States dollars which at the time of its taxation there was a prohibition against transacting in foreign currency for domestic transactions could not be allowed.

I decline the invitation extended to me by the plaintiff to infer that because part of the work (i.e. the drawing up of the exception and special plea) was done before the coming into operation of Statutory Instrument 85/2020 that therefore the transaction in question was done in contravention of Statutory Instrument 142/2019. That amounts to speculation and conjecture. One cannot tell the terms under which the advocate was engaged at that stage. What is critical to my mind is the time of disbursement not the time the work is done. For the reason that the fee note in question was generated *after* the promulgation of SI 85/2020 when the United States dollar was now legal tender for domestic transactions coupled with the fact that the disbursements in question and the presentation of the bill for taxation to the taxing officer were also done after the coming into operation of Statutory Instrument 85/2020 in my view justifies allowing that particular cost. That is, if all the other conditions are met.

The law governing taxation of costs is captured in r72(3) of the High Court Rules, 2021 which reads:

"72. Taxation of costs and review of taxation

(1) … (not relevant)

(2) … (not relevant)

(3) With a view to affording the party who has been awarded an order for costs *reasonably incurred by him* or her in relation to his or her 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 or her 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." (italics for emphasis)

Order 39 rule 308(4) of the 1971 rules under which the taxation commenced provided as follows:

"In taxing any costs under this rule, the taxing officer shall –

(a) Allow disbursements made when they are reasonable, and reasonably incurred; and

(b) Take into account any tax or duty payable by the legal practitioner concerned in respect of any fee or charge.

Although this rule is more expansive and elaborately stated in the 2021 rules, the overarching consideration, however, is whether or not the costs in question were reasonably incurred and were reasonable and proper in the circumstances. In *Bowman N.O.* v *Avraamides* 1991 (1) SA 92 (W) at 95 B-E, FLEMMING J had occasion to interpret a similarly provision in the South African rules, he said:

> "A court, when functioning as a Court, must operate on the assumption that Rule 70(3) does achieve what it sets out to achieve. It is a Rule which determines the taxation of party and party costs. It not only authorises but requires that its injunction shall be applied with a specific object. The object is that the party to whom costs are awarded is afforded 'full indemnity' for every expenditure 'reasonably incurred by him in relation to his claim or defence'. It is expressly added that the object is also to ensure that 'all such costs' shall be borne by the party against whom the order has been awarded. In order to achieve those objects the Taxing Master must allow all costs, charges and expenses which appear to him to have been 'necessary or proper for the attainment of justice' in the case of a plaintiff (or the defending of his rights by any other party). The Rule accordingly requires that an expenditure of a type which it was reasonable to incur must be allowed. The extent of allowance must be on the level of that which is 'necessary or proper' in order to have his case duly presented."

See also *Van Rooyen* v *Commercial Union assurance company of SA Ltd* 1983 (2) SA 465 (O) at 467F & *Jandrell v Stanley* 1967 (3) SA 24 (T) AT 26A.

Whether engaging an advocate was reasonably necessary

It was submitted on behalf of the plaintiff that the engagement of an advocate was completely unnecessary given that this was a "*mere*" summons and that the issues raised therein were neither complex nor novel. It was further averred that whereas it is one's right to engage a legal practitioner of their choice, the costs incurred in engaging an advocate should not be offloaded onto the opposing party. Reliance for this proposition was placed *inter alia* on a decision of the Labour Court in *Rufaro Mahonde* v *National Museums & Monuments of Zimbabwe* LC/H/80/2018 where the following was said:

> "It is settled at Law that an award of costs reasonably incurred in a case and unless a punitive order is made by the court, the award of costs would only follow closely these costs reasonably incurred to prosecute the case. In the case at hand whilst the parties were at liberty to choose representatives of choice they were however at liberty to pass on the costs of such in the event of a loss or success on the matter. An award of costs on ordinary scale would clearly not include payments to be made for outsourcing of an advocate."

Per contra, counsel for the defendant relied on Note 2 of the Law Society of Zimbabwe General tariff of Legal fees 2011 in justifying the engagement of an advocate to defend the matter. This note provides:

> 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;
>
> 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.

Of the above criteria the defendant relied on paras 2.4 & 2.5 namely the amount or value of money or property involved is particularly high and/or the matter is of particular importance to the client.

In *casu*, the value of the property in question can by no means be regarded as low. The value of 14 residential stands on a prime location of a city such as Kwekwe is bound to be substantial whichever way one looks at it. Plaintiff's counsel attempted to suggest that all criteria set out in note two need to be satisfied. Nothing can further be from the truth than that. The individual criteria are quite clearly couched and need to be interpreted disjunctively, not conjunctively. The presence of one or more of their number is sufficient to justify such additional costs such as those for engaging an advocate.

I did not understand the Labour court in the *Rufaro Mahonde* case (*supra*) as saying that under no circumstances can disbursements to an advocate be allowed. The correct position is that if a party unnecessarily or unreasonably engages the services of an advocate then he cannot be allowed to burden the opposing party with the such costs. This is in keeping with the general principle that only reasonably incurred costs may be allowed.

Circumstances may arise, as they not infrequently, do where the engagement of an advocate is justifiable and disbursements thereto are recoverable. In *casu* I hold the new that given what was at stake, i.e., potential loss of 14 residential stands or their equivalent in value, the defendant cannot be faulted for swiftly engaging the services of such an advocate. The stakes were quite high.

In the same vein the contention that the expense was incurred due to over-caution cannot be sustained. As earlier stated the stakes were high and the defendant risked losing something of significant value and the engagement of an advocate on the circumstances was reasonable.

Apart from merely alleging that the amount claimed by the defendant (which originally stood at US$60 000 was unreasonably high and that the work that was apparently done hardly justified such an expense, the plaintiff did precious little to substantiate that averment. No attempt was made to a comparison between fees levied by advocates of similar standing in similar cases.

Whether the disbursements were actually incurred

Subrule 4 of rule 72 of the rules provides that only costs for work actually done or disbursements actually made may be allowed. It reads:

> "(4) A taxing officer may tax all bills of costs for services (other than conveyancing) actually rendered by a legal practitioner or by a notary public in his or her capacity as such, including disbursements made, whether in connection with litigation or not, and whether the work was done before or after the date on which the rules came into operation."

In *Choto* v *CBZ & Anor* HH-126-2006 GUVAVA J (as she then was) had the following to say in this regard:

> "In any event, disbursements on the respondent's bill of costs relate to the actual amount which the legal practitioner will have paid out to counsel and the respondent does not have a choice in the amount charged by counsel. In this case the taxing officer found that the amount charged was reasonable and reasonably incurred and therefore allowed the payment."

It is against this background that the three impugned amounts are to be determined.

The US$60 000 Counsel's fee note

The original argument by the plaintiff's counsel in this regard was that there was no proof showing that the US$60 000 was actually paid to the advocate pursuant to the latter's fee note. It was further argued in this regard that the receipts availed handwritten as they were, did not bear the names of either or both of the parties to whom the pay merits related.

The fact that the receipts are in long hand immaterial. There is no rule requiring receipts to be typed or computer generated. As for the latter argument, plaintiff's counsel conceded that the relevant case Number (HC 43/20) was inscribed at the bottom of the receipts thus establishing the link between the receipts and the proceedings for taxation underway.

Most importantly, however, defendant's counsel as earlier alluded, ultimately conceded that the receipts availed for taxation proved only US$ 20 000 (consisting of two payments – one for US$5000 and the other for US$15 000) having been actually disbursed to the advocate.

The US$ 20 000

During arguments in court, counsel for the defendant indicated that this amount was, as a matter of fact, incorporated in the US$60 000 referred to above. In any event no receipts were availed for this particular amount as a separate disbursement. This amount cannot be allowed

The US$1 500 correspondence fee note.

Under this heading the defendant claimed this amount as a disbursement on two occasions namely 7 April 2020 and 23 April 2020. Not only was the defendant unable to provide proof (in the form of receipts or something similar) of this amount having been actually disbursed, but also that this amount is unreasonable in the circumstances. There is merit on the plaintiff's contention. The purpose of engaging correspondent attorneys in Masvingo was to obviate the need for counsel to travel from wherever to Masvingo so as to save costs. That purpose would be defeated if a party is then allowed to claim such a sum of money for having so engaged a correspondent law firm to seek a postponement or to file process (or some other similar simple procedure) in the the party's legal practitioner of choice's stead. In this regard the plaintiff offered an amount of US$150 as being a reasonable amount in the circumstances and I agree.

In the final analysis the following order is hereby made.

i) The disbursement of a total of US$ 20 000 (or its equivalent in value in local currency calculated at the prevailing interbank rate as of the date of payment) in respect of Counsel's fees (an evidenced by the two receipts of 8 and 23 April 2020) is hereby allowed.

ii) Payment of only US$150 for the correspondent fees (or equivalent in value in Local currency at the prevailing interbank rate calculated on date of payment) is hereby allowed.

iii) The rest of the defendant's bill of costs is as per taxing officer's taxation.

ZISENGWE J.....

Hlabano Law Chamber; Plaintiff's Legal Practitioners
Farai and Associates; Defendant's legal Practitioners