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Judgment No. S.C. 45/99
Civil Appeal Nos. 661/94 & 82/98

(A) ICL ZIMBABWE LIMITED v (1) THE TAXING MASTER, SUPREME COURT (2) AMOS MWATSAKA

(B) AMOS MWATSAKA v (1) ICL ZIMBABWE LIMITED (2) THE TAXING MASTER, SUPREME COURT

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 2 & APRIL 16, 1999

A J Dyke, for ICL Zimbabwe Limited

A Mwatsaka in person

Review of Taxation: Application in terms of s 48 of the Rules of the Supreme Court

McNALLY JA: The two litigants in these matters, whom I will call "ICL" and "Mwatsaka", have been involved in a long-running dispute since ICL dismissed Mwatsaka in March 1991. Mwatsaka won an initial skirmish (judgment SC-175-95) and ICL won the ultimate battle (judgment SC-164-98).

In each appeal the successful party was awarded costs. The bills of costs were duly taxed by the taxing officer of this Court. Each party was unhappy about the results, and so both bills have been taken on review as provided for in Rule 48(2) of the Supreme Court Rules. The Assistant Registrar, who is the official empowered to undertake taxation, presented a report in each case, and the matters came before me in Chambers, although for convenience they were heard in Court.

In passing I remark that the term "Taxing Master" is strictly alien to this jurisdiction. The Supreme Court Rules speak of taxation by "a registrar". The High Court Rules (Order 38) speak of "Taxing Officers" - see particularly Rule 306. The expression "Taxing Master" seems to have come in from South Africa in cases such as *Doyle v Salgo* 1958 R & N 218 (FSC); *Joss v Joss and The Taxing Master* HC-S-359-81; and *Williams v The Taxing Master* 1982 (1) ZLR 122 (H). It was also used in *Cone Textiles (Pvt) Ltd v C. Pettigrew (Pvt) Ltd and Anor* 1984 (1) ZLR 274 (S); and in *T.A. Holdings Ltd v Maceys Consolidated (Pvt) Ltd and Anor* 1988 (2) ZLR 453 (S). I spoke of the "Taxing Officer" in *Machiels v Coghlan, Welsh & Guest (The Law Society of Zimbabwe intervening)* S-176-98 (not yet reported). I think it is the more accurate term.

The principles by which the Court is to be guided when it is asked to review the decisions of the Taxing Officer are well established. SQUIRES J set them out in *Williams v The Taxing Master supra* at 125, and they were repeated, although without reference to the decision in *Williams*, by GOLDIN AJA in the *Cone Textiles* case *supra* at 275 F-G. He set out two grounds:-

> "Firstly on the application of common law rights on review which involve a finding that he was grossly unreasonable or erred on a point of principle or law. In such a situation the Court would be at large and entitled to substitute its opinion for that of the Taxing Master (sic). It should not be overlooked that even when such grounds for interference exist it need not follow that the Taxing Master's (sic) decision must necessarily be set aside or altered. He may have arrived at the correct decision for a wrong or even improper reason.
>
> 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 (sic) was clearly wrong in regard to some item. In such a case the Court will substitute its own opinion for that of the Taxing Master (sic) even if it is a matter involving degree."

(See also *Ocean Commodities Inc v Standard Bank of SA Ltd* 1984 (3) SA 1 (A)). This second criterion has been called "a graft on the main principle". The Court allows itself a wider power to interfere in the decision of one of its own officers, because it is operating on familiar ground. It will be more hesitant to intervene in a discretionary decision by other public officials or tribunals.

I turn now to consider the objections, which perforce have to be dealt with one by one, starting with the ICL application and moving on to the Mwatsaka application.

(A) THE ICL APPLICATION: CASE NO. SC 661/94: JUDGMENT SC-175-95

A. A travel claim of $4 by Mwatsaka was disputed on the grounds of duplication. Mwatsaka says he made two trips. The Taxing Officer agrees. ICL concedes.

B. Seven items are challenged as being legal practitioner and client costs rather than party and party costs. These concern dealings between Mwatsaka and two firms of legal practitioners involving legal advice and opinions obtained from them. These practitioners did not file a notice of assumption of agency in this Court.

There was apparently confusion in the publishing of the judgment, with some copies showing that Mr T K Hove appeared for the appellant. However, I am advised that in fact he did not, and the original judgment and the stamped copy show "The appellant in person".

Therefore, for the purposes of the case and the costs thereof, they were not his legal practitioners of record. The costs of consulting them were not costs of and in the proceedings. It seems to me to be clear that the costs of obtaining legal advice and opinions as to prospects of success are not normally recoverable as between party and party. The reasons for this are set out by M T STEYN J (as he then was) in *Van Rooyen v Commercial Union Assurance* 1983 (2) SA 465 (O) at 478D *et seq*. Speaking of the right of the litigant who appears in person to recover his "necessary or proper costs reasonably incurred in the litigation if he is the successful party" the learned judge said:-

> "It may therefore seem strange, and not in accord with this general approach, not to allow him as a matter of course to obtain counsel's opinion on the merits at the pre-litigation stage on a party and party basis. Such is, however, the general rule as to such opinions … . There are, however, exceptions to this general rule … but such exceptions would then be justified by some feature peculiar to the matter being dealt with, such as exceptional complexity, novelty, etcetera".

This is not the position here. Nor indeed can I find any provisions in the High Court (Fees and Allowances) Rules as applicable at the time (see Supreme Court Rule 48(1)), under which advice on prospects of success or opinions whether by counsel or by a legal practitioner other than the legal practitioner of record may be allowable as a party and party cost, even when the party is represented by a lawyer. *Costello v The Registrar of the High Court and Anor* 1974 (1) RLR 198 turns on a completely different point and has no relevance in this case.

This objection must therefore be sustained, except in relations to items 61 and 62, totalling $22,20, which seems to me to be allowable or, at least, not to have been shown to be disallowable.

C. A further general point was made by ICL, namely that in any event there is no basis in law upon which a litigant appearing in person may rightly be granted any costs, given that the relevant Rules do not apply to "self-actors".

I do not accept this general submission. This Court has frequently made orders of costs in favour of litigants appearing in person. Rule 48(1) begins with the words "Where costs are allowed they shall be taxed by the registrar and (my emphasis) legal practitioners' fees shall be charged and taxed in accordance with the relevant provisions of the tariff …". Individuals appearing in person may often incur travelling, typing and photocopying costs which will be reasonably allowable.

D. The next objection relates to the allowing of the costs of drawing the bill of costs, and the costs of taxation.

These costs are very small - $27 and $7 respectively. Insofar as they cover the expenses of typing the bill and travelling to the taxation, I am not prepared to interfere with the registrar's discretion.

Given the amount taxed off the bill, which was well in excess of the one-sixth referred to in the Rules, it is contended that Mwatsaka should not have been allowed the costs of attending taxation.

As I have said, the amount in dispute is $7. The Rules give the registrar a discretion in this regard (SI 191 of 1997, Part VIII (3)), and for the sake of $7 I am not prepared to intervene.

The objection is disallowed.

E. ICL's objection is to the allowing of an amount of $332.05 as sales tax on the award of costs.

I agree with the submission that sales tax will not be payable by Mwatsaka, and this sum should not be added to the bill. I note that Mwatsaka made no reference to this objection in his opposing affidavit, and must therefore be taken to have conceded it.

This objection is upheld.

Accordingly this bill of costs must be referred back to the Taxing Officer for re-drawing in accordance with this judgment. I will deal with the question of the costs of these applications after disposing of the second review.

(B) MWATSAKA'S APPLICATION: CASE NO. SC 82/98: JUDGMENT 164/98

In this matter Mwatsaka was the loser and he brought ICL's bill of costs on review. I will deal with the points *seriatim*:

A. Item 3 relates to the instructing of counsel and counsel's charges in relation to the drawing of the notice of appeal. The only figure queried in this item is the disbursement of $650, being counsel's fees, and the consequential sales tax of $113.75.

Since the objection in relation to counsel's fees raises a point of principle which also underlies a number of the later objections by Mwatsaka, I will deal with this issue of principle first.

The objection is simply that because of the fusion of the legal profession, which had as one of its main objectives the saving of costs to litigants, the costs of employing counsel should not normally be passed on to the losing litigant. Any legal practitioner may appear in the Supreme Court and raise charges for his or her appearance in accordance with the tariff set out in SI 191 of 1997. But if a legal practitioner wishes to instruct a member of the so-called "*de facto* Bar", then his client must, barring exceptional circumstances, accept the extra costs as a "legal practitioner and client" cost.

The Minister's speech, as recorded in *Hansard* at the time when the Legal Practitioners Bill was being debated on 11 February 1981, was cited in support of the contention that it was introduced to reduce the cost of litigation.

As a matter of broad principle there may be something to be said for this contention. But it seems to me that it is defeated by the provisions of the Rules themselves. And, be it noted, the Rules are approved by the Minister. Thus what he said in Parliament cannot be used to contradict what he specifically approved in the Rules.

The High Court (Fees and Allowances) Rules, 1994, were amended by SI 191 of 1997 on 19 September 1997. These Rules apply in the Supreme Court, despite their name, because Supreme Court Rule 48(1) specifically says so. These Rules provide, in Part I s 2, that:-

> "In the taxation of any party and party bill of costs this tariff shall be adhered to;
>
> Provided that in exceptional cases and for good and sufficient reason, the taxing officer may depart from any provision of this tariff where strict adherence to it would be inequitable."

Section 7 of the same Part reads:-

> "When another legal practitioner is instructed, he shall not be required to adhere to this tariff, but may charge such overall fee as the taxing officer considers fair and reasonable in the circumstances of the case;
>
> Provided that this paragraph shall not apply where a legal practitioner of record is instructed by a country legal practitioner."

It must be stressed that these Rules are concerned with party and party costs. Legal practitioner and client costs are dealt with under the Law Society recommended tariff.

If the law were as Mwatsaka would wish it to be, there would be a second proviso to s 7 above which would read something like this:

> "Provided also that the fee charged by such other legal practitioner shall not be allowed in the taxation of any party and party bill of costs unless the taxing officer is satisfied that the employment of such other legal practitioner is in the circumstances reasonably justified".

But there is no such proviso.

There is, however, one provision which tends partially to support Mwatsaka's contention. Rule 311 of the High Court Rules (not, be it noted, the High Court (Fees and Allowances) Rules) provides as follows:-

> "The taxing officer shall, unless the court when awarding costs orders otherwise, allow as party and party costs -
>
> (a) in any matter (where?) another legal practitioner is employed, the reasonable fee consequent upon such employment;
>
> Provided that he -
>
> (a) may disallow the fee of another legal practitioner in unopposed matters and in matters in which a legal practitioner has not appeared on the other side (my emphasis) …".

Thus there is provision, in the High Court, for taxing off counsel's fees, but the *onus* is on the person seeking to have them taxed off. The normal provision is that counsel's fees are allowable in principle, though the amount of those fees may be subject to reduction.

But against that, the fact is that this provision is in the High Court Rules concerning taxation. No such proviso exists in the equivalent Supreme Court Rules. This may well be because it is desirable, in the highest court in the land, that parties should be represented if possible by more specialist legal representatives. At first instance it may be appropriate to discourage over-representation (though I do not wish to be understood to be supporting the idea that instructing counsel is necessarily over-representation); but in the Supreme Court it would, I think, be difficult to say that a litigant should be discouraged from briefing counsel from the "*de facto* Bar". The better approach, the approach adopted by the Taxing Officer, is that in this Court counsel's fees should not be taxed off (except in the rarest of cases perhaps) but should where necessary be taxed down.

In any event, the Taxing Officer in his discretion has declined to disallow counsel's fees, and, in my view, this was the correct approach. He has, where he thought it reasonable, reduced those fees. Again, I consider this the proper approach. Compare *T.A. Holdings Ltd v Maceys Consolidated supra*.

I should point out that I have used the word "counsel" in this judgment, for convenience, in preference to the more cumbersome "another legal practitioner" introduced by SI 277/81.

The real difficulty in taxing counsel's fees is that neither the Taxing Officer nor the Judges of this Court are in any realistic position to judge the

fairness of those fees, especially in these days of rapid inflation. In fact the Taxing Officer, who deals regularly with this question, is better placed than the Supreme Court Judges whose acquaintance with counsel's fees dates back further than they care to remember. In these circumstances it seems to me desirable that the "*de facto* Bar" should attempt to emulate in some way the Law Society which has produced "recommended tariffs" for charges on a legal practitioner and client basis, depending on the seniority of the practitioner concerned. It seems to me that Part I, s 7 of SI 191/97, puts too great a burden on the Taxing Officer. Some guidance should be agreed. Alternatively the Rules Committee or the Law Reform Commission might wish to consider the matter.

In these circumstances I do not consider it possible to interfere with the Taxing Officer's decision to approve the fee of $650 charged by counsel.

This first objection is disallowed.

B. The second objection was to the fee charged for attending at the Labour Relations Tribunal to inspect the record. The point made was that inspection was unnecessary, given that the record was certified by the registrar of the Labour Relations Tribunal.

This objection is unfounded. It is an unfortunate fact that records are often incomplete and it is necessary for the appellant, whose duty it is to ensure that the full and proper record is before the Court, to check it.

C. The objection to the letter, item 13, is not sustained. The practice of writing letters to confirm oral discussions is not to be discouraged. Rather the reverse.

D. The perusal of a letter dealing with any substantive point in the dispute is not a formal attendance, and the charge in this case was proper. The objection is disallowed.

E. A charge for perusing the record under item 17, following the charge for inspecting the record under item 12, does seem to me to be unjustified duplication. A brief check was all that was necessary, to confirm the inspection of a week earlier. This item should be reduced to $100.

F. The perusal of the letter from the registrar was not a formal one. The objection is disallowed.

G. The perusal by the practitioner of the heads of argument, prepared by his own counsel, was allowed as a formal attendance. I consider the charge was justified. It would be irresponsible simply to pass the document on without knowledge of its contents. The objection is disallowed.

H. Perusal of the opposing heads of argument was a proper and substantive attendance. A practitioner does not abdicate all responsibility for his client's case when he briefs counsel. The objection is disallowed.

I. Item 32 on the bill involves the fundamental question as to whether, when counsel is briefed to appear, the instructing legal practitioner may charge for his attendance as well as that of counsel.

Once again the difficulty facing the objector is that SI 191/97, in Part I, para 5, specifically provides:-

> "Where, in the taxing officer's opinion, more than one legal practitioner has been necessarily engaged in the performance of any work covered by this tariff, each legal practitioner shall be entitled to be remunerated on the basis set out in this tariff for the work reasonable and necessarily done by him."

Once the registrar accepts that the attendance was necessary, the charges are in accordance with the tariff. The function of the instructing practitioner is by no means formal, and I do not consider the Taxing Officer can be faulted for allowing this fee. I should mention that the Taxing Officer, while allowing this amount of some $2 000, has taxed $13 500 off counsel's fee.

J. The final objection is to counsel's fees, and I have dealt with the principle involved under item 2A above. It is not necessary to repeat what I have said. Counsel's fees are properly allowable. In this case, as I have noted, a major proportion of the fee charged by counsel has been taxed off. The objector has misconstrued the Rules and has objected to the application of the High Court (Fees and Allowances) Rules in the Supreme Court. He overlooks the fact that Supreme Court Rule 48(1) specifically provides for that.

The objector also refers generally to the Legal Practitioners Act [*Chapter 27:07*]. I have looked through the Act and find nothing relating to the issues of costs and charges which arise in these two cases. I find no basis

for the contention that the provisions of the Rules to which I have referred are *ultra vires* the provisions of that Act.

Looking at the two applications together, it seems to me that each party has been to some extent successful and therefore I propose to make no order as to the costs of the two applications.

Accordingly I make the following order:

1. In each case the Taxing Officer is directed to amend the taxation in the light of the rulings in this judgment;

2. There will be no order as to costs in either application.

Coghlan, Welsh & Guest, ICL Zimbabwe Limited's legal practitioners