

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

TAXATION REFERENCE NO. 27 OF 2023

(Arising from Ruling and Drawn Order of Taxation Cause No. 67 of 2020 delivered by Hon. J.D. Luambano, Taxing Master, on 20 March 2023 at the High Court of Tanzania (Dar es Salaam Registry at Dar es Salaam between Mirage Lite vs Airtel Tanzania Ltd.)

AIRTEL TANZANIA PUBLIC LIMITED COMPANY (formerly known as AIRTEL TANZANIA LIMITED)APPLICANT

VERSUS

MIRAGE LITE LIMITED.....RESPONDENT

RULING

Date of Last Order: 26/10/2023

Date of Ruling: 03/11/2023

MWAKAPEJE, J.:

This is an application for Reference made under Order 7(1) of the Advocates Remuneration Order, 2015 (G.N. No. 264 of 2015). The application is made by way of a Chamber Summons supported by an Affidavit of one David Lema, Advocate for the Applicant. The Applicant in this application seeks to set aside and quash the decision of the Taxing Master Honourable J. D. Luambano, delivered on 20 March 2023 in Taxation Cause No. 67 of 2020.

The facts of this application are thus: Way back in 2016, the Applicant and the Respondent were involved in Civil Suit No. 216 of 2016 in this Court, where the Respondent herein was the Plaintiff. In the same, the Respondent claimed to be paid the amount due to the tune of **\$272,765** as per the variation certificate he brought against the Applicant herein (Defendant back then). In the end, the suit ended in favour of the Respondent (Plaintiff back then). The Court ordered the Applicant, among other things, to pay the Respondent the said amount as special damages.

Following the decision of the Court, the Respondent filed taxation Cause No. 67 of 2020 seeking payment of **TZS 23,873,000/=** as costs in prosecuting the suit, i.e. Civil Suit No. 216 of 2016. The Taxing Master awarded the Respondent **TZS 21,843,000/=**. Aggrieved with the amount, the Applicant lodged this Reference to the Court contending that:

- (a) The amount awarded as an instruction fee of **TZS 18,820,000/=** was excessive and exorbitant;
- (b) The Taxing Master did not take into consideration all principles of awarding costs and
- (c) There was no justification in awarding **TZS 21,843,000/=** out of the claimed of **TZS 23,873,000/=**.

The Respondent, in his filed Counter Affidavit, disputed the application by stating that the Taxing Master was justified as costs awarded in Taxation Cause No. 67 of 2020 were based on the scales provided in the Advocates Remuneration Order, 2015. On 26 October 2023, all parties appeared before the Court for hearing. On the one hand, the Applicant was represented by Ms. Miriam Bachuba, a learned Advocate, while on the other hand, Mr. Evodius Rutabingwa, a learned Advocate, represented the Respondent.

In her submission, Ms Bachuba referred the Court to Order 12(1) of the Advocates Remuneration Order, 2015 (G.N 263 of 2015), which gives discretionary power to the Taxing Master to allow costs, charges and expenses as provided for in the Rules. She further stated that such powers may be interfered with if the taxing Master did not act judiciously and acted on a wrong principle or consideration.

According to her submission, what was contested was the allowance of instruction fees, transport fees, attendance fees and drafting fees. On instruction fee, she observed that the Taxing Master awarded **TZS 18,820,000/=** being 3% of the total claim of the suit in Civil Suit No. 216 of 2016. It was her contention that the Taxing Master applied the 9th Schedule to the Advocates Remuneration Order, 2015, without giving reasons. It was her submission that the 9th Schedule does not apply to

contentious proceedings in terms of Order 41 of the Rules. Costs of this nature are prescribed in the 10th, 11th and 12th Schedules. It was, therefore, her prayer that the Taxing Master could have applied the 11th and not the 9th Schedule in awarding instruction fees. She further stated that Paragraph 1(d) and (k) of the 11th Schedule was to apply in this matter.

According to Ms Bachuba, the 9th Schedule applies to contentious proceedings of a liquidated sum which was agreed upon by the parties in a contract beforehand. She relied on her submission on the cases of **Southern Highland Earthworks Company Ltd vs UAP Insurance Tanzania Ltd (Taxation Reference 1 of 2021) [2022] TZHC 131** and **WellWorth Hotels and Lodges Ltd vs East Africa Canvas Co. Ltd & 4 Others (Commercial Case No. 107 of 2020) [2023] TZHCComD 197**, whereby it was emphasised that a suit for liquidated damages is different from a suit of specific damages, the 9th Schedule applies only to a suit for liquidated damages and not for specific damages.

On the transport charges, Ms Bachuba submitted that the Taxing Master granted costs without stating the applicable Schedule and reasons thereto as to why such amount was reasonable. She further stated that during taxation, the Respondent relied on the 8th Schedule, though the

same does not apply and was not applied by the Taxing Master. According to her, the 11th Schedule was proper.

On attendance fee and drawing fees, Ms Bachuba was of the opinion that the same was to be included in instruction fees as was observed in the case of **Rose Mkeku (the Administratrix of the estate of the late Simon Mkeku) vs Parvez Shabbirdin (Misc. Application 89 of 2021) [2022] TZHC 3037 (5 May 2022)**. In the said case, it was stated that the instruction fee includes the amount of work involved, the complexity of the case, and time taken at the hearing, including attendance, correspondences, perusal, consulted authorities or arguments. It was her stand, therefore, that charging the same separately amounts to double payment. She further cited the case of **ZTE Corporation vs Benson Informatics Ltd (Commercial Case 188 of 2017) [2018] TZHCComD 65 (2 May 2018)**, which stated that the instruction fee covered the attendance fee. She went on stating that that the Taxing Master never provided reasons as to the justifiability of the same.

Ms. Bachuba was of the considered opinion that attendance and drawing fees were to be included in the instruction fee. Moreover, she stated that the taxing Master ought to have used the 11th Schedule throughout. She then referred this Court to Section 11(3) & (4) of the Law

of Interpretation Act as to the proper construction of the same. In her humble submission, she stated that it was wrong for the Taxing Master to apply different Schedules in the proceedings of the same nature. She, therefore, prayed that the decision of the Taxing Master be set aside and quashed.

In reply, Mr Rutabingwa, on the other hand, refuted the submission by Ms Bachuba on the usage of the 9th Schedule by the Taxing Master. He contended that the same emanates from the total claim in Civil Cause No. 216 of 2016. He stressed that the Taxing Master was justified in doing so by applying Order 12(1) of the Advocate Remuneration Rules, 2015. On the issue of there being an agreement in matters of liquidated sum, he contended that Civil Cause No. 216 of 2016 was the basis of the same. He relied on the case of **Tanzania Rent A Car Limited vs Peter Kimuhu (Civil Reference 9 of 2020) [2021] TZCA 103 (6 April 2021)**, where it was stated that on the observance of the principle of contesting in taxation matters, such principles involve the observation of the advocate, the work done by him and the complexity nature of the assignment. He, therefore, submitted that the amount of **TZS 18,820,000/=** was justified.

Regarding transport charges, Mr. Rutabingwa submitted that it was the 8th Schedule which was invoked by the Taxing Master and the same

was justified to award **TZS 20,000/=** as transport charges under Order 12(1) of the Rules. Mr Rutabingwa, on this area, thought that if the Applicant saw that the transport charges were unreasonable, she could have proposed the amount to have been taxed. According to him, the taxing Master assigned reasons as he was guided by the principles in the Remuneration Rules, 2015.

Mr. Rutabingwa also countered the Applicant concerning attendance and drawing fees. He disputed the fact that the taxing Master had to apply the 11th Schedule as the same deals with matters such as a petition for winding up a company, dissolution of marriage, nullity and separation. He concluded that the 11th Schedule does not provide direction concerning the suit as the present one. He prayed that the amount awarded by the Taxing Master be maintained.

In her rejoinder, Ms Bachuba reiterated what she stated in her submission in chief. She also concurred with the Respondent on the principle established in the case of *Tanzania Rent A Car Ltd (supra)*, which is why she prays for the same to apply in this case since the Taxing master in the said Reference did not apply such principles.

Following the submissions by the counsels for the parties and considering the nature of the present application, I will confine myself to

the issue of whether the Taxing Master was justified to apply the 9th Schedule in awarding costs for instruction fees.

In the disposition of this application, and as cited by both counsels for the Applicant and Respondent, respectively, I am first of all compelled to peep into Civil Suit No. 216 of 2016 to have a better understanding of the application at hand. In short, in 2008, the Applicant herein hired the Respondent to construct a Master Switch room at its head office located along Bagamoyo Road. The term of engagement was to last for six (6) months at a contracted amount of **USD 948,428.04**.

It was, however, contended that in the course of the implementation of the construction, the consultant for the Applicant introduced some variations that were implemented by the Respondent. The same increased the costs of the project. The Respondent, after having completed the construction, claimed for payment, but concerning the variation costs, the appellant was reluctant to pay. Hence, Civil Cause No. 216 of 2016, where the Applicant was ordered to pay the Respondent **USD 272,765.00**.

In the present application, the parties dispute the applicability of the 9th Schedule as far as instruction fees are concerned. According to the taxing officer, the claimed amount (**USD 272,765.00**), which is equivalent to **TZS 627, 359,500/=** is above **TZS 400,000,000/=**

whose charge, according to the 9th Schedule, is 3% (**TZS 18,820,000/=**) as the same deals with a liquidated sum which was the subject in Civil Suit No. 216 of 2016. The Applicant was of the view that the 9th Schedule is inapplicable since it deals with matters related to a liquidated sum, which, in essence, the case was on specific damages.

For the said Schedule to be applicable or not, one has to consider whether the proceedings under Civil Suit No. 216 of 2016 were of a liquidated sum in original or appellate Jurisdiction. As rightly submitted by counsels for the parties, a liquidated sum refers to a specific, predetermined amount of money that is established in advance to settle financial obligations in the event of a breach of contract. This position is also articulated in the cases of **Southern Highland Earthworks Company Ltd** and **WellWorth Hotels and Lodges Ltd** (*supra*), **respectively**.

Looking at Civil Suit No. 216 of 2016, the Respondent, after having completed the construction, claimed for payment of his amount due, including the variation costs. The claims by the Respondent herein, i.e. the variation costs, emanated from the main contract. The Court, in its decision on page 8, noted the existence of a contract between the parties and the Applicant herein failed to respect the same:

*"One would wonder, and if not a party to, then why all these correspondences. Section 73 of the Law of Contract Cap. 345 is certain on Compensation and Damages, **considering failure to respect the contract by the Defendant.**" [Emphasis Supplied].*

From this fact, it is therefore not disputed that there was a contract and that the contract was breached as far as section 73 of the Law of Contract Act, Cap. 345 [R.E. 2019] is concerned. The said section provides that:

*"73.-(1) **Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.**" [Emphasis supplied].*

After clearing the fact that there was a contract between the parties, the question is, under which Rule and Schedule are the costs of the application at hand pegged? Rule 46 of the Remuneration Orders provides for all bills of costs to be taxed on prescribed scales. Considering the fact that the present matter is contentious and is a result of a claim in

liquidated sum, the proper scale for taxation, therefore, was the 9th Schedule as far as Rule 40 of the Remuneration Orders is concerned.

After finding out that it was the scales in the 9th Schedule that were correctly applied by the Taxing Master, the question that we are to answer is whether the amount awarded as an instruction fee of **TZS 18,820,000/=** was excessive and exorbitant. According to Paragraph 8 of the said Schedule, the amount payable to proceeding with the value of more than **TZS 400,000,000/=** is 3%. In the case at hand, the claim was **TZS 627,359,500/=**; its 3% is **TZS 18,820,000/=**, which is already prescribed in the Remuneration Orders. Therefore, I agree with Ms Bachuba that, indeed, the 9th Schedule applies to costs in liquidated sum proceedings, but I am not convinced by her submission that the nature of this matter falls under the 10th, 11th and 12th Schedules since these Schedules do not cover costs related to liquidated sum.

As set down principles as to costs related to instruction fees, in the case of **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd and Another [1972] EA 162** as quoted in the case of **Tanzania Rent A Car Limited vs Peter Kimuhu (Civil Reference 9 of 2020) [2021] TZCA 103 (6 April 2021)**, it was established that:

"(i) costs shall not be allowed to rise to such a level as to confine access to the courts to only the wealthy;

(ii) the successful litigant ought to be fairly reimbursed for the costs he reasonably incurred;

(iii) the general level of the remuneration of advocates must be such as to attract worthy recruits to an honourable profession and

(iv) The costs must be consistent in the awards made, both to do justice between one person and another and so that a person contemplating litigation can be advised by his advocates very approximately for the kind of case contemplated, is likely to be his potential liability for costs. "

To me, the amount awarded (i.e. **TZS 18,820,000/=**) by the Taxing Master as an instruction fee in this application, unlike in the case of **Southern Highland** (*supra*), is reasonable and necessary, looking at the circumstances and nature of the case, amount of the suit, the behaviour of the Applicant in the efforts to settle, and time spent in prosecuting the to end since 2016 to 2021. The amount fits in the principles laid down in **Premchand's** case. More so, in the case at hand, costs are not over and above what is prescribed; they are within the limits,

and hence, they are reasonable and justifiable. It is a well-established principle in the Case of **Gautam Jayram Chavda vs Covell Matthews Partnership Ltd (Civil Appeal 106 of 2002) [2003] TZCA 28 (7 October 2003) (Supra)** that the Court will not interfere with questions of quantum by the Taxing Master unless there are exceptional circumstances, which I do not see in the application at hand.

Concerning costs related to transport, attendance and drawing fees, Ms. Bachuba was of the opinion that they were supposed to be charged under the 11th Schedule and not the 8th. She further stated that the same were to be included in the instruction fees. Paying them separately from the instruction fee is a double payment. On the other hand, Mr. Rutabingwa contested the same and stated that it was the 8th Schedule that was applied, and the said fees are to be treated separately from instruction fees.

I do not agree with both Counsels on the fact that it was the 11th and 8th Schedules which were to apply in this application. As stated above, this application deals with liquidated sums; hence, one cannot apply the 11th Schedule. Also, the 8th Schedule cannot be applied in the present application since it applies to non-contentious matters which are not specifically prescribed in the Schedules as far as Rule 9(c) of the Remuneration Order is concerned.

In the disposition of this application, therefore, I am compelled to refer to Rule 12(1) of the Advocates Remuneration Rules, 2015, which provides for the discretionary powers of the Taxing Officer. The same states:

"12.-(1) The taxing officer may allow such costs, charges and expenses as authorised in this Order or appear to him to be necessary or proper for the attainment of justice."

As noted, the 9th Schedule does not provide for such fees as transport, attendance and drawing costs. The taxing Master is empowered to allow costs as he deems fit. On this fact, the provisions of Rule 12(1) of the Remuneration Orders provides that:

*"12.-(1) The taxing officer may allow such costs, charges and expenses as authorised in this Order or **appear to him to be necessary or proper for the attainment of justice.**"*

[Emphasis Supplied].

Therefore, in my opinion, the taxing Master applied his power after seeing it necessary to award costs regarding transport, attendance and drafting. I do not wish to differ from his findings. Furthermore, looking at the nature of this application, in granting costs, he was guided by the principles already put in the case of **Gautam Jayram Chavda (supra)**.

Therefore, I agree with Ms Bachuba on the fact that the taxing Master did not refer to which Schedule he applied to award transport costs, attendance and drawing costs or did not provide reasons for his choice of the scale to apply.

In the end, as rightly submitted by the Applicant, there are differences between what was claimed of **TZS TZS 23,873,000/=** and the amount awarded of **TZS 21,843,000/=** by the taxing Master. I found some arithmetical errors in calculating the awarded costs. For instance, on page 11 of the Ruling of the taxing Master on transport costs, the correct amount was **TZS 560,000/=** instead of **TZS 460,000/=**. The amount also dropped when written submissions were taxed at **TZS 110,000/=** instead of **TZS 330,000/=**; instruction fees to the tune of **TZS 1,000,000/=** in respect of the bill of cost and the drawing costs were taxed off, and also the reply to the written statement of defence was to be charged at **TZS 90,000/=** basing on the scale of **TZS 30,000** per folio instead of **TZS 300,000/=** appearing on item No.4 at page 11 of the Ruling; also items 36 was rejected summarily by the taxing Master. The correct amount to be awarded, therefore, is **TZS 22,313,000/=**.

In the upshot, I find an order of the taxing Master awarding **TZS 18,820,000/=** by applying the 9th Schedule for instruction fee justifiable. I also find the amount to the tune of **TZS 3,493,000/=** in total awarded

as transport, attendance and drafting costs reasonable and necessary in the circumstances of this application. The total awarded amount is therefore substituted from TZS **21,843,000/=** to **TZS 22,313,000/=**.

Finally, and for reasons stated herein above, I find the application at hand lacking substance. I therefore dismiss it with costs.

It is so ordered.

A handwritten signature in black ink, consisting of several loops and a long vertical stroke, positioned above the printed name and date.

G.V. MWAKAPEJE
JUDGE
03/11/2023