

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 153 OF 2015

HANSPAUL AUTOMECHS LIMITED.....APPLICANT

VERSUS

RSA LIMITED.....RESPONDENT

RULING

Mansoor, J:

Date of Ruling- 30TH SEPTEMBER 2015

Hanspaul Automechs Limited “the Applicant” made an application under Rule 5 (1) and (2) of the Advocates Remuneration and Taxation of Costs Rules G.N No. 515 of 1991 and Section 95 of the Civil Procedure Code, Cap 33 R: E 2002 seeking to vary, alter and change the Ruling of the Taxing Master delivered on 28th May 2015 in respect of the



Advocates Fees awarded by the Taxing Master. The Applicant prays that the Fees Awarded to the Advocate be increased so as to conform to the fees prescribed by the Rules. The Application was supported by an affidavit of Hussein Kitta Mlinga, the Counsel for the Applicant.

The parties filed their respective skeleton arguments, and the hearing was on 4th September 2015, whereby Mr. Hussein Mlinga submitted in support of the application that the Taxing Master erred in relying to Schedule 11 of the Advocates Remuneration and Taxation of Costs Rules, GN 515 of 1991, he said the Taxing Master should have relied to Schedule 9 of the Rules. He said Schedule 11 contains a general prescription for matters in the High Court and Subordinates Courts, while Schedule 9 is specifically for proceedings that are contentious, and those which involves liquidated sums. He said the plaint that was filed , specifically pleads the amount that the plaintiff is claiming, and it was on the basis of the amount claimed, that the applicant considered that the sum was liquidated, and the proper schedule would have been



schedule 9, not schedule 11. The Counsel referred this Court to the case of **Premchand Raichand Limited & Another vs Quarry Services E.A (No. 3) (1972) EA, 162**, he says the decision of this case makes an exception to the general rule that the decision of the Taxing Master cannot be interfered with by the courts, and the exceptions includes that when the amount awarded is so low or so high, or the amount awarded occasioned injustice, or it is arrived at based on an error on principle. He submitted that, the amount awarded having been taxed under the wrong schedule of the Rules, is an error on principle, and it caused injustice to the Applicant. He said, that the Taxing Master failed to consider the complexity of the suit, since it was an intellectual property matter and that the jurisprudence of intellectual property law in the country is still on the offing, it has not been well established, and the Applicant's Counsel had made an extensive research in pursuing the suit. He said the plaintiff claim in the suit was THz 6 billion, and that the award of THz 20 million as Advocates Fees was too low. The Counsel relied on the decision of the case of **Hotel Travertine vs NBC** where the



Court of Appeal had observed that in taxing the instructing fees, the Taxing Officer has to look at the nature, importance and difficulty and interest of the parties.

Mr. Beatus Malima, Advocate represented the Respondent, and in his skeleton arguments he extensively opposed the application. He said the subject matter of the Bill of Costs was not of liquidated sum, it was for a declaration for infringement of copyright, and that the plaintiff claimed for specific damages, loss of goodwill and general damages. He said these are unliquidated damages, and the award thereof are subject to the assessment of the court. The Counsel quoted the definition of unliquidated damages from Black Law Dictionary to mean that *damages that cannot be determined by a fixed formula and must be established by a judge or jury* and a liquidated *sum is the sum agreed and fixed by both parties in a contract*. Thus for a liquidated damages to exist there must be a contract entered to by the parties and the sum must be fixed, and in case of breach of the contract a party shall pay a liquidated damage. On this the Counsel referred me to a



number of authorities including Barrow's Dictionary of Legal Terms, where it was defined that a liquidated damages is "*any amount that is fixed, settled, stated, or exact. It may refer to the value of a negotiable instrument, to a price stated in a contract, or to a measure of damages.*" The sum must be ascertainable at the time the instrument is made and computable solely from examination of it. The Counsel submitted that in the case at hand there was neither a contract between the parties nor a breach of a term of the contract, thus the case fell under Schedule 11 of the Advocates Remuneration and Taxation of Costs Rules.

The Counsel submitted that the amount of THz 20,000,000 awarded to the plaintiff was too much and unjustifiable since the plaint was dismissed on preliminary stages, and the parties attended to court only once for a mention and the second time for delivery of the Ruling. He submitted further that the amount of THz 20,000,000 awarded to the Applicant by the Taxing Master be revised and scaled down to a reasonable and fair amount.



I have carefully considered the counsels submissions and I would say that the question to be determined by this Court is whether the damages claimed by the plaintiff in his plaint was liquidated or unliquidated damages, and whether the Taxing Master was correct in his decision to tax the Bill of Cost under schedule 11 of the Advocates Remuneration and Taxation of Costs Rules, GN 515 of 1991.

In case of breach of contract damages may be claimed by one party from the other who has broken its contractual obligation in some way or the other. The damages may be liquidated or unliquidated. Liquidated damages are such damages as have been agreed upon and fixed by the parties in anticipation of the breach. Unliquidated damages are such damages as are required to be assessed. Broadly the principle underlying assessment of damages is to put the aggrieved party monetarily in the same position as far as possible in which it would have been if the contract would have been performed. I therefore agree with the Respondents submissions that since the kind of damages claimed by the Applicant in his plaint was

not agreed upon by the parties in a contract and fixed by the parties in anticipation of the breach, the damages claimed by the Applicant are unliquidated damages which required to be assessed by the Court upon proof by the plaintiff.

Before the judge in the High Court could interfere in the decision of the Taxing Master there must be shown that the award of the taxing officer is so high or so low as to amount to an injustice to one party as stated in the case of Premchand Raichand Limited and Another vs Quarry Services of East Africa and Others (No3) (1972) 1 EA 162 (CAN). That the Advocates instruction fee was correctly assessed on basis of scales in the Eleventh Schedule to the Remuneration and Taxation Rules, since the suit was for unliquidated damages. The taxing officer had directed himself correctly and exercised his discretion in accordance with the Remuneration Rules. The case was not of exceptional importance or of unusual complexity, as alleged by the Counsel for the Applicant as to entitle an advocate to receive as against his client, a special fee in addition to the remuneration provided in the Rules.



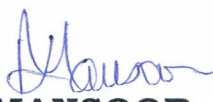
There was no need to assess the fee and to give regard to the labor and responsibility entailed in researching on the case, as the case ended up dismissed on preliminary point of law at the earliest stage of the suit;

I therefore agree that the Taxing Master directed himself correctly, and the Fees Awarded was correctly taxed in accordance to Schedule 11 of the Rules, as the matter was of unliquidated sum.

The Reference is therefore stand dismissed with costs on the above stated grounds.

DATED at DAR ES SALAAM this 30TH day of SEPTEMBER, 2015




MANSOOR
JUDGE

30TH SEPTEMBER 2015