

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

REFERENCE NO. 20 OF 2022

(ARISING FROM TAXATION CAUSE NO. 59 OF 2021)

EXIM BANK (TANZANIA) LTD. APPLICANT

VERSUS

M & FIVE B HOTEL & TOURS LTD. RESPONDENT

RULING

Date of last of order: 27/02/2023

Date of ruling: 10/03/2023

AGATHO, J.:

The Applicant being aggrieved by the ruling in Taxation Cause No. 59 of 2021 filed this reference application. Her Prayers are:

- (a) The court be pleased set aside or quash the ruling in Taxation No.59 of 2021 dated 08/09/2022.
- (b) The court grant any other orders as it deems fit and convenient.
- (c) Costs be provided for.

The above orders sought are based on the following grounds:

- (i) The awarded amount of TZS 500,000,000.00 as instruction fees under Item 1 of the Bill of costs is highly excessive and the Hon. Taxing Officer did not take into account all the principles of awarding costs in taxation of costs.

- (ii) The honourable Taxing Officer had no jurisdiction to entertain the bill of costs and tax it on 08/09/2022 because there is an appeal which is still pending in the Court of Appeal of Tanzania, whereby the Applicant had on 13/07/2021 filed a notice of intention to appeal against the whole decision of the High Court in Commercial Case No. 104 of 2017 delivered on 05/07/2021, in which the order of this Court which awarded the costs is subject of the said appeal.
- (iii) There was no justification for awarding TZS 500,000,000.00 as instruction fee under item 1 of the Bill of costs.
- (iv) That the Taxing Officer did not take the submission made by the counsel during the hearing into account when awarding the said costs by her ruling dated 08/09/2022.
- (v) The Taxing Officer also erred in law because the taxation is not an arithmetic exercise as done but taxation must be exercised judiciously based on the principles governing taxation of bill of costs.

The application is supported by the affidavit of Edmund Mwasaga the principal office of the Applicant. As a sign of protesting the application the Respondent filed a counter affidavit sworn, by Mpaya Kamara, the counsel for the Respondent. Both parties were under legal representation. Whereas the Applicant was represented by advocate Miriam Bachuba, the Respondent enjoyed legal services of Mpaya Kamara. The application was heard orally on 27/02/2023.

In para 7 of the affidavit in support of the application it avers that TZS 500 million as instruction fee under item 1 of the Bill of costs is highly

excessive and exorbitant. The taxing master did not take in the account all the principles of awarding costs in taxation of costs. This has been protested by the Respondent in the counter affidavit paragraph 5. That condemnation against the taxing officer is unjustifiable.

The Applicant further avers in paragraph 8 of the affidavit that the taxing officer never addressed the issue raised by the applicant there is a pending appeal at CAT whereby the applicant intends to appeal against the whole decision in Commercial Case No. 104 of 2017 dated 13/07/2022 in which the order that awarded costs is subject to the said appeal. .

In para 9 of the affidavit, it is stated that there was no justification for awarding TZS 500 million as instruction fee. That the awarding of TZS 504 million in costs by High Court is likely to create conflicting situation should the order awarding the said costs in the decree in Commercial Case No. 104 of 2017 dated 13/7/2022 is reversed by the Court of Appeal. But I concur with the averment in para 4 and 7 of counter affidavit of Mpaya Kamara that, the awarded amount of TZS 500 million is not excessive and exorbitant considering the value or the claim in the main suit USD 12 Million. And the Taxing Officer gave justification for awarding such amount as instruction fee at page 4 of the ruling when she rightly applied the 9th schedule to the Advocates Remuneration Order. She also properly gave justification and cited case of **Premchand Raichand Ltd and Another v Quarry Services of East Africa Ltd and Others [1972] 1EA 2 162** which states the factors to be considered in taxation. She further cited the case of **George Mbuguzi and Another v A.S Maskini [1980] TLR 53** which stated the purpose of instruction fees. The taxing officer correctly found that the case was complex and it involved huge sum of money.

That is USD 12 Million. See pages 5-6 of her ruling. She taxed off TZS 328 million.

The applicant under Para 11 of the affidavit she alleges lack of jurisdiction due to the presence of notice of appeal filed by the Applicant on 13/07/2022. The para 11 relates to para 8 of the same affidavit. I am in agreement with the averment under para 6 of the counter affidavit that no law in Tanzania that bars determination of taxation because of the existence of notice of appeal. The case of **Rose Mkeku (the administratrix of the estate of the late Simon Mkeku v Pervez Shabbirdin, Misc. Land Application Case No. 89 of 2021, HCT Sub-registry of Mwanza**. See also **KCB Tanzania Limited & Another v Delina General Enterprises Limited, Taxation Reference No. 24 of 2022 HCCD** underscores the point. Moreover, there is no order of stay of execution sought or given because taxation is linked to execution. To buttress his submission Mpaya Kamara, the Respondent's counsel cited the case of **Walii Hassan Miyonga v Aaron Kabunga, Civil Reference No. 05 of 2021 HCT at Bukoba**. I am convinced that the latter view though sensible is farfetched. On the other hand Ms. Bachuba for the Applicant faulted the submission the learned counsel for respondent that, the case cited by the Respondent's counsel are the High Court decisions which are just persuasive, as a such she invited the Court to pay attention to the decision of the CAT in **Aero Helicopter (T) Limited v F.N. Jansen [1990] TLR 142**. I have considered the submission of the learned counsel for applicant and discovered that the Applicant's counsel neither told the Court nor did she list all the items that the High Court is barred to handle when there is notice of appeal. In fact the case cited exemplified matters that can be entertained such as

application for leave to appeal to CAT or application for certificate on point of law; matters specifically stated under Section 5(1)(c), (2)(a) (i), (ii), (b), and (c) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], and application for execution unless an order for stay of execution is given. Therefore, and in my considered view the case of **Aero Helicopter (T) Limited** (supra) is distinguishable because it does not categorically bar the taxation proceedings at the High Court. See also analysis in **Rose Mkeku's case** (supra).

As to the contention by Ms. Bachuba, counsel for the Applicant that there was error in application of taxation principles in the taxation cause, and that the sum claimed in the main suit was not liquidated sum hence the 9th schedule was wrongly applied, I am of the view that the learned counsel misconceived the nature of the claim. It is conspicuous that there was credit facility extended by the Applicant to the Respondent. It is true that the Respondent's claim was based on a breach of contract, fraud and negligence. It is trite that where the suit is based on contract such as credit facility agreement then it is contentious proceedings on liquidated sum. **Amos Njile Lili v Amana Bank Limited and Another, Reference Application NO.1 of 2022 HCCD at Mwanza** at page 15 is of relevancy even though it did not define the term liquidated sum. The gist of the claim in Commercial Case No. 104 of 2017 was that the Applicant made fraudulent or unauthorized negligent withdrawals from Respondent's current and loan accounts, breach of contract and the Respondent's claim in the suit was for payment of USD 11,021,018.00 being special damages suffered by the plaintiff (Respondent) as pleaded in para 25 of the plaint caused by the defendant's negligence, fraudulent

conversion and **breach of contract** as was particularized in paras 19, 20,21, 22, 23 and 24 of the plaint.

The issues that divide the Applicant and Respondent is whether the 9th schedule of Advocates Remuneration Order, GN No. 263 of 2015 was properly applied to the matter. There is no dispute that main suit was a contention matter. But was it for a liquidated sum as required by the 9th schedule? According to the pleadings, and Section 74 (1) of Law of Contract Act [Cap 345 R.E. 2019] it requires that such sum be stated in the contract. And here we have a breach of contract. But it is unclear if the said sum was stated in the said (Loan Agreement). It is common ground though that the amount to be repaid to the Applicant was stated in the credit facility agreement. The liquidated sum is thus ascertained amount. It is stated say in the contract, etc. That is what was stated in **Well Worth Hotels & Lodges vs East Canvas Company Ltd & 4 Others, Taxation Reference No. 5 of 2022 HCCD** at page 4 and the Black's Law Dictionary 8th edition at page 949 and 1476.

In my view, since there was a contract then there was a liquidated sum. It should be noted though that liquidated sum is like liquidated damages but not the same as special damages. While the latter is a type of damages that must be proved specifically, the liquidated damages is type of damages that is known or ascertained sum prior to the occurrence of any civil wrong or a breach. As for the liquidated sum this is the amount known for it is stated in the contract or the amount agreed upon by the parties prior to the filing of the suit. Often if it is a contract then, a clause is found in the said contract stating the said amount of money, hence liquidated sum. This is also defined in Black's Law Dictionary.

While I agree that Order 41 of the Advocates Remuneration Order deals with contentious matters and prescribes the application of scales in the 10th, 11th and 12th schedules, but these schedules do not apply to the contentious matter for liquidated sum. I am thus not convinced by the submission of the Applicant's counsel that 11th schedule ought to be applicable in the Commercial Case No. 104 of 2017 after having found that the claim was for the liquidated sum. That schedule does not apply to contentious matter for liquidated sum. The Ruling of the taxing master is conspicuous on pages 4 that the matter was for liquidated sum, and it was contentious one. She rightly declined to apply the 10th, 11th and 12th schedules of the order. I stand by the taxing officer that order 41 which provides for application of 10th, 11th and 12th schedules to contentious matter that provision should not be read in isolation of other provisions of the order (Advocates Remuneration Order). Besides, the 10th, 11th and 12th schedules to the order do not apply to contentious proceeding for a liquidated sum.

Another centre of controversy was the attendance fees that were charged under the 8th Schedule to the Order. Para 5 of supplementary affidavit of Edmund Mwasaga in support of the Application is correct in that 10th, 11th and 12th schedules of the Order do not deal with attendance costs and transport costs. That is partly admitted by the Respondent in paragraph 4 of the counter affidavit to the supplementary affidavit. However, the latter added that none of the above schedules is applicable to the present matter. And I find this to be correct position.

Further on attendance costs, Mwasaga's supplementary affidavit paragraph 7 rightly averred that the 8th schedule deals with scale fee in respect of business the remuneration for which is not otherwise

prescribed. He averred that the schedule covers costs for scale of costs for attendance. The same was noted in paragraph 5 of the counter affidavit to supplementary affidavit. Quite contrary to paragraph 7 of Mwasaga's Supplementary affidavit, Ms. Bachuba submitted that it was wrong to separate instruction fees and attendance fees. I am of the view that it was correct to separate them as explained below these are found in separate schedules to the Order, GN. 263 of 2015. See **KCB's case** (supra).

Another divergence was a blunt averment by the deponent of the supplementary affidavit in paragraph 7 that the 10th, 11th, and 12th schedules provide for remuneration for contentious proceedings. In my view there ought to be elaboration that in case of a contentions matter for liquidated sum then the 9th schedule applies. This omission was probably by design.

I am also not in accord with the argument in paragraph 9 of Mwasaga's supplementary affidavit. In my view that paragraph merely restates the taxation principles as held in **Premchand Raichand's case** (supra).

Turning to paragraph 10 of the supplementary affidavit is equally controversial. I am saying so because I have held the taxing officer applied a correct scale in awarding the TZS 500 million as instruction fee under the 9th schedule of the order and not 11th schedule as suggested by Mwasaga, the deponent of the supplementary affidavit, and the Ms. Bachuba, counsel for the applicant. For attendance fees these were correctly or properly charged under the 8th schedule of the order. It was also proper to separate instruction fees and attendance fees because the 9th schedule does not provide for attendance fees.

In the end and for above reasons, I find the application at had lacking substance. I dismiss it with costs.

It is so ordered.

DATED at DAR ES SALAAM this 10th Day of March 2023.



U. J. AGATHO

JUDGE

10/03/2023

Date: 10/03/2023

Coram: Hon. U.J. Agatho J.

For Applicant: Miriam Bachuba and Mariam Ismail, Advocates.

For Respondent: Miriam Bachuba, Advocate holding brief of Michael Ngalo, Advocate.

C/Clerk: Beatrice

Court: Ruling delivered today, this 10th March, 2023 in the presence of Mariam Ismail and Miriam Bchuba learned counsel for the Applicant also holding brief Michael Ngalo the learned counsel for the Respondent.



U. J. Agatho

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JUDGE

10/03/2023