

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ

CIVIL REFERENCE NO. 13 OF 2005

NATIONAL INSURANCE CORPORATION:..... APPLICANT

VERSUS

PELICAN SERVICES LTD:..... RESPONDENT

(Reference the decision/ruling of the Ag. Registrar by her Worship Ms. Gladys Nakibuule

Kisekka on 22nd day of February 2005 in the taxation of costs for

Civil Appeal No. 15 of 2003)

RULING OF THE COURT

This is a reference to me as single judge under Rule 109 of the Rules of this Court. It is from the decision of the Assistant Registrar of this Court as taxing officer in Civil Appeal No. 15 of 2002, between **the National Finance Corporation vs. Pelican Air Services Ltd.** It was filed by way of notice of motion. It is supported by the affidavit deposed to by Dr. Byamugisha, learned counsel representing the applicant. When the motion was called for hearing before this Court on 22/10/05, the respondent had no representation. From the affidavit of service, the Court noted that Mr. Shonubi Musoke, learned counsel for the respondent had been duly served but opted not to attend and he gave no reason for his non-attendance. On the application of Dr. Byamugisha the hearing of the reference proceeded exparte.

The background of the application is that, the applicant lost to the respondent in the above-mentioned appeal. Counsel for the respondent filed his bill of costs as corrected by the taxing officer at shs. 29.910.758/=. Subsequently the assistant registrar allowed instruction fee at shs 13 million and Vat at shs. 4.515,358/= to make a total of shs 17.910.758/= Aggrieved by the said award the applicant instructed its counsel, Dr. Byamugisha, to apply for a reference to a single judge, hence this reference.

There are two grounds of the reference and read as follows:

- 1. The amount in item 1 of the respondent's bill of costs which was taxed and allowed at shs 13.000.000/= was manifestly excessive and contrary to the law and principle and should be reduced.**
- 2. The amount .for Vat in that bill of costs which was taxed by the same taxing officer and allowed at shs 4,515,358= was also manifestly excessive and contrary to the law and principle and should be reduced.**

On 21/07/05, Dr. Byamugisha filed conferencing notes and his legal arguments which he adopted during the hearing in addition to his brief reply to Mr. Shonubi's conferencing notes and legal arguments in reply.

The complaint on the 1st ground was that the taxing officer had exaggerated the considerations on which she based the award of shs. 13 million allowed as instruction fee. Dr. Byamugisha argued that given the value of the subject matter which was only shs. 75 million the award was unreasonable and excessive. In support of his arguments, he relied on several authorities including **Supreme Court Application No. 22 of 2002, CC Chandran vs. Kengrow Industries Ltd.**

With regard to the second ground it was the contention of Dr. Byamugisha that the taxing officer should not have allowed Vat. Vat is not fees and in the instant case there were no disbursements. Counsel relied on paragraph 4 of the 3rd schedule of the Court of Appeal Rules which reads as follows:

“(1)

(2) Receipts for all disbursements shall be produced to a taxing officer at the time of taxation.

(3) No disbursement shall be allowed which has not been paid at the time of taxation”.

To Dr. Byamugisha the reasoning for the Vat allowed was wrong because no Vat was paid. In any case even if it had been proved it was calculated on a wrong figure. The rate should have

been 17% of the total fees of shs 25,132,400/= claimed in the bill of costs. The taxing officer should have reduced it simultaneously with the instruction fee. If she had exercised her discretion judiciously she would have awarded an instruction fee of shs. 6 million but not shs. 13 million. On that figure the correct amount of Vat should have been 1.920.009 only. The total fees would have amounted to shs. 7.000.000/= (seven million). He, therefore, prayed that the total award be reduced to that figure. He also prayed for costs because counsel for the respondent brought about this situation by claiming excessive fees of shs. 25.000.000/=.

In his reply and legal arguments to Dr. Byamugisha's conferencing notes, Mr. Shonubi disagreed with Dr. Byamugisha. On the first ground, counsel pointed out that the taxing officer was alive to her task. She exercised her discretion judiciously which enabled her to reach the correct figure. She could not be faulted on her awards because she based them on circumstances or factors of this case which included the subject matter, the nature, importance and others. Further, advocates have to be well motivated to attract young people into the profession. In any case counsel argued that Dr. Byamugisha was estopped to pursue the claim for his client in this case, because he had already settled it.

On the issue of payment of Vat, counsel replied that the law governing payment of Vat has been settled. Mr. Shonubi Musoke produced a certificate of registration under the Vat Law. He was entitled to claim it. However, he conceded that the assistant registrar should have also reduced the Vat together with the instruction fee. He, hence, agreed to recalculation of the accurate Vat given the taxed off sums.

Apart from that concession, counsel asked this Court to dismiss the rest of the claim. The applicant should be condemned in costs because the inaccuracy in Vat was so minor that it could have been very easily rectified under the slip rule.

I heard the submissions by Dr. Byamugisha I also perused the conferencing notes and legal arguments of both counsel for the parties and analyzed them carefully. The principles of law governing taxation are well settled and have been reiterated in a number of authorities including **CC Chandran vs. Kengrow Industries Ltd Civil App. No. 22 of 2002 SCU; A. Kassam and 2 others vs. Habre International C.A. No. 16/99; Bank of Uganda vs. Banco Arabe Espanol**

CA No. 23/99 (unreported) Attorney General vs. Uganda Blanket C.A 17 of 1993 and General Parts (u) Ltd vs. Non Performing Assets Trust C.App. No. 21C.App. No.21 of 2000.

It is generally conceded that there is no mathematical formula for calculating awards in taxation but there are accepted principles as reiterated by the Supreme Court in the case of CC Chandran (supra) relied on by Dr. Byamugisha. The court noted that: -

“The correct approach to be adopted by the taxing officer would be the exercise of an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which are sometimes against one another, in order to arrive at the reasonable fees. Thus while the taxing officer has to keep in mind that the successful party has to be reimbursed expenses reasonably incurred due to litigation and that advocate’s remuneration should be at such level as to attract recruits into the profession he or she has to balance that with his/her duty to the public not to allow costs to be so hiked that the courts would remain only accessible to the wealthy”.

The taxing officer has also to observe consistency and must take into account inflation. It is important to note that he or she has a discretion which the courts trust he or she would exercise judiciously. The aforesaid notwithstanding courts are reluctant to interfere with awards of taxation or costs. In the **case of Pramchand Raichand Ltd. vs. Quarry Services 1972E.A 162** the Court of Appeal pointed out that the court would interfere with the award only if it was so high or low as to cause injustice to the parties. The award must be unreasonable and excessive to justify interference.

Applying the aforesaid principles to this reference, the taxing officer clearly, was alive to the correct approach and she generally adopted it. I agree she addressed her mind to the general benchmarks. She gave reasons for the awards she allowed. She agreed with counsel for the respondent, that, the appeal was difficult. It involved important and complicated issues which required research and a lot of industry. It raised important points of law which had not been settled in this jurisdiction. They included insurance interest, judicial notice in respect of insecurity in foreign jurisdiction and Aviation Law.

In answer to Dr. Byamugisha's complaint to the effect that the alleged research was not reproduced the taxing officer had the following to say: 3

“So I hasten to find that there was reasonable research irrespective of whether the lead judgement specifically reproduced it. Brevity of the judgment does not mean that the Hon. Justices did not scrutinize the presented research”.

Clearly the taxing officer knew what she was talking about. She generally based her award on reasonable considerations. However, on the first ground I am unhappy about the question of 10 the instruction fee. I accept the submission of Dr. Byamugisha, that shs. 13 million based on shs 75 million (being value of the subject matter is rather high), in my estimation that award amounts to about 18-20% of shs. 75 million. I have already conceded there is no laid down mathematical formula on which to base the calculation but I am of the view that I would prefer 10% of the value of the subject matter.

Further, as already pointed out consistency is another desirable practice. In the case of **Bank of Uganda vs. Trespert Ltd, Civil Appeal No. 3 of 1997 SCU**, the value of the subject matter was US Dollars 5.533.550.80. The instruction fee was allowed at shs. 360 million which was only about 8% to 9% of the value of the subject matter. In **Sieteo vs. Noble Builders, C.App. No. 31 of 1993 SCU** the value of the subject matter was Us. Dollars 2.9 million. The instruction fee was allowed at shs. 330.068.500/= which was about 10% of U.S.D. 2.9. Million. Similarly in the instant case I would prefer to reduce the 18-20% to 10% of shs 75.000.000/= with Vat at 17% of that figure which would amount to shs. 1.275.000/= and total to shs. 7.500.000/+ 1.275.000/= 30 shs 8.775.000. Considering all the circumstances of this case, mentioned above, especially the value of the subject matter and all the hard work put in by counsel for the respondent, I consider the said shs 7.500.000/= appropriate award as instruction fee.

With regard to Vat counsel for the respondent conceded that it was calculated on a wrong figure. He apparently had no objection to correcting it. In reply to Dr. Byamugisha question as to whether the counsel for respondent was entitled to Vat, he answered in the affirmative. He, however, asked for costs because the inaccuracy in the calculation of Vat was minor and did not necessitate a reference but a correction under the slip rule. I appreciate the concession made by

counsel for the respondent but as the reference has succeeded on both grounds, the applicant would be entitled to costs of this application.

In the result this reference is allowed to the extent that the instruction fee is reduced to shs 7.500.000/ (seven million five hundred thousand shillings only) and Vat also reduced to 17% of shs. 7.500.00/= (1.275.000/= amounting to a total of shs. 8.775.000/=.

The respondent is further ordered to pay costs of this application.

Dated at Kampala this 22nd day of February 2006.

L.E.M. Mukasa-Kikonyogo

HON.DEPUTY CHIEF JUSTICE