

**IN THE FAIR COMPETITION TRIBUNAL
AT DAR ES SALAAM**

**TRIBUNAL REFERENCE NO. 23 OF 2020
(ARISING FROM TAXATION CAUSE NO. 14 OF 2020)
MEDCO ENERGY GLOBAL PTE LIMITED.....APPLICANT
VERSUS
FAIR COMPETITION COMMISSION.....RESPONDENT**

RULING

This reference traces its origin from ruling of this Tribunal in Tribunal Application No. 26 of 2019 whereby the applicant's application against the respondent was dismissed with costs on 05/05/2020. The respondent, subsequently filed a bill of costs, which was taxed as prayed to the tune of Tshs. 5,374,000/= . The applicant was seriously aggrieved with the taxed amount, hence, this reference moving this Tribunal to reverse and set aside the decision of the Taxing Officer issued on 21st July, 2020 vide Tribunal Application No. 14 of 2020 and proceed to tax the costs in accordance with the law, grant cost of this reference and any other relief(s) that this Honourable Tribunal may deem fit and just to grant.

The reference was by way of chamber summons preferred under the provisions of Rule 7(1) and (2) of the Advocates Remuneration Order, Government Notice No. 264 of 2015 to be referred herein after as the 'Order') and was supported by and affidavit of Mr. Gasper Nyika, learned advocate for the applicant.

Upon being served with the chamber summons and affidavit, the respondent filed an affidavit in reply sworn by Mr. Josephant Thadeus Mkizungo, learned State Attorney opposing the grant of this reference. Equally the learned trained minds for the parties in compliance with Rule 28 of the Fair Competition Tribunal Rules, G. N. 219 of 2012 had earlier filed their respective skeleton written arguments.

When the application was called on for hearing on 23/09/2020, the applicant had the legal services of Mr. Laurean Magaka, learned advocate. On the other hand, the respondent had the legal services of Messrs. Josephant Mkizungo and Salvatory Chuwa learned State Attorneys.

Mr. Magaka when invited to address the Tribunal readily prayed to adopt the chamber summons, affidavit and the skeleton written arguments and prayed that this reference be granted as prayed.

Mr. Mkizungo on their part told the Tribunal that they resist this reference and in doing so, they filed an affidavit in reply and skeleton written arguments which they prayed to be adopted in the determination of this reference together with the list of authorities in support of their respective stance. However, the learned State Attorney prayed to add and submitted that the authorities cited in support of the reference are distinguishable in the circumstances we have here.

Basically, on the part of the applicant, and in particular, the affidavit in support of the application advanced two reasons

faulting the Taxing Officer's decision, namely: **one**, it was wrong for the Taxing Officer to base on Eight Schedule to the Advocates Remuneration Order, Government Notice No. 264 of 2015 which is inapplicable in contentious proceedings before the Tribunal; **two**, the respondent at all material time was represented by in-house counsel and as such not permitted to charge and receive instructions fees which is only applicable to private practitioners. Expounding on the two reasons, the learned advocate for the applicant argued strongly that, according to order 41 of the Order, Bill of cost incurred in contentious proceedings under Part IV are to be taxed in accordance to the rates prescribed in the Tenth, Eleventh, and Twelve schedules to the Order. According to the learned advocate for the applicant, such, therefore, the word used is 'shall' and as such, the Taxing Officer using Eighth schedule in determining the bill of costs, erred in law because that schedule was not relevant. In support of his stance, the learned advocate for the applicant drew the attention of the Tribunal to the provisions of orders 40, 41 of the Order which orders give which Schedule should apply. The learned advocate for the application went on to argue that, Eight Schedule is only applicable to non-contentious matters specifically under order 19(c), 29(2). 31 and 34 and concluded that the Taxing Officer erred in law to misapply 8th Schedule and prayed that under the provisions of Rule 7(1) and (2) this Tribunal takes up point by reversing and set aside the decision of the Taxing Officer,

and then, proceed to tax the costs in accordance with the law. No case law was cited to support their arguments on this point.

The second point expounded in the skeleton written arguments was that, items 1-7 as presented in the bill of costs were part and parcel of the entitled to such fees because such fees are only in domain of the private the cases of NATION CHICKS CORPORATION LTD AND OTHERS v. THE NATION BANK OF COMMERCE, COMMERCIAL CASE NO. 11 OF 2014 (Unreported) at page 8 where it was held that:

“Now one will agree with me that claimed cost for stationeries (sic) are more or less operational costs. These falls (sic) under instructions fees. Instructions fee should be distinguished from consultation fees. My Instructions fee should be distinguished from consultation fees. My understanding is always that instruction fee entails a fee for number of activities and, most likely, stationary (sic), printing, making phones call and things of that nature are in the sequences of preparation of defence’s case or prosecution’s case. They are part and parcel of instruction fee...”

Another case cited is ZUBERI V. RETURNING OFFICER AND ANOTHER (1973) E.A.33 in which it was held that, public officer who represent their respective office in litigation is part of their general duties can be paid money actually spent but not instructions fees.

On that note, the learned advocate for the applicant submitted that the costs for perusing, drawing and photocopying documents should not be awarded to the respondent because they amount to instructions fees for which the respondent is not entitled. Lastly, the learned advocate for the applicant without suggesting any specific applicable schedule prayed that I allow this reference, reverse and set aside the decisions of the Taxing Officer and consequently proceed to tax this bill of costs in accordance with the law with costs to the applicant.

In response, M.r Mkizungo principally in his affidavit in reply strongly denied to have claimed instructions fees. According to Mr. Mkizungo, what they claimed was costs incurred in preparation of the records during litigation of Tribunal Application, No. 26, of 2019 amounting to Tshs. 5,374,000/=, Tshs. 50,000/= attending hearing and Tshs. 66,000/= being disbursements, making a total amount claimed to be Tshs. 5,440,000/= which was taxed as prayed and in accordance to Eighth Schedule to the Order.

Accordance to Mr. Mkizungo, the applicable Schedule, in the circumstances, is Eight Schedule because it is the schedule that deals with scale of fees in respect of Business the Remuneration for which is not otherwise prescribed, for is the schedule under which takes regards to case and labour required for is the schedule under which takes regards to case and labour required, the number and length of papers to be perused, complexity of the matter and all other circumstances of the case as it may be fair and reasonable.

Further opposing the reference, the learned State Attorney, framed three issues, which according to him, are whether the respondent herein represented by in-house lawyers in Tribunal Application No. 26 of 2019 of entitled to be awarded costs; whether the respondent herein entitled to be granted costs in accordance with Eight Schedule to the Advocates Remuneration Order, G.N. 264 of 2015; and, whether an order as to costs of reference be awarded to the respondent/ applicant herein.

Expounding the issues framed, in particular, the first one, was their argument that same is raised at this stage of the reference according to them is foreign and their argument before the Taxing Officer was taxation proceedings were to be taxed according to the rates prescribed in the 10th, 11th, and 12th Schedule of the Order. Further, the learned State Attorney seriously disputed the arguments by the applicant's counsel that, they prayed for instructions fees which is not the case. In support of their respective stance they cited the case of JORETH LIMITED v. KIGANO AND ASSOCIATES (2002) IEA92 which defined instruction fee to mean is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached.

On the second issue which is whether the respondent herein is entitled to be granted costs in accordance with Eight Schedule to the Order, G. N. 264 of 2015. The learned State Attorneys, in their skeleton written arguments, argued that the even 11th Schedule which would think applied here is not true because it does not prescribe for costs with regard to competition

matters, hence, leaving 8th Schedule to be the one which applies by virtue of being the only schedule that deals with all that is not prescribed in other Schedules. No case law cited to support this stance.

On the third issue which was couched that, whether and order as to costs of reference be awarded to the respondent/applicant. It was the brief submission of the respondent that, usually costs follow the event, where the application is successfully opposed and in case same are not granted the Tribunal is obliged to give reasons.

In conclusion, the learned State Attorney prayed that this application be dismissed with costs or any other order that this Tribunal may deem necessary.

This marked the end of hearing of this reference. My task now is to determine the merits or demerits of the instant reference. I have carefully considered both written and oral rival arguments of the learned trained minds of the parties on this issue and have noted the following not in dispute. **One**, there is no dispute that the respondent in Tribunal Application No. 26 of 2019 was awarded costs. **Two**, there is no dispute that the claims of disbursement worth Tshs.142,000/= as taxed are not in dispute.

However, I have noted as well that, what is in serious dispute between learned legal minds for the parties is, what is the applicable Schedule of the Order in circumstances, where in-house lawyers are awarded costs? The applicant counsel argues

that is any of the three Schedules, namely; Schedules 10th or 11th or 12th . On the other hand the respondent diametrically argues that it is Eighth Schedule. None of the parties cited any decision of the High Court or Court of Appeal on the point. My quick and close look at these schedules, in my considered opinion, Schedules 10 and 12 are for scales of fee for Probate and Administration and Bankruptcy Proceedings respectively, hence, inapplicable to the situation we have. On the 11th Schedule which is for costs of proceedings in the High Court, subordinate court, and Tribunal. The arguments of the learned advocate for the applicant before the Taxing Officer and before me in this reference is that, the applicability of 11th Schedule is possible because his matter arose from contentious proceedings as provided for under Part IV of the Order. The learned advocates for the applicant cited order 40, 41 and 46 to Justify his arguments. For easy of reference the said orders provide as follows:

Order 40(10) – This part shall apply to proceedings and taxation of costs are between advocate and client and party and party in contentions proceedings and other proceedings. (emphasis mine)

(2) defines what is contentious proceedings

Order 41. Bills of costs incurred in contentious proceedings under this part shall be taxable in accordance to the rates prescribed in the Tenth, Eleventh, and Twelfth Schedules to this Order.

Guided by the wording of the above order, therefore, in my opinion, the applicability of 11th Schedule must be in contentious proceedings and taxation with only two situations, namely; one, **between advocate and client** and **between party and party**. It is further clear in my opinion that, from the wording order 40 which specifically mentioned the kind of parties to be applicable to the 11th Schedule, then, obviously in-house employees are not covered under the 11th Schedule for simple reason that their services is not between **advocate and client nor between party and party** for that matter. However, their relationship is between employer – employee of the respondent. To back up my above opinion, I have done a very thorough research and have failed to get any decision specifically on the point by the High Court or Court of Appeal Nevertheless, I have got a Kenyan decision on the point which I found it persuasive. In case of CHOITRAM AND OTHERS v. MYSTERY MODEL HAIR SALOON [1972] 1 EAD 525 (HCK) in which interpreting the applicability of 8th schedule which was pari material with our repealed Government Notice No. 515 of 1991, and which material with our repealed Government Notice No. 515 of 1991, and which is pari material with the current 8th Schedule had this to say **'fee under the Advocates (remuneration) Order, Schedule 8 can only be fee of any advocate who employed, hence, falls under the application or complaint not otherwise provided for'**

Back to our reference, there is no dispute that the relationship that exists between the respondent and the in-house lawyers

was that of employee and employer relationship, hence, squarely befitting the applicability of 8th Schedule in the circumstances. That said and done, therefore, the arguments of Mr. Mayanga and the language he used that he is afraid that 8th Schedule is not applicable is not true. Sincerely, the learned advocate was not sure and ever bothered make thorough research on this point.

From the totality of the above reasons, I found and hold that the applicable Schedule in the circumstances of this reference is 8th Schedule of it applied for employed advocates who are legally barred from claiming instruction fee as rightly argued by Mr. Mayanga, and rightly so in my own opinion. Since the contention was on which Schedule is applicable or not, and following what I have decided above, I find that all arguments for the learned advocate for the applicant are to fall on this point.

Next was whether the respondent claimed instructions fees. This point will not detain me much. As rightly argued by the learned State Attorneys and rightly so in my opinion, after going through the taxation proceedings before the Taxing Officer, this point has been raised now before me as an afterthought for same was not event argued before the Taxing Officer not was one of the point decided by the Taxing Officer therein to warrant it be proceedings and the decision of the Taxing Officer, no such arguments was raised, argued and determined, so as to be a point for reference by the applicant.

This point therefore without much ado, is rejected for simple reason that the same was raised out of context.

I, therefore, find the decision of the Taxing Officer was proper by using Eight Schedule and I hereby confirm it. Since the contention was on the Schedule used and not the amount, I don't see any need to venture on the amount taxed.

In totality of the above, I am inclined to find this reference devoid of any useful merits is hereby dismissed with no order as costs so as to bring this litigation to an end.

It is so ordered.

Dated at Dar es salaam this 15th October, 2020.

**Hon. Stephen M. Magoiga – Judge/ Chairman of the
Tribunal**

15/10/2020