

UGANDA / JUDGMENT

Official Receiver v Colonial Blanket Syndicate (Bankruptcy Cause No. 31/1936) [1936] EACA 132 (1 January 1936)

[1936] EACA 132

COURT

East African Court of Appeal

BEFORE

Webb, J

CASE / FILE NUMBER

Bankruptcy Cause No. 31/1936

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ORIGINAL CIVIL

BEFORE WEBB, J.

In re GULABCHAND RAMJI, A BANKRUPT THE OFFICIAL RECEIVER, Plaintiff**THE COLONIAL BLANKET SYNDICATE, Defendants Bankruptcy Cause No. 31/1936**

Bankruptcy—Costs—Party and Party—Taxation—Advocate employed by Official Receiver—Limit on costs fixed by order of Court—Agreement between Official Receiver and Advocate—Amount recoverable against unsuccessful defendant—Bankruptcy Ordinance, 1930, sections 22 (10), 57, 101 (1)—Bankruptcy Rules, rr. 77 (2), 79, 83—Rules of Court, 1916, Part XIII, section III, rr. 33-36.

Review of taxation.

The Official Receiver was authorized to employ an advocate to conduct proceedings against the defendants. In the application for leave to employ an advocate it was stated that the "estimated amount" of the Official Receiver's costs was Sh. 300, and the advocate agreed with the Official Receiver that, so far as regarded the bankrupt's estate, he would conduct the proceedings for that fee. In fact the proceedings were taken at the request of the creditors. The proceedings having resulted in a judgment against the defendants with costs, the Official Receiver's costs were taxed at Sh. 589, but the taxing officer, having regard to the order authorizing the employment of the advocate and the agreement between the latter and the Official Receiver, allowed as against the defendants only the sum of Sh. 300 together with disbursements.

Held (5-11-37).—(1) That costs are an indemnity and therefore the successful party, the Official Receiver, was entitled to recover from the unsuccessful party only so much as he was himself liable to pay to his advocate. *Harold v. Smith* (157 E. R. 1229), *Richardson v. Richardson* (64 L. J. P. 119) and *Gundry v. Sainsbury* (1910 1 K. B. 645) followed.

- (2) That in taxing the costs the taxing officer was entitled to have regard to the agreement between the advocate and his client, the Official Receiver: *Ward v. Lawson* (L. R. 8 Ch. App. 65) and *re Duncan* (1892 1 Q. B. 879) followed:
- (3) That the duty of the taxing officer is to satisfy himself, not only that the work charged for has been done, but also that it was reasonable and necessary in the particular case:
- (4) That on taxation of costs of an advocate employed by the Official Receiver the provisions of Bankruptcy Rules r. 83 must be strictly complied with.

Trivedi for applicant, the Official Receiver.

Amin for the defendants.

JUDGMENT.—This matter comes before the Court upon an application to review taxation. On 15-1-1937 the debtor was adjudicated bankrupt on his own petition, presented on 11-12-1936. In the course of the Public Examination it was disclosed that on 15-10-1936 he had

transferred goods to the value of Sh. 1,395 to the Colonial Blanket Syndicate in purported discharge of his liability to them. On 25-6-1937 the Official Receiver, who was trustee in the bankruptcy by virtue of an order made under section 116 of the Ordinance, applied under sections 57 and 22 (10) for authority to employ an advocate to institute and conduct proceedings for the recovery of these goods or their value, and in his application it was stated, as is required, that the "estimated amount of the Official Receiver's costs" was £15. On 29-6-1937 an order was made authorizing the Official Receiver to expend a sum not exceeding £15 for the said purpose. Thereupon a motion was instituted against the Colonial Blanket Syndicate and on 24-9-1937 judgment was given declaring that the transfer impeached was void as a fraudulent preference and ordering the respondents to pay to the Official Receiver Sh. 1,395, the value of the goods, "together with the taxed costs of these proceedings" and interest. On taxation the bill of costs submitted by Mr. Trivedi, who had acted for the Official Receiver, was taxed at Sh. 589, but upon Mr. Amin, the advocate for the respondents, calling attention to the fact that there had been an agreement between the Official Receiver and Mr. Trivedi that the latter should conduct the proceedings for Sh. 300, the Acting Registrar allowed as against the respondents only the sum of Sh. 300 profit costs together with Sh. 112 for disbursements, and the question referred to me is whether his decision was correct.

It would appear that on this taxation the requirements of Rule 83 were not complied with. That rule provides: "Before the bill or charges of any advocate ... employed by the Receiver or Trustee is taxed, there shall be produced a certificate in writing signed by the Receiver or trustee, as the case may be, setting forth whether any, and if so what, special terms of remuneration have been agreed to, and in the case of the bill of costs of an advocate, a copy of the authority sanctioning

the employment", and I desire to state that, whatever may have been the practice heretofore, this rule must be strictly complied with.

The first point taken by Mr. Trivedi is that the Acting Registrar had no jurisdiction to tax the costs at all. He relies on section 101(1) of the Ordinance and Bankruptcy Rule 77 (2) and rr. 33-36 of the Rules of Court, 1916, Part XIII, section III. Section 101 (1) provides: "Subject to the provisions of this Ordinance and to general rules, the costs of and incidental to any proceeding in Court under this Ordinance shall be in the discretion of the Court". Rule 77 (2) says: "In the absence of any express direction, costs of an opposed motion shall follow the event and shall be taxed as between party and party": rule 36 of the Rules of Court, 1916, is in identical terms: rule 34 (a) says that the costs of contentious proceedings in the Supreme Court shall be taxable according to the rates in the First Schedule. If I am correct in understanding the argument to be that section 101(1) means that it is for the Court to tax the costs in Bankruptcy, and that when a matter comes before the Registrar for taxation his powers are limited to satisfying himself merely that the work charged for has in fact been done, then I can only say that I most emphatically disagree. In my opinion section 101 (1), like section 27 of the Civil Procedure Code, gives the Court power in certain circumstances to refuse to award costs to a party who would normally be entitled to them, and, as regards the Registrar, his duty as taxing officer is to satisfy himself,

not only that the work charged for has been done, but also that it was reasonable and necessary that it should be done for the attainment of justice in the particular case; see *Smith v. Buller* (L. R. 19 Eq. 473); if he is satisfied on these two points, then no doubt rule 34 (a) gives him no discretion as to the rate of remuneration to be allowed, save in the case of the fee for "Instructions", but if he considers that any of the work done was not necessary his duty is to disallow the fee for it.

Coming now to the question raised by this reference, it seems to me that the answer to it depends on a consideration first of the nature of party and party costs, and, secondly, of the question who were the parties to the litigation in which these costs became payable.

The general principle regarding party and party costs is thus stated by Bramwell B. in *Harold v. Smith* (5 H. & N., 381, 157 E. R. 1229): "Costs as between party and party are given as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained". *Richardson v. Richardson* (64 L. J. P. 119) and *Gundry v. Sainsbury* (1910 1 K. B. 645) are decisions to the same effect.

On the second question I am clearly of opinion that the Registrar was right in holding that the parties in this litigation were the bankrupt's estate, represented by the Official Receiver, and the Colonial Blanket Syndicate. Although the advocate may have had some private arrangement with the creditors, and although they may have urged the Official Receiver to take these proceedings, they were not parties to the proceedings nor could they have been made liable in costs had the

result been the other way. In *re Lavey* (1921 1 K. B. 344) Horridge J. said: "... it is necessary to consider what the position is of a trustee in bankruptcy in his relations to the solicitor who is appointed to conduct the litigation. In my view the solicitor knows what the position is, because everybody is presumed to know the position which is defined by the law. If the true view is that the trustee is not entitled beforehand to fix the costs so as to bind the taxing Master, the solicitor must be taken to know that and to take the business knowing the position created by the law as regards the trustee and his estate". It is true that that was a case of the taxation of the solicitor's bill as against the trustee, no limit having been fixed as to the costs to be incurred in the litigation for which he was employed, and the question was whether the bill should be taxed as one between solicitor and own client or as one where the costs are to be paid out of a common fund in which the client and others are interested, but the principle appears to me to be equally applicable to the present case. Mr. Trivedi has relied on the case of *Adams v. London Motor Builders* (1921 1 K. B. 495), in which it was held that the plaintiff was entitled to judgment with costs although, as member of a Trade Union, he was entitled to legal aid and was represented by solicitors engaged by the Union, which undertook to pay their costs. But this case in my view does not apply here: the advocate was not engaged by the creditors on behalf of the Official Receiver, and the basis of that decision was that there was no agreement proved that the solicitors were not entitled to receive remuneration from the plaintiff, even though he might be entitled to indemnity from the Had it been established that the plaintiff was under no Union. liability to the solicitors the decision would have been the other way. But here the advocate was employed by the Official Receiver on the express terms that he was to receive remuneration from him, but only up to a limited amount, and therefore, on the principle established by *Harold v. Smith*; *Gundry v. Sainsbury* and *Richardson v. Richardson* (supra), the successful litigant—i.e. the Official Receiver—is not entitled to recover from the losing party more than he is himself liable to pay. The costs, be it remembered, are his and not the advocate's.

It was suggested that the Registrar was not entitled to take into consideration the agreement between the advocate and the Official Receiver. In my opinion the Registrar was right in rejecting this argument: if it is sound it is hard to see what was the object of rule 83. *Ward v. Lawson* (L. R. 8 Ch. App. 65) is an authority to the contrary, as is also *re Duncan* (1892 1 Q. B. 879) in which Lord Fisher M. R. said: "... the taxing master in taxing the costs, although in form he is taxing them as between the person who has employed the solicitor, and the solicitor, is in fact taxing them as between the bankrupt's estate and the solicitor, and his jurisdiction is limited to the amount which the Official Receiver has been authorized to incur".

In my judgment the Registrar was correct in holding that the respondents were liable to pay only the sum of Sh. 412 as the taxed costs of the motion as between party and party, and this application fails with costs out of the estate of the bankrupt.

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