MELODY MUZA
versus
CITY OF HARARE
and
REGISTRAR OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 17 October 2023 and 10 May 2024

Opposed Matter

S T Mutema., for the applicant
C Kwaramba, for the 1st respondent
No appearance for the 2nd respondent

MHURI J: This is a hybrid application for a declarator and a mandamus which seeks the determination of the applicable tariff for enforcement purposes of the order obtained on 20 October 2020 under Civil Appeal No. SC 142/20. The issue is whether the court can make an order in terms of s 14 of the High Court Act [*Chapter 7:06*] to the effect that the applicable tariff to the applicant's costs is as enunciated by the Law Society in the form of the 2011 USD Tariff and a mandamus compelling the first respondent to allow costs under SC 142/20 to be taxed as per the 2011 Law Society tariff notwithstanding the pronouncement by the said society that such a tariff was applicable in respect of orders granted post 2 June 2020.

As per her Draft Order, applicant is seeking the following;

1. "Application for a declaratory order be and is hereby granted.
    a. The decision of the Law Society of Zimbabwe to have the United States Dollar Tariff of 2011 applicable to attorney client bills made in terms of orders handed down from 2 June 2020 be and is hereby declared to be within the provisions of section 3 of S.I 220/2020.

b. The drafting of a bill of taxation by the Applicant in terms of the 2011 Law Society of Zimbabwe's United States Dollar Tariff be and is hereby declared to have complied with the applicable law.

c. The resistance by the 1st Respondent to have the 2011 United States Dollar Tariff of Law Society applied to the determination of attorney client costs in respect of the Supreme Court order Under SC 142/20 be and is hereby declared to be a breach of the prerogative of the Law Society of Zimbabwe's mandate to determine the applicable tariff for a specified period.

2. Application for a mandamus be and is hereby granted.

a. 2nd Respondent be and is hereby directed to tax the bill of costs drafted by applicant pursuant of SC142/20 in terms of the 2011 United States Dollar Law Society Tariff within 5 days of this order.

b. The 1st Respondent be and is hereby ordered to comply with the proceedings specified in paragraph {2a} above.

c. The amount awarded to the Applicant pursuant to the process in paragraph {2a} shall be paid subject to the following conditions: -

i. The 1st respondent be and is hereby ordered to pay the amount realized in terms of paragraph {2a} at an inflation rate of 255% per annum from the date of the order under SC142/20 to date of full and final payment.

ii. The 1st respondent be and is hereby ordered to pay interest at the prescribed rate from the date of an order under SC142/20 to date of full and final payment.

3. The 1st Respondent be and is hereby ordered to pay costs of suite in the present application on an attorney client scale.''

The facts of the matter are as follows;

The applicant filed an Urgent Chamber application for Spoliation. The matter was not held to be urgent and the Applicant proceeded with the matter as an ordinary application. The matter was dismissed and this led to an appeal to the Supreme Court under SC 142/20. The Supreme Court proceeded to allow the appeal with costs on 20 November 2020. The first respondent was ordered to pay costs of appeal and in addition substituted costs on an attorney client scale. Despite several attempts to have the bill taxed, the first respondent has frustrated and resisted the attempts to tax the bill in United States Dollars.

The taxing officer rejected the use of the Law Society 2011 USD Tariff and its applicability on the basis that it preferred that the applicant drafts the bill of costs denominated in RTGS

currency. Upon the registrar being notified of the contention between the parties, he directed that the bill be taxed as drafted by the judgment creditor and in terms of the Law Society 2011 USD Tariff which the judgment debtor resisted. The bill hasn't been taxed necessitating this application.

It is the applicant's submission that, it is the mandate of the Law Society and not the taxing officer to determine what tariff to apply, when and in what currency the value should be locked. He states that the 2011 USD Tariff as duly proposed by the responsible authority should apply to the taxation of the bill. He placed reliance on a letter dated 2 June 2020 written by the Law Society to the applicant. The bill was therefore prepared in terms of the Tariff which the Law Society of Zimbabwe said was the applicable tariff at the time, which is the 2011 United States Dollar Tariff. The taxing officer rejected the use and applicability of the tariff on the basis that it preferred that the applicant uses an RTGS Tariff. Unhappy with the decision of the taxing officer, the matter was referred to the registrar for directions who directed that the taxation should proceed as per the drafted bill but the taxing officer was to exercise discretion in the proceedings.

The applicant is of the view that it is proper to seek the preservation of the value which ought to have been paid had execution been timeously concluded. For this reason, the applicant is being asked to subject the taxed bill to the normal payment at the prevailing inflation rate . The applicant is of the view that liquidation of costs awarded by the Supreme Court was done in RTGS dollar but the computation is based on the 2011 United States Dollar Bill since the order was obtained on the 20th day of October 2020 when the Law Society had already authorized the use of the 2011 USD Tariff post 2 June 2020 to the1st of April 2021and no corresponding RTGS tariff existed for the period in issue.

In opposing the application, the first respondent states that the various taxing officers who were mandated to tax the bill did not refuse to act as such, but rather insisted on the applicant presenting a bill in local currency for taxation because they were of the view that the applicable tariffs were set in local currency effective from the 1st of April 2021. It further argued that the applicant has no cause of action as costs had already been awarded in her favor. It stated that no taxation had been conducted yet so there is no taxation to challenge. It is its submission that the taxing officer indicated that she could not tax the bill denominated in United States Dollars because there was no Law Society Tariff for the relevant period which permitted taxation of the bill in such currency. It is of the view that the applicant has no cause of action as it is of the view that there is

no need for a mandamus and declaration of rights since the applicant has already been awarded costs and the currency in which those costs must be taxed is a matter of fact and law. The 1st respondent further states that since no taxation has been conducted yet there is no taxation to challenge. It states that the applicant contends falsely that at some point the parties consented to have the bill taxed in United States Dollar.

The first respondent submitted in its heads of argument that the tariff set by the Law Society of Zimbabwe for the relevant period which was an RTGS Tarriff which the taxing officer and itself insisted that it be applied in the taxation of the disputed bill. It submits that the applicable tariff from June 2020 to April 2021 was the May 2020 RTGS tariff. It is of the view that the setting of the 2011 USD Tarriff by the Law Society entails that it presented the new tariff which was denominated in RTGS but premised it on the rates that were being charged in 2011 converted at the exchange rate plus rationalization.

It is imperative to note that this application is a proper application in terms of section 14 of the High Court Act [*Chapter 7:06*] in which this court can exercise its jurisdiction and determine an existing right or obligation arising from an order as to costs in SC 142/20. The parties have a direct and substantial interest in the matter, the applicant being the judgment creditor and the first respondent being the judgment debtor satisfying the requirements in s14 of the High Court Act (see *Johnson* v *AFC* 1995 (1) ZLR 65 (H)).

It is fairly settled that the courts will not readily interfere with the exercise of the taxing officer's discretion unless it is satisfied that the taxing officer acted on some wrong principle or failed to exercise his or her discretion properly (see *Mazarire v Taxing Officer and Another* SC 87/23 par 13). It is not in dispute that the applicant and the first respondent have a long-standing dispute over the currency to denominate the taxation of the bill of costs giving rise to the matter being referred for determination to this court.

Issues for determination

1. Whether the Law Society United States Dollar Tariff of 2011 is the applicable tariff?
2. Whether the first respondent pay costs under SC 142/20 subject to the official Reserve Bank gazette inflation rate of 255% per annum from the date of judgment to the date of full and final payment?

3. Whether the first respondent pays interest at the prescribed rate from the date of judgment to date of full and final payment?

Whether the Law Society 2011 United States Dollar Tariff is the applicable tariff?

The parties differed in their interpretation of the applicability of Law Society 2011 United States Dollar Tariff. In order to assist the profession and the public in this regard and to seek a degree of uniformity and consistency, it is mandated in terms of R72(7) of the High Court Rules that a taxing officer be guided in taxing of costs by such tariff as set by the Law Society of Zimbabwe or recommended by the Council of the Law Society under the Legal Practitioners Act [*Chapter 27:07*] for application to all legal work undertaken by legal practitioners, save where some other tariff is applied by law or where the client has agreed to some other rate or basis of charging. Legal practitioner and client fees in civil litigation fall within this ambit.

The Law Society's pronouncement of the applicability of the 2011 USD Tariff effective from June 2020 the applicant is relying on was promulgated after the costs for prosecuting or defending the matter were already incurred. In *Zizhou* v *Taxing Officer & Another* SC 7/20 MAKARAU JA ruled that the applicable tariff is the one which will be applicable at the time the work was done. The work was done from May 2019 to March 2020. During the period in question, the Law Society General Tariff of February 2019 on fees for legal practitioners was denominated in RTGS dollars up to the latest tariff of May 2020 which introduced the 2011 USD tariff.

The applicant's reliance on the 2011 USD Tariff 2011 by interpreting it to mean that the bill should be taxed denominated in United States Dollar is not well founded within the law. The applicants base their contention on the fact that the judgment debt becomes due when the Law Society had already pronounced that the 2011 USD Tariff applies to taxation of bills. The latest tariff which was applicable when the judgment debt became due was the High Court (Fees) (Civil Cases) (Amendment) Regulations, 2020 (No.23) SI 221 of 2020 where costs were denominated in RTGS currency and clearly emphasized in Note 9 of the Explanatory Memorandum and Directions of General Tariff and Fees for Legal Practitioners from the Law Society with effect from May 2020 which stated that:

> " The rates have been set in RTGS. Where fees are charged in another currency, the 2011 LSZ General Tariff shall apply and the market exchange rate for the US dollar shall be used."

When the latest tariff was then revised and amended in a letter dated 2 June 2020, the Law Society stated that:

> "The Law Society cannot adopt a tariff based on the parallel market rate as it will be deemed illegal. It also realizes that the official rate, as it is currently pegged, will lead to absurd outcomes which will result in the impoverishment of members. In order to achieve a somewhat middle of the road approach, it has adopted a tariff premised on the 2011 USD$ tariff converted at the official exchange rate plus a rationalization percentage. Further in order to counter the effects of unrealistic exchange rate the Society adopted a wider interpretation of the premium charges as well as widening the premium brands."

It should be noted that during the period in question, local currency was the sole legal tender in terms of s23 of the Finance Act [*Chapter 23:04*]. The currency to denominate domestic transaction was determined from time to time by the Reserve Bank of Zimbabwe through Statutory Instruments. During the period in which the work was done various Statutory Instruments were issued all of which point to the fact that the Zimbabwean dollar should denominate domestic transactions. The first effective date was 22 February 2019 where Statutory Instrument 33 of 2019 came into effect which converted all debts, assets and liabilities valued and expressed in United States dollar to be at par with the RTGS dollar. The Zimbabwean dollar was declared to be the sole legal tender in terms of s 23(1) of the Finance Act as well as in terms of Statutory Instrument 142 of 2019 which was promulgated on 24 June 2019.The position was further entrenched through Statutory Instrument 212 of 2019 which made the Zimbabwean dollar the exclusive currency for local transactions. The instrument was further amended by Statutory Instrument 85 of 2020 which permitted the payment of goods and services chargeable in Zimbabwean dollars in foreign currency using one's free funds at the prevailing rate at the date of payment. The instrument was amended by the insertion of Statutory Instrument 185 of 2020 which introduced dual pricing, displaying, quoting and offering of prices for goods and services.

The judgment debt became due on the date of judgment which is 20 October 2020 after the Law Society had pronounced a revised tariff when the Exchange Control (Exclusive Use of Zimbabwean Dollar for Domestic Transactions) (Amendment) Regulations, S.I 185/2020 which was promulgated on 24 July 2020 which provided for dual pricing, displaying, quoting and offering

of prices for goods and services was operational. The meaning of S.I 185/20 was well articulated in *Falcon Gold Zimbabwe Limited* v *Taxing Officer No and Another* SC 25/24.

> "The introduction in S.I. 185/2020 of an election to pay in the United States Dollar equivalent of the chargeable RTGS dollar did not change the currency of account to United States dollar. The phrase "chargeable in Zimbabwe dollars" in S.I. 185/2020 portrays the pricing primacy or dominancy of the local currency over any foreign currency. This therefore, casts the local currency as the dominant currency of account "

The issue of whether the court can allow payment of legal services in foreign currency was well clarified in *Nyahuma's Law Golden Stairs Chambers* v *Busha* HH 304/21, in which MUSITHU J ruled that:

> "The 2011 general tariff was denominated in the United States Dollar. It follows that where a client is billed in another currency other than the Zimbabwean dollar, then that amount has to be converted at the prevailing market exchange rate if a legal practitioner wishes to enforce payment of that fee through the courts. ……In the absence of an agreement, the plaintiff's claim ought to have been expressed in Zimbabwean dollars but payable at the prevailing market exchange rate in line with s22(1)(e) of the Finance Act, as read with Note 9 of the May 2020 Law Society of Zimbabwe General Tariff. It stands to reason that this court cannot grant a default judgment in a currency that is at variance with the law "

In *Zizhou* case *supra*, it was ruled further that tariffs should be dominated in local currency as set out in Reserve Bank of Zimbabwe (Legal tender) Regulations, 2019 SI 142 of 2019 which governs fees and costs where MAKARAU JA pronounced that:

> "In light of the prevailing legal position at the time the bill was taxed, its denomination in United States dollars was in contravention of the law. The first respondent therefore erred in passing under his hand a bill that contravened the law. Accordingly, and on this basis alone the bill cannot stand. It is settled position of the law that anything alone in direct conflict with a statute is a nullity."

The court agrees with the reason of the tax officer that the bill should be taxed denominated in RTGS currency. The taxing officer as the responsible authority mandated to tax bill of costs derive guidance from the tariff prescribed by the Law Society of Zimbabwe or recommended by the Council of the Society. The taxing officer is a statutory functionary who is strictly bound by

the four corners of the enabling statute and should discharge his or her duties within the constraints of the law (see *Mavurudza* v *Mavurudza and Another* HH 234/11).

Whether the first respondent pays costs under SC 142/20 subject to the official Reserve Bank of Zimbabwe gazetted inflation rate as at November 2022 which stands at 255% per annum from the date of judgment to the date of full and final payment?

In order to preserve the value which ought to have been paid had execution been timeously concluded, the applicant is of the view that the taxed bill be subjected to the normal payment at the prevailing inflation rate gazetted by the Reserve Bank of Zimbabwe. He placed reliance on Paragraph 2 of the Press Statement Resolutions of the Monetary Policy Committee Meeting of 2 December 2020 issued by the Reserve Bank of Zimbabwe which stated that:

> "The Committee expressed satisfaction with the positive impact of the recent policy measures on macroeconomic stability and economic performance and noted the need to sustain the gains realized so far. The Committee also noted the progressive decline in monthly inflation, from a peak of 30.7% in June 2022 to 1.8% in November 2022, which has seen annual inflation falling from 285% in August 2022 to 255% in November 2022."

The applicant is mistaken as to the meaning of the aforementioned paragraph. It does not relate to the fact that interest rate is payable at 255% per annum as the applicant prayed for. The percentage of inflation was mentioned so as to highlight the falling of inflation rate on the general economy. I do not see how the paragraph entitle the applicant to claim interest rate of 255% per annum from the date of judgment to the date of full payment of the judgement debt.

Whether the first respondent pays interest at the prescribed rate from the date of judgment to date of full and final payment?

The Order under SC 142/20 granted the applicant costs but is silent on the issue of payment of interest. Applicant is now praying for interest.

In *Mbundire* v *Buttress* 2011 (1) ZLR 501 (S) at 512E, GARWE JA (as he then was) ruled that:

> "It is now established, certainly in South Africa, that a monetary debt has to be paid according to its nominal value and, to take into account inflation, interest is then added on that debt until payment is made in full."

Applying the principle in *Mbundire* case *supra*, interest should be taken into account payable at the prescribed rate in terms of the Prescribed Rate of Interest Act [*Chapter 08:10*] from the date of judgment until payment is made in full. A monetary debt in which the rate of interest is not specified, the prescribed rate of interest applies from the day the debt becomes due up to the full and final settlement of the debt. In this case the debt became due on the date of judgment.

Whether the court is in a position to grant a mandamus in these circumstances?

The applicant sought for a mandamus to the effect that the taxing officer tax the bill in United States currency. The requirements for granting of a mandamus are well articulated in the case of *Chironga and Another* v *Minister of Justice & 3 Ors* CCZ 14/20 where HLATSHWAYO JCC held that there should exist a clear right, existence of a reasonable apprehension on the part of the applicant and that there must be no other remedy.

In my view, there is no existence of a reasonable apprehension as the taxing officer did not refuse to tax the bill, but rather recommended that the bill be taxed in local currency. The taxing officer's decision is not irrational and is well within the law. I therefore find no reason that warrants the granting of a mandamus.

First Respondent prayed for costs on the attorney client scale. Ordinarily, costs follow the cause and it will be at the discretion of the court to order otherwise. The court is of the view that this was not an abuse of court process that would warrant costs on a higher scale.

In the result it is ordered that,

1. The application for both a declaratory order and a mandamus be and is hereby dismissed with costs on the ordinary scale.
2. The relief being sought by the applicant as per the Draft Order be and is hereby declined.

Stansilous and Associates Law Firm, applicant's legal practitioners.
Mbidzo, Muchadehama & Makoni Legal Practice, 1st respondent's legal practitioners.