

DR. JL MAVURUDZA
and
MRS MAVURUDZA
and
MEIDLER POOLS AND CONSTRUCTION (PVT) LTD

HIGH COURT OF ZIMBABWE
BHUNU J.
HARARE, 22nd June 2011 and 26 October 2011

P Chiutsi, for the plaintiff
The Taxing Master Mr. Mudefi N.O. D Drury, for the defendant

BHUNU J: Sometime in October 2006 the plaintiffs contracted the defendant to refurbish their swimming pool whereupon the defendant rendered defective service thereby giving rise to a claim for specific performance or alternatively damages in the sum of US\$7 904 235. 00.

“I subsequently issued the following order in favour of the plaintiffs:

It is accordingly ordered:

1. That the defendant be and is hereby ordered to rectify the defects on the plaintiffs' mabalite tiles in terms of specifications from Cemcrete South Africa (Private) Limited within 14 days of service of this judgment upon it.
2. In the alternative, the defendants be and are hereby ordered to pay damages in the sum of US\$7 000.00 being the cost of repairing the defects
3. The defendant shall bear the costs of suit.”

A dispute has now arisen as to whether or not costs awarded in para 3 of the order are claimable in foreign currency although they were incurred during the period

extending from January 2009 to December 2010 when there was no statutory tariff for the claim of costs in foreign currency.

The plaintiff's legal practitioner is of the view that costs are claimable in foreign currency for that period because the Zimbabwean Dollar had by then become dysfunctional and of no use to anyone whereas the Taxing Master is of the view that costs are claimable in terms of the governing statutory instrument as at the time the costs were incurred.

The taxing officer has now referred the matter to me sitting in chambers for the determination of the above dispute in terms of r 313 which provides that;

“313. Taxing officer may refer point to judge in chambers

The taxing officer may, without filing any formal documents, submit any point arising at a taxation for decision by a judge in chambers, and it shall be competent for the taxing officer and for the legal practitioners who appeared at the taxation to appear before the judge respecting such point.”

The taxing officer is a statutory functionary who is strictly bound by the four corners of the enabling statute. The taxing officer's powers in taxing party and party costs are laid down under r 308 (2) which provides that:

“(2) In the taxation of costs as between party and party in respect of work done in connection with judicial proceedings, a taxing officer shall be guided as far as possible by the tariff of legal practitioners' fees prescribed in the High Court (Fees and Allowances) Rules:

Provided that no regard shall be paid to any amendment to the said tariff of fees if the work concerned was done before the said amendment came into operation.
(My emphasis)”.

The rules require the taxing officer to be guided as far as is possible by the prescribed tariff without strictly binding him to slavishly follow the prescribed tariff. What this means is that the taxing officer is allowed a certain measure of discretion provided he keeps within reasonable limits of the tariff.

It is common cause that during the period under review the applicable tariff was denominated in Zimbabwean Dollars in terms of the High Court (Fees and Allowances) (Amendment) Rules, Statutory Instrument 166 of 2005. There was no tariff denominated

in foreign currency until 4th February 2011 when statutory instrument 12 of 2011 was promulgated.

As I have already pointed out, the taxing officer is required by law to derive guidance from the existing tariff as at the time the work was performed. It stands to reason that in the absence of an official conversion rate from Zimbabwean to any foreign currency, the tariff denominated in Zimbabwean Dollars does not offer any guidance to the taxing officer with regard to taxation in foreign currency. That being the case, there can be no basis upon which the taxing officer can tax bills in foreign currency for the period in question other than in Zimbabwean dollars.

The plaintiff's reliance on the subsequent tariff denominated in foreign currency was misplaced in so far as the proviso to r 308 (2) expressly prohibits the taxing officer from relying on a subsequent amendment to the tariff.

“ (2) In the taxation of costs as between party and party in respect of work done in connection with judicial proceedings, a taxing officer shall be guided as far as possible by the tariff of legal practitioners' fees prescribed in the High Court (Fees and Allowances) Rules:

Provided that no regard shall be paid to any amendment to the said tariff of fees if the work concerned was done before the said amendment came into operation.”

The applicable tariff is therefore, the ruling tariff as at the time the work was done BERE J came to the same conclusion in a well reasoned judgment concerning Law Society tariffs in *In Re: The Estate Of The Late Patrick Matimura HH – 12 - 2010*

The taxing officer was accordingly correct in disregarding the tariff prescribed in statutory instrument 12 of 2011 as it was promulgated after the work concerned was done.

In the result it is determined that the applicable tariff in this case is Statutory Instrument 166 of 2005 being the tariff applicable at the time the work in this case was done.