DISTRIBUTABLE (1)

FARAI BWATIKONA ZIZHOU
v
(1) THE TAXING OFFICER (2) RITA MARQUE MBATHA

SUPREME COURT OF ZIMBABWE
MAKARAU JA
HARARE: 13 NOVEMBER 2019 AND 20 JANUARY 2020

IN CHAMBERS

Applicant in person

Second respondent in person.

No appearance for first respondent.

MAKARAU JA:

This is a review of taxation in terms of r 56 of the Supreme Court Rules 2018. The Rule provides that any party aggrieved by the taxation of a bill of costs shall give notice of review setting out his or her grounds of objection. Thereafter the matter shall be set down before a judge in chambers.

I will refer to the parties as applicant, first and second respondents respectively for convenience.

The applicant raised three grounds of objection. He alleged firstly, that the first respondent had erred in denominating the taxed bill in United States dollars in light of the provisions of SI 33 of 2019. Secondly, he argued that the first respondent erred in allowing second respondent's travelling expenses from Bulawayo to Harare when second respondent is resident in Harare. Finally, he argued that the first respondent erred in allowing costs for legal services rendered to the second respondent in contravention of the Legal Practitioners Act [*Chapter 27:07*].

The second respondent opposed the review. In the main, she contended that the parties agreed to the bill as well as to two other bills relating to other matters. The draft bill agreed to in *casu* was simply presented to the first respondent for his endorsement. She further argued that it was quite proper for the parties to agree to a bill denominated in United States dollars at the time of taxation as the prohibition against charging for goods and services in foreign currency came into force after 28 September 2019 when S.I. 213/19 was published.

In compliance with r 56 (3), the Registrar filed a report. The report was compiled by the first respondent. It states that when the parties appeared before him, they advised that they wanted to discuss the bill between themselves before engaging him. When they finally did, they presented to him a bill for endorsement. The issue of the denomination of the bill in United States dollars was never discussed with him.

I note at this stage that it was this endorsement of the bill by the first respondent that has given rise to this review. The applicant regarded the endorsement, and correctly so in my view, as adoption of the bill by the first respondent.

The first respondent cannot distance himself from the denomination of the bill in United States dollars. By affixing his signature to the draft that was presented to him and lending the authority of his office to the draft, he effectively passed the bill under his hand. For this reason, both parties regarded the bill as having been taxed by the first respondent hence, the second respondent took out a writ of execution to recover the amount of the taxed costs.

The issue that falls for determination in this review is whether the bill of costs as taxed in this matter is proper.

The court is very slow to interfere with the exercise of the taxing officer's discretion. It will not readily do so unless it is satisfied that the taxing officer acted on some wrong principle or did not exercise his or her discretion at all.

The bill was presented for taxation on 8 July 2019. By that date, S.I 33 of 2019 was part of the law, having been published on 22 February 2019. The statutory instrument introduced the RTGS dollar as a currency and legal tender, and placed it on par with the bond note and the United States dollar. Although not of direct relevance to the determination of this review, S.I.33 of 2019 also decreed that all assets and liabilities denominated in United States dollars prior to the publication date were to be deemed to be in RTGS dollars at a rate of one-to one with the United States dollar. It also declared that every enactment in which an amount was stated in United States dollars was to be construed as stating the amount in RTGS dollars, at parity with the United States dollar.

In addition and more relevant to the determination of this matter, at the time the draft bill was presented for taxation, S.I. 142 of 2019 was also in force, having been published

on 24 June 2019. Whilst S.I 33 of 2019 introduced the RTGS dollar as legal tender alongside the bond note and other currencies, S.I 142/19 made the local currency as set out in S.I. 33 of 2019 the sole legal tender in all transactions in Zimbabwe.

The second respondent argued that it was not illegal to have the costs awarded in United States dollars where the parties had agreed to the amount being denominated in the currency of their choice. The illegality of the denomination of the bill in United States dollars only arose on 28 September 2019, she argued, when S.I. 213/19 was published. In her view, it was this instrument that made it illegal to sell goods and services in any other currency save the local currency.

With respect, the second respondent is in error. S.I. 213/19 amended the Exchange Control Act to enforce the exclusive use of the Zimbabwean dollar in domestic transactions by creating civil offences and penalties. The S.I. merely provided sanctions for contravening the law that had decreed the local currency as the sole legal tender in all domestic transactions. The law that declared the local currency as the sole legal tender in all domestic transactions was S.I. 142/19 and not S.I. 213/19.

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 the settled position at law that anything done in direct conflict with a statute is a nullity.

In making the above finding I am aware that the second respondent averred that the denomination of the bill in United States dollars was with the consent of the applicant.

Such consent, which is disputed, would have been of no import even if proven to be true. The parties could not by their consent to act against the clear letter of the law, confer legality upon a bill of costs denominated in United States dollars.

It is therefore my finding that the bill of costs taxed in SC 211/19 should be set aside for the reason that it was in contravention of the law.

Whilst the above finding disposes of the proceedings before me, there is one issue that I wish to advert to briefly and in passing.

It is common cause that the second respondent was a litigant in person in Case No. SC 211/19. The bill under review for that matter indicates that the second respondent received legal advice from an entity called T. S. Labour Specialists. By the second respondent's own admission, this entity is not a firm of registered legal practitioners. It is therefore not entitled to charge fees for legal services rendered. The bill of costs is therefore also improper to the extent that it purports to compensate the second respondent for the outlays she made to this entity as fees for legal services rendered.

I am satisfied that the applicant has made a case for the setting aside of the bill of costs purportedly taxed in SC 211/19. It will be so ordered.

In view of the fact that the bill was erroneously drawn up and denominated in United States dollars, I cannot make an order remitting it to the first respondent for fresh taxation. If so inclined and advised, the second respondent may draw up a fresh bill and submit it for taxation.

The applicant has prayed for costs. I have no basis for denying him these as costs ordinarily follow the cause save where in the discretion of the court, a different order of costs is deemed just and appropriate. There are no circumstances in this matter justifying a departure from the general position.

On the basis of the foregoing, I make the following order:

1. The bill of taxed costs in SC 211/19 is hereby set aside.
2. The second respondent shall bear the applicant's costs of review.