BENJAMIN SIBANDA
versus
OBADIAH SIBANDA
and
NATHAN SIBANDA
and
CHARLES SIBANDA
and
JOHN SIBANDA
and
MISHECK SIBANDA
and
JELITHA SIBANDA N.O.
(Executor, Estate Late Cornelius Sibanda)
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 20 October 2021 & 6 January 2023

Opposed application – Taxed Bill of Costs

R. Zimudzi, for the applicant
E. Mubaiwa, for the 1st, 3rd and 4th respondents

MUSITHU J: This application before the court is an offshoot of a bill of costs that was taxed by a taxing officer on 16 November 2020 in favour of the respondents. The application was opposed by the first, third and fourth respondents (hereafter referred to as the respondents). The taxed amount is US$10, 122.00. The taxed bill was presented to the applicant's legal practitioners on the same day of taxation. The applicant claims that he settled the bill by paying the taxed amount in Zimbabwe dollars. Through their legal practitioners of record, the respondents denied that the payment in local currency discharged the bill. They argued that the payment constituted a fraction of the amount required to discharge the taxed bill. They instructed the seventh respondent to proceed with the execution of the applicant's property.

On 15 December 2020, the seventh respondent proceeded to seize and place under attachment, the applicant's herd of cattle at Marirangwe Farm in Marirangwe. The applicant approached this court on a certificate of urgency seeking the following relief on an urgent basis:

"TERMS OF THE ORDER MADE

(a) **Final Order sought**
That the 1st to 7th Respondents show cause to this Honourable Court why a final Order should not be made on the following terms:-
(i) It is hereby declared the payment of ZW10 122 RTGS Dollars made by the Applicant to the Respondents' lawyers on the 19th November 2020 was in full and final settlement of the taxation debt dated 16 November 2020 given under Case No. HC 2980/2018.
(ii) That the attachment of the Applicant's cattle and the intended sale in execution of same in situ is unlawful, null and void.
(iii) The 7th Respondent be and is hereby directed to release the seized cattle from attachment forthwith.
(iv) That the 1st to 6th Respondents pay the costs of suit on a legal practitioner and client scale.

(b) Interim Relief Granted
Pending the return date and the final determination of this matter, this Order shall operate as a temporary order directing the Respondents to stay the execution of the Writ of Execution in matter HC 2980/18 and the notice of seizure and attachment dated 15 December 2020."

The urgent chamber application proceeded as an ordinary application after being struck off the roll of urgent matters. What the applicant therefore seeks is a final order as per the terms of the final order sought above.

ISSUE FOR DETERMINATION AND THE SUBMISSIONS

The significant issue for determination is whether the settlement of the taxed bill in Zimbabwe Dollars effectively discharged the applicant's liability for the said costs. The applicant's contention is based on the implications of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019, (hereinafter referred to as "S.I. 33/19" or the instrument), as read with the Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019 (hereinafter referred to as S.I. 142 of 2019).

Mr *Zimudzi* for the applicant submitted that the Law Society of Zimbabwe tariff (the tariff), which was in operation at the material time was denominated in the United States dollar. It therefore meant that the bill had to be paid in the local currency by virtue of those two instruments. Counsel further submitted that the applicant was not so much concerned with the decision of the taxing officer, and that explained why the taxed bill of costs had not

been taken on review. Rather, the applicant was concerned about the currency in which the tariff was denominated.

It was further submitted that in terms of s 4(1)(d) of S.I. 33 of 2019, any liability valued or expressed in United States dollars would, after the effective date of that law, be valued in the Zimbabwe dollar at a rate of 1:1 to the United States dollar. It was also contended that since the 2011 Law Society of Zimbabwe tariff was expressed in the United States dollar immediately before the effective date, it therefore fell within the ambit of s 4(1)(d) of S.I. 33 of 2019. This is because the tariff gave rise to a liability that was expressed in the United States dollar.

In his heads of argument, the applicant further submitted that s 4(1)(d) of S.I. 33 of 2019 was specific as to the type of assets and liabilities excluded from its reach. The origin of the liabilities was not the criterion for the exclusion. The fact that the liability was based on a taxed bill did not exempt the liability from the application of the provisions of s 4(1)(d). The applicant argued that what brought an asset or liability within the provisions of the said law was the fact that its value was expressed in the United States dollar immediately before the effective date, and that it did not fall within the class of assets and liabilities referred to in s 44C (2) of the Reserve Bank of Zimbabwe Act.[1]

Still in its heads of argument, the applicant further argued that from a closer reading of s 4(1)(d) of S.I. 33 of 2019, it was not possible to exclude a judgment debt expressed in United States dollars immediately before the effective date from the application of the provision. The fact that the source of the liability, the value of which was expressed in United States dollars, was a taxed bill was immaterial for the purposes of S.I. 33 of 2019. The applicant referred to the case of *Zambezi Gas Zimbabwe (Pvt) Ltd* v *NR Barber (Pvt) Ltd & Anor*[2], which he claimed was on all fours with the present matter. In that case, the court held that the settlement in local currency of a liability expressed in the United States dollar immediately before the effective date, constituted a full and final settlement of the judgment debt in terms of s 4(1)(d) of S.I. 33 of 2019.

The court was urged to grant the order with costs on the higher scale against the first to sixth respondents. The justification given was that the said respondents' conduct was deplorable in that: they fraudulently tampered with the writ of execution; their failure to disclose to the seventh respondent that the applicant had made a payment was fraudulent and

[1] [*Chapter 22:15*]
[2] SC 3/20

their obstinate position regardless of the clear position of the law on the issue as clarified by the Supreme Court made their conduct all the more abusive of the court process.

In response, *Mubaiwa* for the respondents accused the applicant of blowing hot and cold. The applicant claimed that he had no qualms with the taxed bill. That meant that the taxed bill was correct. If the applicant accepted that the taxed bill was correct, then the matter was resolved. Counsel further submitted that what was clear was that the applicant was displeased by being asked to settle the taxed bill in the United States dollar currency. It was further submitted that at law, a taxed bill had the force of an order of court and liable to execution on its terms. An order of court was not executed on terms that a party affected by the order preferred. It remained extant and therefore binding and enforceable. Reference was made to the case of *Bezuidenhout v Patensie Sitrus Beherend Bpk*[3].

It was further submitted that a party dissatisfied with an order of the court had to challenge it in terms of the law. The procedure was set out in r 314 of the High Court rules, 1971. The applicant was therefore seeking a review of the taxing officer's decision through the medium of a *declaratur*, which was clearly an abuse of the court process. It was further averred that this court could not interfere with a determination of another judicial authority other than on appeal or review. A *declaratur* could not be invoked to procure the setting aside of an order made by a competent judicial authority.

Mr *Mubaiwa* submitted that the applicant's argument that the taxed bill and the tariff that gave birth to that bill were subject to S.I. 33 of 2019 was misplaced. While it was correct that the new law affected obligations that arose before February 2019, it was not the position with a bill of costs that was only taxed after February 2019. Those costs only became due after taxation. The bill was taxed on 16 November 2020. For that reason it was not an outstanding liability or asset as at the effective date of S.I. 33 of 2019. According to counsel, it was for that reason that the *Zambezi Gas Zimbabwe (Pvt) Ltd* v *NR Barber (Pvt) Ltd & Anor*[4] case was distinguishable from the present case. He urged the court to dismiss the application with a punitive order of costs on the scale of legal practitioner and client since was surely incompetent and devoid of merit.

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[3] 2001 (2) SA 224 (E) Where at p 229 the court this to say:

> "An order of court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494 A-C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside ….."

[4] *Supra*

The Analysis

S.I. 33 of 2019 and S.I. 142 of 2019 are two instruments that considerably altered the currency regime in Zimbabwe. On 22 February 2019, the Government of Zimbabwe introduced a new currency called the Real Time Gross Settlement Electronic dollar (RTGS). The new currency was introduced into the monetary system through S.I. 33 of 2019. That instrument was gazetted on 22 February 2019. That date became the first effective date as defined in the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act). The new currency ran parallel with other currencies that were then accepted as legal tender, under what was commonly known then as the multi-currency basket.

On 24 June 2019, the Minister of Finance and Economic Development caused to be gazetted S.I. 142 of 2019. The 24 of June 2019 became the second effective date as defined in the Finance Act. This instrument abolished the multi currencies and declared the ZWL to be the sole legal tender in Zimbabwe. The two instruments were later incorporated into the Finance Act, which was gazetted on 21 August 2019. The key parts of the Finance Act which assimilated some of the provisions of the two instruments are ss 22 and 23. The two sections state in part as follows:

> **"22 Issuance and legal tender of RTGS dollars, savings, transitional matters and validation**
> 1) Subject to section 5, for the purposes of section 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date—
> (a) that the Reserve Bank has, with effect from the first effective date, issued an electronic currency called the RTGS dollar; and
> (b) ……..; and
> (c) that such currency shall be legal tender within Zimbabwe from the first effective date; and
> (d) that, for accounting and other purposes (including the discharge of financial or contractual obligations), <u>all assets and liabilities that were, immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar</u>; and
> (e) that after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing-seller willing-buyer basis; and
> (f) every enactment in which an amount is expressed in United States dollars shall, on the first effective date (but subject to subsection(4)), be construed as reference to the RTGS dollar, at parity with the United States dollar, that is to say, at a one-to-one rate.
> (2) ……..
> (3)The use of the RTGS currency with effect from the first effective date is hereby validated.
> (4) For the purposes of this section—
> <u>(a) it is declared for the avoidance of doubt that financial or contractual obligations concluded or incurred before the first effective date, that were valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act)</u>

shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar;

(b) ……..; (Underlining for emphasis)

23 Zimbabwe dollar to be the sole currency for legal tender purposes from second effective date

(1) For the avoidance of doubt, but subject to subsection (4), it is declared that with effect from the second effective date, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever are no longer legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe.

(2) Accordingly, the Zimbabwe dollar shall, with effect from the second effective date, but subject to subsection (4), be the sole legal tender in Zimbabwe in all transactions." (Underlining for emphasis).

The principal Act referred to in sections 22 and 23 above is the Reserve Bank of Zimbabwe Act.[5] Section 22(1)(d) of the Finance Act stipulates that *"…..for accounting and other purposes (including the discharge of financial or contractual obligations), all assets and liabilities that were, immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar…"*. The words *"financial or contractual obligations"* are defined in s 20 of the Finance Act to include (for the avoidance of doubt), judgment debts. A judgment debt is defined in the same section to mean:

> "…….a decision of a court of law upon relief claimed in an action or application which, in the case of money, refers to the amount in respect of which execution can be levied by the judgment creditor; and, in the case of any other debt, refers to any other steps that can be taken by the judgment creditor to obtain satisfaction of the debt (but does not include a judgment that has prescribed, been abandoned or compromised)" (underlining for emphasis).

The words *"assets and liabilities"* are not defined in the Finance Act or in S.I. 33 of 2019. The Supreme Court considered the issue of assets and liabilities in *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Anor*[6]. The court said:

> "The liabilities referred to in s 4(1)(d) of S.I. 33/19 can be in the form of judgment debts and such liabilities amount to obligations which should be settled by the judgment debtor. In interpreting s 4(1)(d), regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of S.I. 33/19. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22 February 2019 for the provisions of s 4(1)(d) of S.I. 33/19 to apply to them.
>
> Section 4(1)(d) of S.I. 33/19 would not apply to assets and liabilities, the values of which were expressed in any foreign currency other than the United States dollar immediately before the effective date. If, for example, the value of the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula, s 4(1)(d) of S.I. 33/19 would not apply to such a transaction even if the payment would thereafter be in

[5] [*Chapter 22:15*] (No. 5 of 1999).
[6] *Supra* at p 9

> United States dollars. It is the assessment and expression of the value of assets and liabilities in United States dollars that matters."

Further down in the same judgment the court went on to state that S.I. 33 of 2019 was specific to the type of assets and liabilities excluded from s 4(1)(d), reasoning that the origin of the liabilities was not a criterion for the exclusion. The court highlighted that:

> "What brings the asset or liability within the provisions of the statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in s 44C(2) of the Reserve Bank of Zimbabwe Act…."

Still on the issue of assets and liabilities, the court in the *Zambezi Gas Zimbabwe* judgment further stated that:

> "The issue of the time frame within which the liability arose in relation to the effective date of 22 February 2019 does not matter. What is of importance is the fact that the liability should have been valued before the effective date in United States dollars and was still so valued and expressed. The judgment debt was ordered against the appellant on 25 June 2018. It was valued and expressed in United States dollars and was still so valued and expressed immediately before 22 February 2019."[7]

The issue that requires further interrogation is whether the taxed bill is a liability that was valued and expressed in the United States dollars before the first effective date. Mr *Zimudzi* argued that the issue was not so much about the taxed bill, but the tariff which gave birth to that bill. It was expressed in the United States dollar and therefore fell within the ambit of S.I. 33 of 2019. According to Mr *Zimudzi*, the tariff could not give birth to obligations that required payment in any other currency other than the local currency. I find this submission devoid of merit for the simple reason that the tariff alone does not create an obligation to pay a bill. Once the costs are contested then a bill has to be drawn up and referred to a taxing officer for taxation.

In the present matter, the bill of costs was only taxed on 16 November 2020. The liability to pay the taxed amount arose on that day. Going by the dictum in the *Zambezi Gas Zimbabwe* judgment, the liability to pay the taxed amount was only valued after the bill was taxed. It means that the liability only arose after the first effective date of S.I. 33 of 2019, which is 22 February 2019. That is what sets apart the present matter from the *Zambezi Gas Zimbabwe* judgment. In that case, the court found that the judgment debt was ordered against the appellant on 25 June 2018. It was valued and expressed in United States dollars and was still so valued and expressed immediately before 22 February 2019. In other words, the liability to pay the judgment debt had arisen before the first effective date.

[7] At p 11 of the judgment

The next question concerns the effect of S.I. 149 of 2019 on the tariff as well as the taxed bill. It was the applicant's contention that the law effectively outlawed the use of foreign currencies in Zimbabwe. It is indeed correct from a reading of s 23 (1) of the Finance Act, that all foreign currencies are no longer legal tender in Zimbabwe. However a court can still make an order sounding in any of those currencies provided that order gives the debtor the latitude to pay the debt in local currency at any of the officially accepted exchange rates. From a proper reading of the law, it is clear that an order granted in the United States dollar after the first effective date should only be construed in such a way that the envisaged payment complies with s 22(1)(e) of the Finance Act. The effect of the new law is that after the first effective date, a party cannot seek to enforce payment in the United States dollar currency. The correct approach is that after the first effective date "any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing-seller willing-buyer basis".[8]

In conclusion therefore, the court determines that the liability to pay the taxed costs only arose after the bill was taxed by the taxing officer. While the taxed bill is denominated in the United States dollar, payment cannot be enforced in that currency but at the prevailing interbank rate, or any other official exchange rate acceptable under the present monetary legal framework. The court also determines that the applicant ought to have sought the review of the taxing officer's decision instead of approaching this court for relief by way of a *declaratur*. This explains why counsel for the applicant was at pains when he tried to downplay the significance of the taxed bill, while asserting that the applicant's grievance was with the tariff that gave birth to the taxed bill. One cannot attack the tariff and forget the taxed bill of costs, which is the very instrument that led to the seizure and attachment of the applicant's property.

COSTS

The general rule is that a successful party is entitled to costs on a scale determined by the nature of the case and the manner in which litigation was conducted. The matter involved a fairly intricate area of the law which still contains some grey areas that require further exploration. For that reason I see no justification in penalising the unsuccessful party with an order of costs on the punitive scale of attorney and client.

[8] See section 22 (1)(e) of the Finance Act

DISPOSITION

Resultantly it is ordered that:-

1. The application be and is hereby dismissed.
2. The applicant shall pay the first, third and fourth respondents' costs of suit.

Zimudzi & Associates, legal practitioners for the applicant
Hove Legal Practice, legal practitioners for the 1st , 3rd and 4th respondents