REPORTABLE (25)

FALCON GOLD ZIMBABWE LIMITED
v
(1) TAXING OFFICER N.O, (2) RIO GOLD (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HARARE 3 OCTOBER 2023 & 6 MARCH 2024

R. Kadani, for the applicant

No appearance for the first respondent

T. Nyamayaro for the second respondent

CHAMBER APPLICATION

KUDYA JA:

[1] On 24 August 2023, acting in terms of r 56 (2) of the Supreme Court Rules, 2018, the applicant filed the present chamber application for the review of the first respondent (taxing officer)'s decision. On 1 August 2023, the first respondent declined to award to the applicant the United States dollar denominated disbursements, which it had paid to its own counsel, at the interbank rate prevailing on the date of taxation. Instead, the first respondent awarded the applicant these costs in RTGS dollars at the interbank rate prevailing on the date on which the applicant had voluntarily paid counsel in United States dollars.

THE FACTS

[2] On 27 January 2023, in case No. SC 170/21, this Court awarded a costs order in favour of the applicant. The applicant duly filed a bill of costs predominantly denominated in RTGS dollars. However, the disbursements made to counsel of choice, being items 27 and 35 thereon, were denominated in United States dollars, in the sum of US$ 3 435 and US$2 650, respectively. These disbursements were settled on 4 November 2021 and 23 November 2021.

THE SUBMISSIONS BEFORE THE TAXING OFFICER

[3] Before the Taxing Officer, Ms *Sibanda*, for the second respondent objected, firstly, to the denomination of the disbursements in foreign currency and secondly to the settlement in such currency or even at the prevailing interbank rate as at the date of payment. She contended that the Exchange Control (Exclusive Use Zimbabwe Dollar for Domestic Transactions) Regulations, SI 212/2019, which was promulgated on 27 September 2019, precluded the applicant from setting and settling counsel's fees in any other currency other than the local currency.

[4] *Per contra*, Ms *Manuel* for the applicant, contended that while s 3 of S.I. 212/2019, provided for the exclusive use of local currency as the sole legal tender in domestic transactions, that position was subsequently altered by the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, S.I. 85/2020 (promulgated on 29 March 2020) and the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, 2020 (No. 3) S.I. 185/2020 (promulgated on 24 July 2020). She argued that S.I. 85/2020 allowed a holder of free funds or a nostro FCA to pay for goods and services in foreign currency

while S.I. 185/2020 mandated the dual pricing or displaying, quoting or offering of prices for goods and services by providers thereof in Zimbabwe in both local and foreign currency at the ruling interbank rate. She therefore submitted that the disbursements denominated in United States dollars ought to be passed under the hand of the taxing officer in that currency or at the interbank rate on the date of payment.

THE DETERMINATION OF THE TAXING OFFICER

[5] The taxing officer upheld the first respondent's objection. She relied on *Zizhou v The Taxing Officer & Anor* SC 7/20 and held that both the denomination and disbursement of counsel's fees in United States dollars was unlawful. In her report, submitted in terms of r 56 (3) of the Rules of Court, she averred that she was bound by the 1:1 parity rate enunciated in *Zizhou, supra*. She further asserted that:

> "The Registrar allowed disbursements in RTGS at the equivalent amount on the date the invoices were raised, giving reference to SI 212/19."

She determined that the United States dollar amounts could not, thereafter, be converted to RTGS dollars at the prevailing interbank rate between the two currencies on the date of payment subsequent to taxation but at the rate prevailing on the invoice dates. It was common cause that the exchange rates on 4 November 2021 and 23 November 2021, were USD 1: RTGS97 and USD 1: RTGS 104. The equivalent sum for US$ 3 435 and US$ 2 650 would be RTGS 334 910.50 and RTGS 275 865.00. She therefore passed these RTGS dollar amounts under her hand.

THE GROUNDS FOR REVIEW

[6] Aggrieved, the applicant filed the present review on two grounds. The first was that in view of SI 85/2020 and SI 185/2020, the denomination and setting of costs, in the bill of costs, in the foreign currency in which they were settled on the invoice date subsequent to the promulgation of these two statutory instruments, the position enunciated in the *Zizhou* case would be inapplicable. The second was that the taxing officer's conversion rate on the invoice date and not on a future date of payment was irrational. The relief sought is that I interfere with the decision, allow the application for review and substitute it with my own decision that upholds the denomination of the two items and their payment in foreign currency or at the prevailing interbank rate on the date of payment, with no order as to costs.

THE SUBMISSIONS BEFORE ME

[7] Mr *Kadani,* for the applicant, submitted that the taxing officer's discretion could be impeached if her decision was grossly unreasonable, or if she erred on a point of principle or law or was clearly wrong on some item. He contended that in view of the change in the law subsequent to the jurisdictional facts in the *Zizhou* case, *supra*, the taxing officer misconstrued the import of the Zizhou decision. He also argued that the permission in S.I. 85/2020, for the payment of goods or services in either local currency or foreign currency on the invoice date, meant that such payment could be reimbursed in that specific currency on the date of payment (consequent to the taxing officer's order or decision). He relied on the case of *Sibanda v Sibanda & Ors* HH 5/23 and *Gandawa v Gopoza* HH 577/22 for the further proposition that where the invoiced payment is made in foreign currency, as in the present matter, the taxed costs would also be payable in local currency at the interbank rate prevailing on the date of payment or reimbursement.

He therefore submitted that the taxing officer wrongly taxed counsel's fees at the interbank rate prevailing on the invoice date.

[8] Mr *Nyamayaro* for the second respondent made the following contentions. The amendment in S.I. 85/2020 simply allowed the holder of free funds to elect to pay in foreign currency for goods and services "chargeable in Zimbabwe dollars". It did not alter the position prescribed in S.I. 212/2019 to denominate the obligation to display, quote, price or sell and purchase goods or services in local currency. The obligation for dual pricing, displaying, quoting and offering goods or services at the prevailing interbank rate between the local and foreign currency was introduced by S.I. 185/2020. The dual pricing was conditional upon the goods and services being charged in local currency. S.I. 185/2020 expressly required, firstly, the applicant's counsel to indicate the local currency value of the United States dollar denominated tax note on the invoice date. Secondly, the bill of costs had to reflect the amounts denominated in each of these two currencies and not in United States dollars only. The bill of costs in the present matter did not embody the dual pricing requirement prescribed in SI 185/2020. It did not comply with the peremptory language of a statute. It was therefore invalid. Had it done so, the RTGS amount equivalent to the United States dollars would have appeared on the invoice. The taxing officer therefore correctly passed the impugned RTGS amounts under her hand on 1 August 2023.

He argued that the *Zizhou* case, *supra*, affirmed that 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, S.I 33/19 introduced RTGS$ alongside specified multi-currencies. He further argued that it also confirmed that the Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019,.SI 142/19 introduced the local currency as the sole legal tender before holding that a bill of costs drawn up and denominated in foreign currency at the time the draft bill in that case was presented for taxation was invalid.

He further strongly contended that the import of the applicant's argument that the value of the RTGS dollar could be increased by using the United States dollar as a storer of value was contrary to the principle of currency nominalism.

[9] It is quite apparent to me that the contentions by both counsel seek to interrogate the impact of currency nominalism on S.I. 85/20 and SI 185/20 and its application to the taxation of costs.

THE LAW

[10] The Finance Act (No 2), Act 7 of 2019 (the Finance Act), came into effect on 21 August 2019, which was the date on which S.I. 33/19 lapsed. It re-enacted the provisions of SI 33/19 and applied them retrospectively to 22 February 2019, the date on which S.I. 33/19 took effect. The practical effect was therefore that the Finance Act introduced the RTGS dollar at par with the United States dollar on or before 22 February 2019. It also provided that after that date the value of the RTGS dollar would be determined at the prevailing interbank rate between the local currency and the United States dollar. Section 23 (1) of the Finance Act also subsumed the RTGS dollar as the sole legal tender in

Zimbabwe, with effect from 24 June 2019, as prescribed in S.I. 142/2019. See *Breastplate Service (Pvt) Ltd v Cambria Africa* PLC SC 66/20 at p 14.

[11] S.I. 212/19 was promulgated on 27 September 2019. It criminalized the use of any other currency other than the Zimbabwe dollar. It, however, exempted specified domestic transactions from the overarching reach of S.I. 142/19 and allowed for their payment to be made in foreign currency. On 29 March 2020, S.I. 85/20, amended S.I. 212/19. It permitted the holders of Nostro FCA and of free funds to pay for domestic transactions, chargeable in RTGS dollars, in United States dollars. Section 6 (2) of S.I. 85/20 stipulates that:

"*Payment for goods and services using free funds*

6. (1) In this section—

"Free funds" bears the meaning given to that term in Statutory Instrument 109 of 1996, and includes funds lawfully held or earned in foreign currency by any person.

(2) Notwithstanding these regulations, <u>any person may pay for goods and services chargeable in Zimbabwe dollars, in foreign currency using his or her free funds at the ruling rate on the date of payment.</u>

(3) The payment envisaged in subsection (2) may be done electronically through a foreign currency account or in cash or through any electronic payment platform." (Underlined for emphasis)

Again, S.I. 212/19 was amended by S.I. 185/20 on 24 July 2020 by the insertion of s 7, which, in relevant part, reads:

"*Dual pricing and displaying, quoting and offering of prices for goods and services*

7. (1) <u>Any person who provides goods or services in Zimbabwe shall display, quote or offer the price for such goods or services in both Zimbabwe dollar and foreign currency at the ruling exchange rate</u>." (Underlined for emphasis)

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CURRENCY NOMINALISM

[12] The concept of currency nominalism was adverted to by the then South African Appellate Division in *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A*)*, where it was dealing with the computation of loss of earnings lost by the respondent between the date of the delict [5 February 1983] and the trial [1 October 1988]. The principle relates to the loss of purchasing power of money or currency over time due to inflation and its effect on the numerical value of the monetary loss, that is, whether the principle entitles the affected party to be awarded an upward adjustment equivalent to the loss of the buying power. EM GROSSKOPF JA at 839G - 840C stated that:

> "This result seems to me to be in conflict with the principle of nominalism of currency which underlies all aspects of South African law, including the law of obligations. Its essence, in the field of obligations, is that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of an appreciation. See Farlam and Hathaway *Contract: Cases, Material and* H *Commentary* 3rd ed at 719 note 2; H J Delport 'Inflation and South African Law' (1982) 4 *Modern Business Law* 115 and A Spandau 'Inflation and the Law' 1975 *SALJ* 31.
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> Nominalism is the norm in the common law of Western States with similar systems to our own. Thus, in *Deutsche Bank Filiale Nürnberg v Humphrey* (1926) 272 US 517 at 519 the United States Supreme Court said:
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> > 'An obligation in terms of the currency of a country takes the risk of currency fluctuations and creditor or debtor profits by the change the law takes no account of it.... Obviously, in fact a dollar or a mark may have different values at different times, but to the law that established it, it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the J plaintiff could recover no more dollars on that account.'

The same applies in England. In *Treseder-Griffin and Another v Co-operative Insurance Society Ltd* [1956] 2 QB 127 (CA) at 144 DENNING LJ said the following:

> "... (I)n England we have always looked upon a pound as a pound, whatever its international value. We have dealt in pounds for more than a thousand years - long before there were gold coins or paper notes. In all our dealings we have disregarded alike the debasement of the currency by kings and rulers or the depreciation of it by the march of time or events.
> .....
> Creditors and debtors have arranged for payment in our sterling currency in the sure knowledge that the sum they fix will be upheld by the law. A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time. Sterling is the constant unit of value by which in the eye of the law everything is measured. Prices of commodities may go up or down, other currencies may go up and down, but sterling remains the same."

At 839F the learned judge of appeal articulated the reason why currency nominalism is firmly entrenched in most legal system thus;

> "…it would represent a revolutionary transformation of our legal system if courts were to be called upon to determine the true economic value (in terms of purchasing power) of all obligations sounding in money."

Lastly, the learned judge of appeal emphasized at 841E-F that the principle does not however apply to the assessment of general damages and pertinently pronounced that:

> "A monetary debt… has to be paid according to its nominal value."

[13] The principle of nominalism has been adopted in this jurisdiction in *Mbundire v Buttress* 2011 (1) ZLR 501 (S) at 512E, where GARWE JA stated 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."

See also *Muzeya NO* v *Marais & Anor* 2004 (1) ZLR 326 (H), *Komichi v Tanner & Anor* 2005 (2) ZLR 358 (H), *Marume & Anor v Muranganwa* HH 27/07 and *Madzongo v Besent* HH 33/2009.

ANALYSIS

[14] It is clear from our current legislative framework that the principle of nominalism is firmly entrenched in our law. It is axiomatic that a monetary debt denominated in local currency in Zimbabwe does not appear ever to have been adjusted for the depreciation or even the appreciation of the buying power of the local currency.

[15] The issue under consideration did not confront the High Court in the *Sibanda* and *Gandawa* cases, *supra*. The order in the *Gandawa* case to make payment in foreign currency or the equivalent local currency at the date of payment is contrary to the finding of this Court in *Chimbandi v Mabel Canvas (Pvt) Ltd* SC 68/22. An either-or order similar to the one in *Gandawa* case, *supra*, was substituted with one in which judgment was granted in the sum equivalent to the foreign currency amount in RTGS dollars. This was for the reason that while the foreign currency claim arose before 22 February 2019, it only became a judgment debt on the date of judgment (which was well after 22 February 2019) but payable in the local currency equivalent of the foreign currency on the date of payment because as at the date of judgment the local currency was the sole legal tender. In the *Sibanda* case, the court did not consider the impact of S.I. 85/20 and S.I. 185/20 on the United States dollar denominated bill of costs. It is therefore not possible to draw from these two cases the principle that the nominal numeric value claimed in local

currency but paid in foreign currency assumes a new value equivalent to its interbank rate on a future payment date.

[16] The introduction in S.I. 85/2020 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 dollars. The phrase "chargeable in Zimbabwe dollars" in SI 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 election to pay the United States dollars (instead of the RTGS dollars chargeable) that the applicant chose to discharge its obligation to counsel, did not bind the second respondent to reimburse it in United States dollars or their equivalent at the prevailing rate on the date of payment. Rather, it bound the respondent to reimburse the fee in RTGS dollars or if it elected to do so the equivalent United States dollars encapsulated on the fee note, on the invoice date.

[17] In keeping with the principle of currency nominalism, the amount due to the applicant, which the second respondent was obliged to pay was frozen or crystallized in the fee note issued on the invoice date. The numeric nominal value of the local currency on the invoice date could not be altered by changing it into a foreign currency and then demanding its subsequent value relative to the foreign currency at a later date. The fairness in the principle of nominalism is demonstrated in the following manner. An appreciation in the value of the local currency against the foreign currency on the date of payment of the bill of costs would not benefit the second respondent by allowing it to elect to pay the foreign currency value in the computable lower local currency amount. See *Muzeya NO* v *Marais & Anor*, *supra* at 338A, where CHINHENGO J stated:

> "Therefore, a debt sounding in money must be paid in terms of the nominal value of the currency irrespective of any fluctuations in its purchasing power. In any event, I think the principle of nominalism is even-handed because it places the risk of depreciation of the currency on the creditor and that of appreciation on the debtor."

DISPOSITION

[18] I am satisfied that the nominal value of the local currency on 4 November 2021 and 23 November 2021 remained constant until discharged by the costs' judgment debtor (the second respondent). It did not assume the value of the foreign currency in which it was voluntarily discharged by the applicant. The taxing officer correctly and properly taxed counsel fees at the nominal amount due as at 4 November 2021 and 23 November 2012.

[19] Costs must follow the cause.

[20] Accordingly, it is ordered that:

> "The application for review of the taxation of the bill of costs on 1 August 2023 be and is hereby dismissed with costs."

Atherstone & Cook, the applicant's legal practitioners

Wintertons, 2nd respondent's legal practitioners