REPORTABLE (105)

MABEL CANVAS PRIVATE LIMITED
v
(1) MUCHANETA THOEDORA CHIMBANDI (2) THE TAXING OFFICER

SUPREME COURT OF ZIMBABWE
UCHENA JA, KUDYA JA & MWAYERA JA
HARARE: 31 OCTOBER 2022 & 10 OCTOBER 2023

O. Mashuma, for the appellant

A. Masango, for the first respondent

No appearance for the second respondent

KUDYA JA: The appellant seeks the reversal of the whole judgment of the High Court (the court *a quo*) handed down on 17 May 2022. The court *a quo* set aside on review the second respondent's decision upholding the appellant's bill of costs that was pegged on the United States dollar value of the services rendered for payment in RTGS dollars on the date of taxation. The impugned bill of costs constituted part of an order granted in the court *a quo* in case No. HC 11 725/16 on 15 January 2020. The related costs order was confirmed on 21 July 2020 appeal to this Court in SC 18/20.

THE FACTS

On 15 January 2020 the High Court ordered the first respondent to pay the appellant the sum of US$58 500 or its equivalent at the intermarket bank rate with interest at the

prescribed rate, calculated from 31 December 2013 to the date of payment in full and costs on the legal practitioner and client scale.

Dissatisfied with that order, the first respondent appealed to this Court in SC 18/20. She partially succeeded. This Court ordered that:

> "1. The appeal succeeds to the extent that the relief granted by the court *a quo* is set aside and substituted with the following:
>
> (a) Judgment is granted in the sum equivalent to US$58 500 in RTGS calculated at the prevailing interbank rate.
> (b) Interest on the said amount in paragraph (a) at the prescribed rate from 31 December 2013 to the date of payment in full.
> (c) Costs of suit on a legal practitioner and client scale."

On 5 August 2020, the appellant duly lodged its bill of costs with the second respondent. The bill comprised fees and disbursements in respect of 184 items covering the period between 3 November 2016 and 5 August 2020. The fees and disbursements for the first 133 items (the impugned costs) covered the period between 3 November 2016 and 10 April 2018. In the preamble to the bill, the appellant indicated that the impugned costs were premised on the 2011 Law Society general tariff, which was denominated in United States dollars. This tariff subsisted between February 2011 and 24 June 2019 and continued in force after the latter date for those clients who were willing to pay in hard currency or through a Nostro foreign currency account (Nostro FCA). It was, however, replaced by another general tariff, which was denominated in RTGS dollars, in February 2019. The latter tariff was used to cost the remaining 50 items in RTGS dollars for the period between 6 June 2019 and 5 August 2020.

The appellant incurred and paid the impugned costs in two tranches of US$4 000 on 28 June 2017 and US$5 000 on 10 April 2018, well before the coming into effect of both the first effective date of 22 February 2019 and the second effective date of 24 June 2019.

The characterization of these dates in this manner is provided in the Finance Act (No 2), Act 7 of 2019 (the Finance Act), which came into effect on 21 August 2019

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The taxation was held on 13 August 2020. The second respondent passed under her hand US$7 649.50, which she converted at the ruling interbank rate to RTGS$ 583 005.15. She did so at the prompting of the appellant and in spite of the request by the first respondent to refer to a judge in chambers the propriety of drawing up and presenting the first 133 items of the bill in the manner adumbrated in the appellant's preamble.

Aggrieved by the treatment accorded the impugned costs by the second respondent, the first respondent took her decision on review, before the court *a quo,* in terms of r 314 of the High Court Rules, 1971.

THE CONTENTIONS BEFORE THE COURT *A QUO*

In the court *a quo*, Mr *Masango,* for the first respondent, submitted that the denomination and subsequent taxation of the impugned costs at the prevailing interbank rate on the date of taxation was unlawful and therefore invalid. He contended that, the 2011 Law Society General Tariff constituted an enactment envisaged by s 22 (1) (f) of the Finance Act. He argued that the impugned costs ought to have been quoted in the RTGS dollars in the amounts prescribed in the 2011 Law Society General Tariff. Counsel premised his argument on the provisions of s 22 (1) (d) and (e) of the Finance Act and s (4) (1) (d) 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, SI 33/19, which converted all assets and liabilities and judgment debts that were valued or denominated in United States dollars immediately before 22 February 2019 to RTGS dollars at the rate of

one-to-one as between the two currencies. He further contended that the denomination of the impugned costs in United States dollars was unlawful because it was in violation of the provisions of the Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019, SI 142/2019, which took effect on 24 June 2019 and were replaced, with retrospective effect to that date by s 23 (1) of the Finance Act. He lastly assailed the second respondent's failure to refer to a judge in chambers, in terms of r 313 of the High Court Rules, 1971, the propriety of drawing up and lodging the impugned costs in United States dollars.

Mr *Mashuma*, for the appellant, on the other hand, submitted that the legal costs paid by a litigant to its own legal practitioner in United States dollars before the first effective date and awarded to it by a court after that date would be payable in RTGS dollars at the prevailing interbank rate between the two currencies on the date of taxation. He argued that such a costs order would only become a costs judgment debt on the judgment date. Counsel further contended that such a costs order would be treated in the same way as any debt denominated in United States dollars before 22 February 2019 that would become a judgment debt after that date. He therefore submitted that such a costs order would, in terms of s 22 (1) (d) and (e) of the Finance Act be payable in RTGS dollars, on or after 24 June 2019, at the interbank rate prevailing between the United States dollar and the RTGS dollar on the date of taxation. He also countervailed the applicability of s 22 (1) (f) of the Finance Act by contending that the 2011 Law Society General Tariff was not an "enactment" as defined in s 3 (3) of the Interpretation Act [*Chapter1:01*]. He further submitted that s 22 (1) (e) of the Finance Act catered for the conversion of charges that, like the impugned costs, were denominated in United States dollars before 22 February 2019. Mr *Mashuma* therefore submitted that, in tandem with the provisions of S.I. 142/19, the impugned costs would properly be payable in RTGS dollars at the interbank rate prevailing on the date of taxation. He also argued that the second

respondent's refusal to refer to a judge in chambers the propriety of denominating the impugned costs in United States dollars constituted a judicious exercise of her discretion. Counsel therefore entreated the court *a quo* to uphold the taxation passed under the hand of the second respondent.

THE FINDINGS OF THE COURT *A QUO*

The court *a quo* made the following findings. The second respondent's failure to refer the legal issue raised by the first respondent to a judge in chambers in terms of r 313 of the High Court Rules, 1971, constituted an improper exercise of her discretion. Some of the provisions embodied in S.I. 33/19 and SI 142/19 were incorporated in ss 22 and 23 of the Finance Act, with retrospective effect to the first effective date and the second effective date. The first respondent incurred the liability to pay the impugned costs on the judgment date on which the costs order was granted, which date was subsequent to the first effective date. While the logical inclination derived from the partial success in SC 18/20 would be to uphold the second respondent's taxation of the impugned costs, the Court was, however, on the principle of *stare decisis,* bound by *Zizhou v The Taxing Officer & Anor* SC 7/20. The *Zizhou* case held that, a bill of costs drawn up, presented and taxed in United States dollars after the second effective date violated the peremptory provisions of SI 33/19 and SI 142/19 and therefore void *ab initio,* of no force or effect and illegal. The 2011 general tariff was an enactment envisaged by s 22 (1) (f) of the Finance Act, whose United States dollar denominated charges were converted into RTGS dollars at the one-to-one parity rate between the two currencies on the first effective date. In these circumstances, the second respondent's failure to refer the legal question to a judge in chambers constituted an injudicious exercise of her discretion.

The court *a quo*, therefore, granted the application for review, vacated the costs on the impugned items, and remitted the taxation of a bill of costs drawn up in RTGS dollars for items 1 to 133 to the second respondent with each party bearing its own costs.

THE GROUNDS OF APPEAL

Dissatisfied with the court *a quo's* decision, the appellant raises the following four grounds of appeal.

"1. The court *a quo* erred and misdirected itself in failing to find that a judgment of the court after 22 February 2019 in respect of costs of suit incurred in United States dollars before 22 February 2019, is a debt the evaluation of which does not fall within the ambit of s 22 (1) (d) of the Finance Act (No. 2), Act 7/2019 or its predecessor section 4 (1) (d) of SI 33/2019.

2. The court *a quo* erred and misdirected itself in failing to find that items 1 to 133 of the bill of costs were only denominated in United States dollars for purposes of ascertaining the RTGS dollar equivalent at the prevailing interbank rate on the date of taxation as set out in the bill of costs.

3. The court *a quo* erred and misdirected itself in finding that the denomination of items 1 to 133 of the bill of costs was unlawful.

4. The court *a quo* erred and misdirected itself in finding that the Law Society General Tariff of Fees 2011 violated the law."

The appellant sought the success of the appeal with costs, the vacation of the judgment of the court *a quo* and its substitution by an order dismissing the application for review with costs on the legal practitioner and client scale.

THE ISSUE

The sole issue that arises from the four grounds of appeal is whether a United States dollar costs order granted by a court after 22 February 2019 constitutes a judgment debt susceptible to payment at the one-to-one parity rate between the United States dollar and the RTGS dollar. If that question is answered in the affirmative, then the appeal fails. If not, then it succeeds.

THE CONTENTIONS BEFORE THIS COURT

Mr *Mashuma* for the appellant submitted that the court *a quo* erred in failing to find that a costs order constitutes a judgment debt whose liability for payment arises on the judgment date. He therefore contended that where such a costs order is granted after the first effective date, as happened in the present case; it would fall outside the ambit of s 22 (1) (d) of the Finance Act or s 4 (1) (d) of SI 33/19, which preceded it. Counsel also submitted that this Court's decision in the *Zizhou* case, *supra,* was distinguishable from the present case and was therefore not binding on the court *a quo*. The first distinguishable feature he alluded to was that the *Zizhou* case was concerned with the construction of s 4 (1) (d) whose wording was fundamentally different from the latter wording of s 22 (1) (d). The second distinguishing feature was that while the bill of costs in the *Zizhou* case was drawn up, presented and taxed in United States dollars, the impugned costs in the present bill were only denominated in United States in order to provide the second respondent with an appropriate formula for the computation of the RTGS dollar equivalent of such costs. He also justified the denomination of the impugned costs in United States dollars on the provisions of r 307 and r 308 (3) of the High Court Rules, 1971. These rules require the second respondent to be guided firstly, by the rationale to award the successful litigant "a full indemnity for all costs reasonably incurred by

him". Secondly, "to be guided as far as possible by any tariff by the Law Society of Zimbabwe or recommended by the Council of the Society under the Legal Practitioners Act, 1981".

In interaction with the Court, counsel conceded that the 2011 Law Society General Tariff was prescribed by s 63 (2) (l) of the Legal Practitioners Act [*Chapter 27:07*], but argued that as it had had never been gazetted in compliance with the provisions of s 63 (3) of that Act, it did not constitute an enactment, as defined in s 3 (3) of the Interpretation Act [*Chapter 1:01*] and contemplated by s 22 (1) (f) of the Finance Act. He however, conceded that were this Court to find that the general tariff was an enactment, then the decision of the court *a quo* would be unassailable. He prayed for costs on the higher scale on the basis that the appeal was opposed merely for purposes of delay, which was deliberately conceived to erode the value of costs awarded on taxation through the inevitable rise in inflation.

Mr *Masango*, for the first respondent, submitted that, none of the appellant's three grounds of appeal attacked the correctness of the finding by the court *a quo* that it was bound by the *Zizhou* case. Counsel pinned his colours on the mast of the submissions which he made in the court *a quo.* He disputed that the *Zizhou* case was distinguishable from the present case on the main basis that the bill of costs in *Zizhou* was, like the impugned costs, denominated in United States dollars. He reiterated that the court *a quo* was, on the basis of the stare decisis doctrine, rightly bound by the *ratio decidendi* in the *Zizhou* case, that the denomination of a bill of costs in United States dollars was a nullity and therefore illegal as it violated a statute and that anything done under it was also void.

He therefore submitted that the denomination and taxation of items 1 to 133 of the bill in United States dollars were a nullity because they were in direct conflict with s 3 (1) of

SI 142/19 as replaced by s 23 (1) and (2) of the Finance Act. Counsel also submitted that the 2011 general tariff constituted a s 22 (1) (f) enactment whose prescribed United States dollar denominated charges were automatically converted to RTGS dollars at the one-to-one rate on the first effective date. He further argued that the charges, in keeping with s 22 (4) of the Finance Act, emanated from contractual obligations between the appellant and its own erstwhile legal practitioners that had arisen before the first effective date. He also argued that as these contractual obligations had been valued and expressed in United States dollars before the first effective date, their valuation automatically converted to RTGS dollars on the effective date and continued to hold that value until discharged. He therefore submitted that it was remiss of the appellant to denominate them in United States dollars and for the second respondent to accept such denomination for the purpose of conversion at the interbank rate. He lastly submitted that the appellant should have utilized the general tariff denominated in RTGS dollars that was issued by the Law Society at the onset of the first effective date. He therefore prayed for the dismissal of the appeal with costs.

ANALYSIS

Legislative provisions

In terms of s 6 (1) of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] the regulations such as SI 33/19, unless earlier repealed, have a life span of 180 days. The import of this provision is that SI 33/19 ceased to be of force and effect on 21 August 2019, which coincidentally was the same date on which the Finance Act took effect. The Finance Act was therefore the law that prescribed the prevailing legal position at the time the costs order was made and the impugned costs were drawn up, presented and taxed. The provisions of s 4 (1) (a) to (f) of SI 33/19 were broadly replicated in s 22 (1) (a) to (f) of the Finance Act. These sections stipulate that:

"4. (1)

(d) that, for accounting and other purposes, all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in s 44C (2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar; and

(e) that after the effective date any variance from the opening parity rate shall be determined from time to time by the rate at which authorised dealers under the Exchange Control Act exchange the RTGS Dollar for the United States dollar on a willing-seller willing-buyer basis; and

(f) that every enactment in which an amount is expressed in United States dollars shall, on and after the effective date, 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.

22 (1)

d) that, for accounting 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; 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 authorized dealers exchange the RTGS dollar for the United States dollar on a willing seller-willing buyer basis.

e) 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 one-to-one rate"

(4) For the purposes of this section-

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

The underlined and bolded words highlight the legislative differences between the provisions of s 4 (1) (d), (e) and (f) of SI 33/19 and s 22 (1) (d), (e) and (f) of the Finance Act. Section 22 (4) (a) of the Finance Act is a new explanatory provision that did not form part of s 4 of SI 33/19. It is noteworthy that the underlined words in s 22 (1) (d), (e) and (f) vest these provisions with retrospective application to the first effective date.

The meaning of "shall on and after the effective date" in s 4 (1) (d) was provided by MALABA CJ in *Zambezi Gas Zimbabwe (Pvt) Ltd v NR Barber (Pvt) Ltd & Anor* SC 3/20 at pp 11-12 in the following words.

> "The effect of the phrase "on and after" is that the conversion of the values of "all assets and liabilities" which were valued and expressed in United States dollars immediately before the effective date to values in RTGS dollars at a rate of one United States dollar to one RTGS dollar would apply at the time the value of the asset or liability is liquidated or discharged. Assets and liabilities covered by s 4(1)(d) of S.I. 33/19 are of a *sui generis* nature. They accrue immediately before the effective date and continue to exist after the effective date."

Mr *Mashuma's* contention that the effect ascribed to s 4 (1) (d) above does not apply to the assets and liabilities referred to in s 22 (1) (d) because the words "on and after" have been substituted by "on" in the latter provision is incorrect. This is because the

retrospective effect of s 22 (1) (d) covers the life span of the Finance Act commencing from the first effective date. In other words, the provisions of s 22 (1) (d) apply to all the assets and liabilities which were valued and expressed in United States dollars on and after the first effective date. While the wording in the two provisions and of the other alluded to above are different, they, however, bare the same meaning and effect.

In the *Zizhou* case, the applicant objected to the taxation of a bill of costs denominated in United States dollars in light of the provisions of S.I. 33 of 2019. At p 4, MAKARAU JA, as she then was, stated 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 the settled position at law that anything done in direct conflict with a statute is a nullity."

And at p. 5 the following appears:

> "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."

Lastly the Learned Judge of Appeal further stated at p 6 that:

> "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."

These remarks show that this Court set aside the bill of costs taxed in the *Zizhou* case, *supra*, because it was in violation of the prevailing legal position set out in SI 33/19 and SI 142/19 at the time it was drawn up, presented and taxed in United States dollars. There are however several distinguishing features between the *Zizhou* case and the present case. The bill

in *Zizhou* related to Case Nos. SC 211/19 and SC 211/19. This Court is allowed to have regard to its previous proceedings by the case of *Mhungu v Mtindi* 1986 (2) ZLR 171 (S).

On 21 June 2019, the costs order in SC 211/19 was granted by consent of the parties by HLASTWAYO JA, as he then was, for the dismissal of an application for the reinstatement of an application for condonation under SC106/19 which had been regarded as abandoned and deemed dismissed by the Registrar of this Court on an earlier date. The bill in *Zizhou* related to costs for the period between 5 April 2019 and 27 May 2019. It was presented on 8 July 2019 and taxed on 24 July 2019. It was drawn up, presented and taxed in United States dollars during the subsistence of SI 33/19 and SI 142/19. The bill of costs in the present matter was presented on 5 August 2019 and taxed on 13 August 2019 during the subsistence of SI 33/19 and SI 142/19. When Zizhou was argued in November 2019, the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019, SI 212/19 had been published on 27 September 2019. It affirmed the sole use of the RTGS dollar for domestic transactions in Zimbabwe and imposed civil penalties for any violation thereof. When the present matter was argued in October 2020, the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, 2020 (No. 2) SI 85/20, had been published on 29 March 2020. It allowed Nostro FCA account holders and holders of free funds to pay for domestic transactions chargeable in RTGS dollars in United States dollars.

The costs order underlying the Zizhou matter was granted in case number SC 211/19 on 21 June 2019 while the one in respect of the present matter was granted in SC 18/20 on 21 July 2020**.** Items 1 to 133 in the present matter were pegged in United States dollars merely for the purpose of calculating the RTGS dollar value on the date of taxation. The purpose was highlighted in the preamble on the face of the bill. The former the bill was taxed in United States dollars while in the latter it was taxed in United States dollars and converted

into RTGS dollars on the date of taxation. The former bill concerned a self-actor and premised, in terms of r 308 (2) of the High Court Rules, 1971, on the High Court Tariff. The present bill is based on the 2011 Law Society General Tariff, referred to in r 308 (3) of the same Rules. The Zizhou matter was determined when there was a drought of jurisprudence on the ramifications of the financial transaction regime imposed by the above-mentioned enactments. However, when the present matter was argued, there was a plethora of case law on the construction of these legislative instruments.

The relevant distinguishing features that stand out are that the costs order in the *Zizhou* case was granted after the first effective date but 3 days shy of the second effective date. The costs had been incurred between 14 April 2019 and 27 May 2019. They were wholly drawn up, presented and taxed in United States dollars after the second effective date. In the present case the costs were incurred by the first respondent after the first and second effective dates. They were denominated in United States dollars solely for the purpose of calculating their RTGS value on the date of taxation. There was a veritable treasure trove of jurisprudence on the import of these legislative instruments at the time the present matter was argued and hardly any when the *Zizhou* case was determined.

In argument, Mr *Masango* relied on the pronouncement made in *Zizhou*, *supra*, at pp 4, 5 and 6 to the effect that a bill of costs drawn up, presented and taxed in United States dollars after the promulgation of SI 142/19 is unlawful and void for contravening that enactment. The costs order in the *Zizhou* case, *supra,* emanates from SC 211/19, a matter between the two parties. In the light of the pronouncements in *Zambezi Gas, supra,* a costs order granted prior to the first effective date, which would have been valued in United States dollars, transmuted into RTGS dollars at the one-to-one rate.

It is correct that the court *a quo* cannot be faulted for relying heavily on the *Zizhou* case, which on its own circumstances, was correctly decided. Be that as it may, the various distinguishing features between the present matter and the *Zizho*u ought to have led the court *a quo* to a different decision.

It is correct that the impugned costs were incurred by the appellant and settled with its own legal practitioners in United States dollars prior to the first effective date. It is also correct that the costs order, upon which the impugned costs rest, was granted after the first and second effective dates. The cost order therefore became a judgment debt subsequent to both the first and second effective dates. It would for that reason fall under the ambit of s 22 (1) (e) of the Finance Act. This finding is in tandem with the remarks of this Court in the *Zambezi Gas* case, *supra* at p 13 that:

> "The transactions entered into after the effective date would fall under the provisions of section 4 (1) (e) of S.I. 33/19."

Section 4 (1) (e) of SI 33/19 has the same effect as and s 22 (1) (e) of the Finance Act. The submission by Mr *Mashuma* that as the first respondent incurred the liability, which was valued and expressed in United States dollars after first effective date, it was required by the provisions of s 22 (1) (e) and s 23 (1) of the Finance Act to settle the liability in RTGS dollars at the prevailing interbank rate between the two currencies on the date of taxation is correct. In fact, this is the only conceivable basis upon which, in respect of United States dollar denominated transactions that had taken place prior to the first effective date, this Court in SC 18/20 ordered the first respondent in para. 1 (a) of the substitutory order to pay the appellant "the sum equivalent to US$58 500 in RTGS calculated at the prevailing interbank rate". The same reasoning must apply with equal force to the substitutory costs order awarded in para. 1 (b) of the same.

Mr *Masango* further argued that the 2011 Law Society General Tariff was an enactment in which the fees contained therein were denominated in United States dollars before the first effective date. He thus contended that, in terms of s 22 (1) (f) of the Finance Act and s 4 (1) (f) of SI 33/19, which preceded it, the fees chargeable in the general tariff were converted to RTGS dollars at the one to one parity rate on the first effective date. He therefore submitted that the impugned costs should have been drawn up, presented and taxed in RTGS dollars equivalent to the United States dollars in which they were valued and expressed before the conversion at the one-to-one parity rate. Mr *Mashuma* conceded that if the 2011 general tariff were an enactment, then Mr *Masango's* submission would be unassailable. He, however, strongly contended that the general tariff in question was not an enactment.

In our law, an enactment and a regulation are statutorily defined in s 3 of the Interpretation Act [*Chapter 1:01*] in the following terms.

> ""enactment" means—
>
> (*a*) any Act; or
> (*b*) any statute included in a revised edition of the laws of Zimbabwe prepared under an Act;
> (*c*) any statutory instrument; or
> (*d*) any regulations made in terms of an Order in Council made under the Federation of Rhodesia and Nyasaland Act 1963 of the United Kingdom; or
> (*e*) any ordinance made in terms of the Southern Rhodesia Act 1979 of the United Kingdom and having the force of law within Zimbabwe; or
> (*f*) any provision contained in an enactment mentioned in paragraph (*a*), (*b*), (*c*), (*d*), or (*e*)";
>
> "regulation", "rule", "by-law", "order" or "notice" means respectively a regulation, rule, by-law, order or notice in force under the enactment under which it was made."

In addition, s 32 (1) and (4) prescribed that the existence of an enactment is evidenced by publication in the Government Gazette and that if the approval or consent of or consultation with the President, a Minister or any other authority is required before the

enactment is made, a notification in the Gazette stating that this has been done constitutes *prima facie* proof of such approval, consent or consultation.

The power of the Law Society to make by-laws is enshrined in s 63 of the Legal Practitioner Act [*Chapter 27:07*]. It stipulates that:

> "**63 Society may make by-laws**
> (1) By-laws may be adopted by a majority of members present personally or by proxy at a general meeting of the Society.
> (2) By-laws may be made in terms of subsection (1) for any or all of the following purposes—
>
> Fixing a tariff of charges and commissions or minimum or maximum charges and commissions for services rendered by legal practitioners in matters not provided for by the rules of the Supreme Court, High Court or of magistrates courts:
> Provided that no by-laws made in terms of this paragraph shall prohibit any registered legal practitioner from acting in any proper case or matter without making any charge therefor;
> (3) By-laws made in terms of subsection (1) shall not have effect until they have been approved by the Minister and published in a statutory instrument."

In terms of the s 63 (2) (l), the Law Society may fix a tariff of charges and commissions for services rendered by legal practitioners where such charges are not provided by the court rules of the courts in which the services are rendered. The by-laws can only take effect upon approval by the relevant Minister and publication in a statutory instrument. It is therefore apparent from the provisions of s 63, that a by-law that meets the requirements of the section would be regarded as an enactment.

It is common cause that the 2011 general tariff was not published in terms of s 63. It was not promulgated into a by-law. It was merely a recommendation issued to legal practitioners by the Law Society. It says so in its preamble. Since it was not an enactment, it does not fall under the ambit of either s 4 (1) (f) or s 22 (1) (f) of the Finance Act. In the circumstances, Mr *Masango's* submission that, the fees prescribed therein in United States

dollars were converted to RTGS dollars, and even then, at the one-to-one parity rate is incorrect. The valuation and expression in United States dollars in that document was unaffected by the provisions of s 4 (1) (f) of SI 33/19 and ands 22 (1) (f) of the Finance Act.

The next question that presents itself for determination is whether such a tariff could be used to determine the costs awarded to the appellant on 21 July 2020 in SC 18/20. The answer is provided in r 308 (3) of the High Court Rules, 1971. In order to give the context of the subrule (3), it is necessary to reproduce the provisions of subrule (1) and (2). They stipulated that:

> ***"308. Services rendered, work done and disbursements***
>
> (1) A taxing officer may tax all bills of costs for services (other than conveyancing) actually rendered by a legal practitioner or by a notary public in his capacity as such, including disbursements made, whether in connexion with litigation or not, and whether the work was done before or after the date on which the rules came into operation.
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> (2) In the taxation of costs as between party and party in respect of work done in connexion 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:
> [Subrule amended by s.i. 101 of 1994]
>
> 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.
> [Proviso substituted by R.G.N. 359 of 1978]
>
> (4) In the taxation of costs in respect of work done in connection with any matter not referred to in subrule (2), including the taxation of costs as between a legal practitioner and his own client in respect of work done in connection with judicial proceedings, a taxing officer shall be guided as far as possible by any tariff by the Law Society of Zimbabwe or recommended by the Council of the Society under the Legal Practitioners Act, 1981. [Subrule substituted by s.i. 101 of 1994]"

A taxing officer such as the second respondent is mandated by r 308 (3) to be guided as far as possible any tariff made by the Law Society or any recommendations emanating from the Council of the Law Society.

The 201l general tariff was one such document that the second respondent was obliged to use. The first respondent's liability to pay the appellant's costs, which were valued and expressed in United States dollars was incurred on 21 July 2020. In *Ingalulu Investments (Pvt) Ltd & Anor v NRZ & Anor* SC 42/22 at p 5 the Court stated that:

> "It is also axiomatic that a delict, unlike a financial or contractual obligation, cannot be categorized as an asset or liability until it is voluntarily accepted as such by the wrongdoer or until such acceptance is foisted upon the wrongdoer by a court of competent jurisdiction. This is because a delict is committed and does not accrue like an asset nor is it incurred like a liability. In accounting terms, an asset or a liability has an ascertainable monetary value, which is recorded in the relevant books or statements of account. This is the position that pertains to a judgment debt. It constitutes an asset in the books of the judgment creditor and, conversely, a liability in the hands of a judgment debtor. Neither of these parties can treat a delictual claim as an asset or a liability. They can only do so after a competent court of law has made a determination on whether the claim establishes a liability and thereafter assesses the measure of such a liability. In any event, only a judgment debt and not a delictual claim can be executed in the manner contemplated in s 20 of the Act."

While these remarks concerned a delictual claim, the force of the reasoning applies with equal power to a claim for costs. Such a claim can only accrue as an asset in the appellant's books and conversely be incurred as a liability in the books of the first respondent on the judgment date. It is on that date that the provisions of s 4 (1) (e) of SI 33/19 and s 22 (1) (e) of the Finance Act come into force. The import of these sections appears in *Magauzi v Jekera & Anor* SC 54/22 at p. 7 where UCHENA JA said:

> "Section 4 (1)(e) clearly means that the rate at which any value in United States dollars established by any means including judgment debts shall after the effective date be based on the rate at which authorised dealers under the Exchange Control Act exchange the RTGS Dollar for the United States Dollar on a willing seller –buyer basis."

The reasoning in *Magauzi, supra,* was premised on the construction of s 4 (1) (e) of S.I. 33/19 in *Zambezi Gas Zimbabwe (Pvt) Ltd v NR Barber (Pvt) Ltd & Anor* SC 3/20 at p 8 where the learned CHIEF JUSTICE said:

> "Section 4 (1) (d) of SI 33/19 states that for such *sui generis* liabilities, including judgment debts, a rate of one-to-one between the United States dollar and the RTGS dollar will apply. The transactions entered into after the effective date would fall under the provisions of s 4 (1) (e) of SI 33/19."

The said underlying facts in that case are clearly distinguishable from the facts in the present matter wherein the first respondent's liability commenced to run after the first effective date. Such liability was correctly assessed and converted by the second respondent from the amount denominated in United States dollars to RTGS dollars at the prevailing interbank rate on the date of taxation. The court *a quo* wrongly set aside the second respondent on the basis of *Zizhou*, which is distinguishable from the present matter in the respects outlined above.

COSTS

The appeal raised an important issue that required resolution. The first respondent cannot be penalized by a punitive order of costs for taking a position that appeared to be supported by the *Zizhou* case, *supra*. A costs order which follows the result is, however, appropriate.

DISPOSITION

Accordingly, it is ordered that:

1. The appeal succeeds with costs.
2. The order of the court *a quo* is set aside and substituted by the following:

   "a. The application for review be and is hereby dismissed.

   b. Each party shall bear its own costs."

UCHENA JA **:** I agree

MWAYERA JA **:** I agree

Mushuma Law Chambers, appellant's legal practitioners.

Muronda Malinga Legal Practice, 1st respondent's legal practitioners.

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