MUCHANETA THEODORA CHIMBANDI
versus
THE TAXING OFFICER
and
MABEL CANVAS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 4 May 2021 & 17 May 2022

Opposed Application – Review

A Masango, for the applicant
O Mushuma, for the second respondent

MUSITHU J: The applicant seeks a review of the first respondent's decision on a bill of costs that she taxed in a matter involving the applicant and the second respondent under HC 11725/16. The application for review was made in terms of Rule 314 of the High Court Rules 1971 (the rules). The relief sought reads as follows:

> **"IT IS ORDERED THAT:**
> 1. The application for review be and is hereby granted.
> 2. Items **1 to 133** of Bill of costs taxed by the 1st Respondent on 13th August 2020 under **HC 11725/16** be and is hereby set aside.
> 3. The matter be remitted back to 1st Respondent for taxation of **Items 1 to 133** on the Bill of Costs only after 2nd Respondent has denominated same in Zimbabwean Dollars.
> 4. 2nd Respondent pays Costs of review on a legal practitioner-client scale."

BACKGROUND

The background to the dispute is decipherable from the applicant's founding affidavit. It is as follows. The second respondent herein instituted action proceedings against the applicant under HC 11725/16 in terms of which the second respondent, as the plaintiff therein claimed against the applicant, as defendant in those proceedings, the sum of US$58 500 being the balance due in respect of some 1 500 army rucksack bags manufactured and delivered to the applicant herein at the applicant's instance. The second respondent also claimed interest on the said amount

plus costs of suits on a legal practitioner and client scale. At the conclusion of the trial, PHIRI J, in a judgment under HH 26/20, granted the following order in favour of the second respondent:

> "Wherefore it is hereby ordered that defendant pays:
> (a) Judgment in the sum of US$58 500 or its equivalent at the intermarket bank rate
> (b) interests on the said sum of US$58 500 or its equivalent at the prescribed rate from 31 December, 2013 to the date of payment in full; and
> (c) Costs of suit on a legal practitioners and client scale."

That applicant herein appealed against that judgment to the Supreme Court under SC 18/20. On 21 July 2020, the Supreme Court granted the following order:

> "**WHEREUPON**, after reading documents filed of record and hearing counsel,
> **IT IS ORDERED THAT:**
> 1) The appeal be and is hereby succeeds to the extent that the relief granted by the court a quo is set aside and substituted with:
> Judgment in sum equivalent
> (a) In the sum equivalent to US$58 500 in RTGS calculated at the prevailing interbank rate.
> (b) Interest on the said in paragraph (a) at the prescribed rate from 31 December 2013 to date of payment in full.
> (c) Costs of suit on a legal practitioner and client scale."

After the Supreme Court order, the second respondent proceeded to prepare a notice of taxation which was duly served on the applicant's legal practitioners of record on 5 August 2020. Part of the bill of costs (items 1 to 133 to be specific) was prepared using the 2011 General Law Society Tariff (the 2011 tariff) and some of the attendances were quoted in the United States dollar payable at the prevailing interbank rate on date of taxation. The applicant's legal practitioners conceived that to be an irregularity and on 6 August 2020, they wrote to the second respondent's legal practitioners as follows:

> **"RE: MABEL CANVAS (PVT) LTD v MUCHANETA THEODORA CHIMBANDI – HC11725/2016**
> …….
> We have noted with concern that your Bill of Costs refers to United States Dollars as our hourly rate yet the law is very clear that:
> ***"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.*** As per section **22 1 (f) of the Finance Act No. 2 of 2019"**
> Legally, the Bill is now in RTGS on a rate of one as to one.
> The court order did not change this position.
> You cannot be claiming interbank rate on date of taxation as this is not the amount you were charging in 2016, it amounts to overcharging.
> In the premises kindly withdraw your Bill of Costs.

We shall be raising the same issue before the taxing Officer should you insist with the taxation in its present state.

……

The second respondent's legal practitioners responded to the letter through their letter of 7 August 2020. It reads in part as follows:

"**"RE: MABEL CANVAS (PVT) LTD v MUCHANETA THEODORA CHIMBANDI – HC11725/2016**

…….

We are not in agreement with the views you express to the effect that United States dollar rates applicable from 2016 to January 2019 were converted to RTGS rates at one-to-one with the United States dollar.

We take the view that a judgment of the court after the first effective date in respect of costs of suit incurred in United States dollars before the first effective date (22 February 2019), is a debt in the sum equivalent to the taxed United States dollar amount in RTGS dollars calculated at the prevailing interbank rate. This treatment of debts expressed in United States dollars after the first effective date is provided for in section 22(1)(e) as read with section 22(1)(d) of the Finance Act (No.2) Act, 2019. It is the legal basis upon which the Supreme Court allowed our client to recover its debt from your client in the sum equivalent to US$58 500.00 in RTGS dollars calculated at the prevailing interbank rate.

In ordering your client as it did to pay the sum equivalent to US$58 500.00 calculated at the prevailing interbank rate, the Supreme Court rejected your submission to the effect that in terms of section 22(1)(d) of the said Finance Act, the US$58 500.00 was, by operation of the law, converted to RTGS dollars at the rate of one-to-one to the United States Dollar. We note, however, that you now seek to place reliance on section 22(1)(f) of the said Finance Act to argue that the United States dollar rates that applied, in the present case, from 2016 to January 2019 have, by operation of the said provision, become RTGS dollar rates on a one-to-one rate with the United States dollar on the first effective date.

With all due respect, we are unable to agree. We take the view that section 22(1)(f) of the said Finance Act does not apply at all. It is common knowledge that the United States dollar General Tariff of Fees in force from February 2011 to January 2019 is not an enactment, i.e., a law passed by Parliament. Not being an enactment as contemplated in the said provisions, the said General Tariff of Fees is not covered under the provisions of section 22(1)(f) of the Finance (No.2) Act, 2019.

Concerning the allegation that we cannot be claiming *"interbank rate on date of taxation as this is not the amount you* (read "we") *were charging in 2016"* and that *"it amounts to overcharging",* our response is simple. The amounts we charged from 2016 to January 2018 were fixed in United States dollars as per the General Tariff of Fees referred to above. There was no RTGS General Tariff of Fees then. The conversion of the United States Dollar fees to RTGS fees at the ruling interbank rate on date of taxation does not amount to overcharging. It restores parity in this hyperinflationary environment in line with paragraph (e) of section 22(1) of the said Finance Act, the provisions of which validated recovery of the main debt in the sum equivalent to US$58 500.00 in RTGS dollars at the prevailing interbank rate as aforesaid.

> In light of the foregoing, we take the view that there is no legal basis for your demand that we withdraw the Bill of costs. You are free to raise any issue before the taxing officer in connection with the Bill of Costs.
> ……."

The parties attended taxation on 13 August 2020 before the first respondent. The applicant's legal practitioners maintained their position that the denomination of part of the bill of costs in United States dollars contravened S.I. 33/2019. The second respondent's legal practitioners insisted on their position as communicated in their letter of 7 August 2020. The first respondent declined the applicant's request to refer the legal question to a Judge in Chambers in terms of r 313. She directed that the bill of costs be taxed in its current form.

The Applicant's Case

The applicant's first contention was that the first respondent erred in proceeding with the taxation when part of the bill of costs was denominated in United States dollars. The applicant averred that the issue ought to have been referred for determination by a judge in chambers in terms of r 313, before taxation proceeded. Accordingly, the first respondent fell into error when she proceeded with taxation before that legal issue was decided.

The second contention was that it was wrong for the bill of costs to be denominated in the United States dollar currency. That was a contravention of the law. The first respondent compounded the illegality by proceeding to tax the bill in that format. The applicant further averred that the 2011 tariff was converted from the United States dollars to RTGS by operation of law. The tariff created financial obligations which were denominated in the United States dollars before the first effective date. After the first effective date, such obligations were converted to RTGS at the rate of one is to one with the United States dollar. The applicant further averred that since the 2011 tariff was concluded before the first effective date and had the effect of creating financial obligations, it was converted to RTGS and the Supreme Court order that decided the legal point could not have changed this position of the law. More pointedly, the Supreme Court order did not suggest that legal costs should be charged in United States dollars, but only the capital amount.

The applicant also averred that the 2011 tariff was a creature of statute and therefore fell within the ambit of s 22(1)(f) of the Finance Act (No.2) of 2019 (the Finance Act). That section provides that any enactment in which an amount is expressed in United States dollars shall on the

first effective date be construed as referring to the RTGS dollar at parity with the United States dollar. The intention of the legislature was to deem any reference to the United States dollar prior to the first effective date to be a reference to the RTGS dollar. That tariff could not escape the deeming provisions to the extent that it made reference to the United States dollars. According to the applicant, in February 2019, the Law Society issued the same tariff in RTGS dollars. It was therefore wrong to charge the 2011 tariff in United States dollars and then to convert it at the prevailing interbank rate when it had already been allocated a rate of one is to one.

The applicant further contends that SI 142/19 made the Zimbabwean dollar the sole legal tender for use in domestic transactions. That made the bill of costs illegal to the extent that items 1 to 133 were denominated in United States dollars.

Second Respondent's Case

In its opposition, the second respondent averred that the first respondent was reposed with discretion to decide whether or not to refer the legal issue to a judge in chambers. She was at large to make a decision on that legal point which is what she ultimately did. Rule 313 was not mandatory. It was merely permissive. The first respondent considered the parties written submissions on the point before they attended taxation. The parties 'counsels made oral submissions on that point at taxation. Having considered the submissions, the first respondent determined that there was no need to refer the matter to a judge in chambers and proceeded with taxation.

The second respondent contends that a judgment of the court after the first effective date in respect of costs of suit incurred in United States dollars during any period before 22 February 2019, is a debt in the sum equivalent to the taxed United States dollar amount in RTGS calculated at the prevailing interbank rate on the date of taxation. It further contends that the Supreme Court accepted its argument that since the judgment was handed on 15 January 2020, which was after the first effective date, it was a debt in respect of which s 22(1)(d) of the Finance (No. 2) Act did not apply. It was a debt in respect of which s 22(1)(e), as read with s 22(1)(d) of the Finance Act applied. It was averred that the Supreme Court had already settled the point.

The second respondent denied that the 2011 tariff was an enactment as contemplated in s 22(1)(f) of the Finance Act. It was not covered by that section. The 2019 General Tariff alluded

to by the applicant was not relevant as it covered the period after February 2019. It was further contended that the applicable tariff for the period November 2016 to January 2019 was the one denominated in United States dollars. There was no applicable RTGS dollar tariff, and as such there was nothing illegal about using the United States dollar tariff as long as the United States dollar amount was to be converted to RTGS dollars at the prevailing interbank rate on date of taxation. The second respondent also argued that r 307 was intended to fully indemnity a successful party all costs reasonably incurred in the conduct of litigation. The second respondent claimed to have incurred US$9 700 to prosecute its claim during the period November 2016 to April 2018.

The court was urged to dismiss the application with costs on the attorney and client scale as it was devoid of merit and a waste of time.

The Issues

Three issues arise for determination in this matter, and these are:

- Whether the first defendant exercised her discretion judiciously when she decided not to refer the legal issue between the parties to a judge in chambers;
- Whether the first defendant erred in proceeding to tax a bill which was denominated in the United dollar currency;
- The level at which costs should be awarded to the successful party.

The Law and the Submissions

Whether the first defendant failed to exercise her discretion judiciously in deciding the legal issue between the parties –

The applicant submitted that the first respondent erred in not referring to a judge the legal issue of whether or not it was proper to denominate a bill of costs in United States dollars in view of the new currency regime wrought by S.I. 33/19 and S.I. 142/19. Rule 313 states 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."

Rule 313 gives the first respondent discretion to decide whether or not to refer any issue arising at taxation to judge in chambers for a decision. The use of the word *"may"* in my view suggests that it is not a mandatory requirement that the issue be referred to a judge in chambers.

It endows the first respondent with discretion. As was observed by MAKARAU JA (as she then was), in *Zizhou* v *Taxing Officer & Ano*[1]*:*

> "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 court will interfere with the exercise of discretion where it is clear that the taxing officer misdirected herself on some legal principle or in the manner the taxation itself was conducted. In *Yakub Mahomed v Bredenkamp & Ano*[2], MAKONI JA said:

> "Consequently, there are two instances in which a court may competently interfere with the decision of a taxing officer. Firstly, where a finding is made that the taxing officer's decision was grossly unreasonable or that he erred on a point of principle or law. Secondly, a court is entitled to interfere where the taxing officer was clearly wrong regarding some item."

From a reading of the record it is not clear why the first respondent did not refer the legal issue to a judge in chambers as had been requested on behalf of the applicant. Her ruling on that point, if ever there was one, is not part of the record. The parties counsel have given different versions of what transpired on the day of taxation. According to second respondent's counsel, the first respondent considered the parties written and oral submissions and determined that it was not necessary to refer the issue to a judge. She then proceeded with taxation. In her heads of argument, the applicant claims that the first respondent reasoned that referring the matter to a judge in chambers was not practical and would cause delays since judges were on vacation. In light of these divergent positions on the issue, and in the absence of a ruling by the first respondent, this court is constrained from a finding on whether or not the first respondent properly exercised her discretion in deciding that point.

Nonetheless, r 314 provides an immediate respite to an aggrieved party. It states as follows:

> "***314. Review of taxation***
> (1) A party aggrieved by the decision of a taxing officer may apply to court within four weeks after the taxation to review such taxation. The application shall be by court application to the taxing officer and to the opposite party, if such opposite party was present at the taxation or if the court decides that such opposite party should be represented."

[1] SC 7/20 at p3 of the judgment
[2] SC 82/20 at page 7 of the judgment

It is in terms of that provision that the present application was instituted. The issue that the applicant wanted referred to a judge in chambers is the same issue this court is being asked to determine. It forms the gravamen of the present application.

Whether the first defendant erred in proceeding to tax a bill which was denominated in the United States dollar currency

The dispute between the parties is only resolvable upon a consideration of the consequences of the law that entrenched the new monetary regime effective 22 February 2019. On 22 February 2019, the Government of Zimbabwe introduced a new currency called the Real Time Gross Settlement Electronic dollar (RTGS), through 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). The 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 accepted as legal tender, under what was known then as the multi-currency basket.

On 24 June 2019, the Minister of Finance and Economic Development caused to be gazetted Statutory Instrument 142 of 2019 (Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019) (SI 142/2019). The 24th 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 sections 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), 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 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—

(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 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.

(3) ……...

(4) Nothing in this section shall affect—

(a) the opening or operation of "nostro foreign currency accounts", as defined in section 44C(5) of the principal Act as inserted by this Act, which shall continue to be designated in the foreign currencies with which they are opened and in which they are operated, nor shall this section affect the making of foreign payments from such accounts;

(b) the requirement to pay in any of the foreign currencies referred to in section 2(1) duties in terms of the Customs and Excise Act [Chapter 23:02]that are payable on the importation of goods specified under that Act to be luxury goods, or, in respect of such goods, to pay any import or value added tax in any of the foreign currencies referred to in subsection (1) as required by or under the Value Added Tax Act [Chapter 23:12].

(5) Notwithstanding subsection (1) and (2), it is permissible to tender any of the foreign currencies referred to in subsection (1) in payment for international airline services". (Underlining for emphasis).

The principal Act referred to in sections 22 and 23 above is the Reserve Bank of Zimbabwe Act.[3] Mr *Masango* for the applicant argued that legal fees and attendances being a financial obligation expressed in United States dollars were incurred and concluded before 22 February

[3] [*Chapter 22:15*] (No. 5 of 1999).

2019, and for that reason, must be deemed to be values in RTGS. He submitted that legal costs sought to be recovered through taxation were a liability to the applicant and valued in the United States dollar before 22 February 2020. They were accordingly converted to RTGS dollars. The second respondent could not therefore claim legal costs in United States dollars when such costs were incurred before the first effective date.

Mr *Masango* further averred that if judgment debts which sounded in United States dollars could be deemed to be RTGS, then legal costs incurred before 22 February 2019 could not remain denominated in the United States dollar even if judgment was obtained after 22 February 2019. He argued that the 2011 tariff could not survive the deeming process as the intention of the Legislature was to convert it to RTGS at the rate of one is to one with the United States dollar. The legal costs therefore fell within the ambit of s 22(1)(d) of the Finance Act.

Mr *Mushuma* for the second respondent argued that a judgment of the court after the effective date in respect of costs of suit incurred in United States dollars before the first effective date was a debt in the sum equivalent to the taxed United States dollar amount in RTGS dollars calculated at the prevailing interbank rate at the date of taxation. He further submitted that the treatment of debts expressed in United States dollars after the first effective date is provided for in s 22(1)(e) of the Finance Act as read with s 22(1)(d) thereof. Mr *Mushuma* further submitted that it was the basis upon which the Supreme Court upheld part of PHIRI J's judgment which ordered payment of the equivalent of US$58,000.00 in RTGS at the prevailing interbank rate.

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. 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. 33/19. The Supreme Court considered the issue of assets and liabilities in *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Ano*[4]. 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 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. 33/19 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…."

Mr *Mushuma* submitted that what distinguished the present case from the *Zambezi Gas Zimbabwe* case was that the judgment in *casu* was only delivered after the first effective date, such that it could not be construed as an asset or liability that fell within the ambit of s 22 (1)(d) of S.I. 33/19. That submission is somewhat persuasive. It can only explain why the court then went ahead and ordered that the applicant pays an amount equivalent to US$58 500 in RTGS calculated at the prevailing interbank rate. Indeed at page 11 of the *Zambezi Gas Zimbabwe* judgment, the court held:

> "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

[4] SC 3/20 at p 9

> 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 the present case, the claim arose way back before the effective date, but judgment of the High Court was delivered after the first effective date on 15 January 2020. The Supreme Court order was handed down on 21 July 2020. The question that arises is, was liability valued and expressed in United States dollars before the effective date or not? Applying the logic in the *Zambezi Gas Zimbabwe* judgment, it seems to me that liability is only deemed to be valued after the court has determined the extent of such liability through a judgment or an order. This would explain why the court ordered payment of an amount equivalent to US$58 500 in RTGS but calculated at the prevailing interbank rate. Had the court interpreted liability in relation to the claim that had not yet been determined, then it would have simply ordered payment of the sum of RTGS $58 500, without the need for applying the interbank rate to equate it to the United States dollar amount. The written judgment of the court would certainly come in handy in clarifying this point.

In the court's view, the same logic would surely apply in relation to the question of costs. If they were incurred prior to the first effective date but only assessed after the first effective date, then the same logic that was applied in respect of the principal amount should apply to the question of costs. However, the position of the law on the question of costs of suit was settled by the Supreme Court in *Zizhou* v *Taxing Officer & Another*[5]. Just like in this matter, the court had to deal with a bill of costs that was denominated in United States dollars. The court held as follows:

> "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"

[5] *Supra* at pages 3-4 of the judgment

My understanding of the court's conclusion is that the entrenchment of the local currency as the sole legal tender made it illegal to denominate the bill of costs in any other currency other than the local currency. The court also dismissed the respondent's argument 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 a currency of their choice. The respondent had further argued that the illegality of the denomination of the bill in United States dollars only arose on 28 September 2019, when S.I. 213/19 (Presidential Powers (Temporary Measures) (Amendment of Exchange Control Act)) Regulations, 2019 was published. It was the instrument that made it illegal to sell goods and services in any other currency save the local currency.

The court found that 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. It merely provided sanctions for contravening the law that had decreed the local currency as the sole legal tender in all domestic transactions. The court reaffirmed the position that 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. The court went on to state 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."[6]

The *Zizhou* case is almost on all fours with the present matter. The court was concerned with a bill that was denominated in United States dollars. In *casu*, the attendances which resulted in the present dispute were denominated in the United States dollars. Mr *Mushuma's* argument that the two cases are distinguishable is clearly without merit. The issues before the courts are the same. In both cases, the taxation was done after the first effective date, and the court was required to determine the legality of denominating the bill in United States dollars after the first and second effective dates.

[6] At page 4 of the judgment

This court is bound by the decisions of superior courts. This position of the law was reasserted by MATHONSI JA in *The Commissioner General v Benchman Investments (Private) Limited*[7], where he said:

> "More importantly, the court *a quo* was bound by the judgment of this Court in *Care International in Zimbabwe*, *supra.* It was not a question of "agreeing" with it. It had to follow that decision given that it is a decision of a superior court. The practice in this jurisdiction, which has withstood the test of time, is that inferior courts are bound by the decisions of courts superior to them. It was therefore not open to the court *a quo* to overlook the pronouncement of this Court on the citation of the appellant in favour of its own fanciful one."

The conclusion by the court in the *Zizhou* case was that it was wrong for a bill of costs to be denominated in the United States dollars and taxed in that currency when the United dollar had ceased to be legal tender by operation of the law. By parity of reasoning, the 2011 tariff in terms of which the impugned attendances were delineated also violated the law. In the *Zizhou* case, the court also found that the denomination of the bill in United States dollars, even if done by consent was irrelevant. The court reasoned that the parties could not by their consent upset the clear letter of the law and confer legality upon a bill of costs denominated in the United States dollars.

For the foregoing reasons, the court finds that the denomination of the items 1 to 133 of the bill of costs was unlawful as it violated the law as determined by the Supreme Court in the *Zizhou* case. It also follows that the first respondent ought to have referred the legal issue for determination by a judge in chambers pursuant to r 313, before proceeding with the taxation. That portion of the bill cannot therefore be allowed to stand.

COSTS

The general rule is that costs follow the event. The applicant had sought costs on the legal practitioner and client scale in the event of the court finding in its favour. At the conclusion of his oral submissions, Mr *Masango* indicated that the applicant was no longer pursuing the award of costs on the legal practitioner and client scale. The award of costs is a matter of judicial discretion. In exercising that discretion, the court takes into consideration the circumstances of each case[8], the issues and the conduct of the parties. The dispute before the court revolves around a fairly complex

[7] SC 88/21 at p 12
[8] *Cronje v Pelser* 1967 (2) SA 589 (A) at 593

area of the law which may require further exploration. I find it befitting under the circumstances to order that each party bears its own costs of suit.

DISPOSITION

Resultantly it is ordered that:

1. The application for review be and is hereby granted.
2. Items **1 to 133** of the bill of costs taxed by the first respondent on 13th August 2020 under **HC 11725/16** be and are hereby set aside.
3. The matter is hereby remitted back to the first respondent for taxation of **Items 1 to 133** of the bill of costs only after second respondent has denominated its attendances in Zimbabwean Dollars.
4. Each party shall bear its own costs of suit.

Muronda Malinga Legal Practice, applicant's legal practitioners
Mushuma Law Chambers, second respondent's legal practitioners