CENTRAL AFRICAN ROAD SERVICES (PRIVATE) LIMITED
versus
COMMISSIONER GENERAL OF ZIMBABWE REVENUE AUTHORITY
and
ZIMBABWE REVENUE AUTHORITY
and
STANBIC BANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 3 August 2017 & 20 September 2017

Urgent Chamber Application

F. Girach, for the applicant
A. Moyo, for 1st respondent & 2nd respondent

CHATUKUTA J: On 30 January 2017, the applicant filed this urgent chamber application seeking the following interim relief:

> "1. That the first and second respondents be and are hereby directed to repay to the applicant any and all monies taken by them pursuant to the issue by the first respondent of the notice in terms of s 58 of the Income Tax Act [*Chapter 23:06*] from the accounts as detailed hereunder:
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> a) Central African Road Services (Pvt) Ltd Stanbic, Bank, Msasa Branch Account number 914 0000443009.
> b) Central African Road Services (Pvt) Old Stanbic Bank, Msasa Branch Account number 914 0000202575.
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> 2. Third respondent be and is hereby directed to disregard the notice in terms of s 58 of the Income Tax Act [*Chapter23:06*] issued to it by the first respondent or any further notices issued to it pursuant to the issue of this interim order.
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> 3. First and second respondent be and are hereby interdicted and restrained from issuing any further notices in terms of section 58 of the Income Tax Act pending finalisation of this application."

The application was dismissed by my sister MATANDA-MOYO J in judgment number HH 110/17 primarily on the basis that it was not urgent. On 7 March 2017, the applicant appealed against the decision under case number SC 126/2017. The appeal was allowed on 17 July 2017. An order was issued setting aside the decision under case number HH 110/2017 and remitting the application for hearing on an urgent basis.

The facts of this matter are lucidly summarised by my sister MATANDA-MOYO J in case number case number HH 110/2017. I can do no better than quote the summary:

> "The brief facts of this matter are that the applicant on 23 June 2014 received a revised income tax assessment for the period January to December 2009, January to December 2010, January to December 2011 and January to December 2012. According to the revised assessments the applicant owed income tax, penalties and interest to the tune of
> US$490 042-54. The parties engaged to no avail. The applicant then filed an objection to the revised assessment which objection was dismissed. The applicant filed an appeal in the Fiscal Appeals Court. Such appeal was argued on 14 September 2015. The judgment was reserved and is yet to be delivered.
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> Prior to filing the application the applicant had on 10 December 2014 written to the second respondent requesting indulgence not to have its bank accounts garnished pending the determination of the appeal. In that letter the applicant acknowledged that "its obligation or liability to pay the assessed tax, is not suspended by the noting of the appeal". The second respondent indicated that it was not its desire to effect a garnishee against the applicant's bank accounts but advised that the applicant's failure to effect payment or provide an acceptable payment plan may necessitate the use of such measures. The applicant was through that response of 19 December 2014 advised to immediately make a payment or come up with a payment plan. The applicant chose to do neither of the above options but responded that should the second respondent choose that route, the applicant should be advised so that it could lodge an urgent application for an interdict against such garnishee.
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> On 23 January 2017 the applicant was advised by the fourth respondent that they had received instructions from second respondent to freeze the applicant's accounts pending a garnishee order. Subsequent to that a garnishee order was issued by ZIMRA. A total amount of
> $85 180-00 has so far been debited."

Aggrieved by the second respondent's decision to attach the applicant's accounts with the third respondent and the removal of the funds, the applicant filed the present application for an interdict.

The parties were agreed as to the requirements for an interdict which are that the applicant must establish:

(a) a prima facie right even if it is open to doubt;
(b) an infringement of such right or a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;

(c) a balance of convenience favouring the grant of the interdict; and
(d) the absence of any other remedy. (*Bozimo Trade and Trading Co (Pvt) Ltd* v *First Merchant Bank of Zimbabwe Ltd & Ors* 2000 (1) ZLR (HC) 9; *Phillips Electrical (Pvt) Ltd* v *Gwanzura* 1988 (2) ZLR 1117 (HC); *Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunication Regulatory Authority of Zimbabwe & Ors* 2015 (1) ZLR 651.)

Mr Girach submitted that the applicant has a right to prompt, efficient and reasonable administrative conduct as provided for in terms of s 68 (1) of the Constitution as read with s 3 (1) of the Administrative Justice Act [*Chapter10:28*]. The right was infringed by the second respondent with the garnishing of its account with the third respondent. The dispute regarding the tax due to the second respondent arose as far back as 2014 when the applicant challenged the tax assessment for the years 2009 to 2012. From 2014, the second respondent did not garnishee despite being entitled to do so in terms of the Income Tax Act [*Chapter 23:06*] (the Act). The second respondent only did so in December 2016, more than a year later after the hearing of the appeal in the Fiscal Appeals Court. Further, the second respondent issued the applicant with a tax clearance certificate (ITF 263) at the end of December 2016 implying that it did not owe any tax. Whilst it was lawful for the second respondent to garnishee the applicant, the delay in doing so was not in conformity to the dictates of the Constitution and the Administrative Justice Act and therefore unlawful. The delay "lulled" the applicant into believing that the second respondent was not proceeding with its lawful mandate, to garnishee it.

It was further submitted that the applicant would suffer irreparable harm as it will cease to operate resulting in the closure of its operations and the unemployment of its employees. The second respondent had waited for two and a half years to garnishee it and would not suffer any prejudice during that period and whilst awaiting the determination of the final relief sought. The balance of convenience therefore weighed in the applicant's favour.

Mr Moyo submitted that the applicant had not established any *prima facie* right. The conduct by the second respondent was constitutional and lawful as conceded by the applicant. It was not competent for the court to interdict lawful conduct. The second respondent was obliged to act in accordance with the law. The first respondent could not suspend the operation of an act of parliament except upon a request by the applicant which request was not made. There being no time limit within which a garnishee should be effected, perceived delay did not constitute failure to act promptly. Besides, the applicant had an alternative remedy, that is to approach the first respondent and it failed to do and is therefore the author of its misfortune.

Section 68 of the Constitution does guarantee every person the right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. The first question for determination is therefore whether the delay by second respondent in performing the constitutional and lawful function of garnishing the applicant creates a right entitling the applicant to an interdict. This very question was, in my view dealt with in *Zimbabwe Revenue Authority* v *Packers International (Private) Limited* SC 28/2016 (*Packers International*). GOWORA JA at p11 remarked as follows:

> "It seems to me that the criticism of the approach taken by the learned judge is not entirely unwarranted. Having dealt with the lawfulness of the actions of ZIMRA, the court a quo then deviated and sought to review the imposition of the garnishee on the basis of alleged unreasonableness. In the cyclostyled judgment, the court a quo remarked:
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> "I propose to start by looking at what the highest law in the land has to say about the exercise of a discretion by an administrative body. Section 68 of the Constitution of Zimbabwe provides that Section 3 of the Administrative Justice Act provides as follows: Section 2 provides for Interpretation and application. Respondent by his own description in para 5 of the notice of opposition is an administrative authority. My reading of the interpretation section of the Administrative Justice Act is that any action taken by the respondent or any of its employees, is administrative action, and that in exercising discretion in any administrative action, the conduct must be reasonable and substantively and procedurally fair. Applicant has not denied that the respondent's actions were lawful. My understanding of the applicant's contention is that the exercise of the discretion by the respondent was not reasonable, in the sense of violating the provisions of s 3 (1) (a) of the Administrative Justice Act, and s 68 of the Constitution, in the sense that the exercise of discretion was not reasonable, or proportionate, or both substantively or procedurally fair to it."
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> Once it was conceded by Packers that the conduct by ZIMRA was lawful, such concession effectively defeated its cause of action as it rendered the perceived unlawfulness of ZIMRA actions nugatory. If the court found as a fact that the appointment of FBC Bank was properly made in terms of s 48 of the relevant Act, it begs the question in what circumstances the discretion to appoint the agent may become subject to review on the basis of alleged unreasonableness."

The import of the above in my view is that once it was conceded that the second respondent's conduct was lawful, an interdict cannot be issued to restrain the exercise of that lawful conduct. The applicant in the present matter, as in *Packers International* conceded that the discharge by the second respondent of its function to garnishee the applicant was not only constitutional but also lawful in terms of s 68 of the Income Tax Act. The delay in garnishing the applicant cannot therefore be said to be unlawful.

The question can further be looked at by considering whether or not there is a time-limit within which the second respondent is enjoined to exercise its function. Put differently, the promptitude of the second respondent is dependent on whether or not there is a time frame provided by the Act or any other law within which the second respondent must act. It appears there is no such limit, except probably in the Prescription Act [*Chapter 8:11*]. In terms of s 15

(a) (iii) of the Prescription Act, the prescription period of a debt in respect of taxation imposed or levied by or under any enactment is thirty years. The garnishee by the second respondent was within the prescription period. Given the prescription period of thirty years, the garnishing of the applicant within the period complained of by the applicant cannot be considered to create a right to prompt administrative action. In any event, a right is not created by conduct but by law. Consequently, the applicant's right to prompt and reasonable administrative conduct cannot be said to have been infringed.

Further, it is clear that an interdict was not the appropriate relief in the present circumstances where monies had already been removed from the applicant's account with the third respondent. An interdict is meant to prevent future conduct and not decisions already made or actions already done. Whilst the applicant has termed the relief sought an interdict, it appears to me that what the applicant seeks is akin to spoliatory relief, which is the restoration of the *status quo ante*. It is understandable why the applicant sought to term it an interdict. The conduct of the applicant was lawful.

The appropriateness of an interdict in such circumstances was discussed in *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority* CCZ 7/2014 ((2) ZLR 78). MALABA DCJ (as he then was) observed at 84 E-H that:

> "The subject of the application is not the kind of subject matter an interdict, as a remedy, was designed to deal with. An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a prima facie right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired.
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> It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a prima facie right. It is also axiomatic that the prima facie right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct. *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S); *Stauffer Chemicals* v *Mansato Company* 1988 (1) SA 895; *Ruddolph & Anor* v *Commissioner for Inland Revenue & Ors* 1994 (2) SA 771." (See also *Packers International* (supra) and *National Treasury & Ors* v *Opposition of Urban Tolling Alliance* [2012] ZACC 18).

The applicant is seeking return of monies already recovered by the second respondent. The horse has already bolted. It is therefore not competent for me to grant an interdict in the present matter. It appears that the application is premised solely on the fact that the applicant was "lulled" into believing that the second respondent was not going to proceed to garnishee it. It is this lulling that the applicant seeks to convert into a constitutional right. It is not correct that the applicant was lulled into believing that the respondent was no longer going to garnishee it. The second respondent gave the applicant notice of its intention to garnishee as far back as

November 2014. It was given an opportunity to suggest a payment plan. Instead, it did not so and requested to be given notice of garnishee which notice was by operation of the law upon being notified of the assessment. It was not entitled at law to any further notice.

The applicant was simply sluggard and seeks to hide behind the perceived administrative misconduct of the second respondent to cover up for its tardiness. It is trite that the law does not protect the sluggard.

The applicant sought to rely on the ITF 263 in support of its proposition that the decision of the second respondent was irrational in that soon after issuing the ITF 263 which stated that his tax position was satisfactory and proceeded to garnishee its accounts the same month. I failed to comprehend the relevance of the ITF 263. The ITF 263 clearly reflects that it was for the year ending 31 December 2016. It surely could not cover the applicant's tax position for the disputed period between the year 2009 and the year ending 2012. In my view nothing turns on that document.

The next question for determination is whether the balance of convenience weighs in favour of the applicant. The question is best answered by understanding the rationale for collection of revenue by Government. During the hearing of this application, I requested the parties to consider the relevance of my decision in *Bindura Nickel Corporation Ltd* v *The Zimbabwe Revenue Authority* 2008(1) ZLR 152 (H). The applicant was of the view that the case was of no relevance to the determination of this application presumably because the issue before the court was whether or not the *in duplum* rule applies to tax debts. The applicant appears to have overlooked the two legal principles therein contained and identified by the 1st and second respondents that: the relationship between a taxpayer and the second respondent is not that of borrower and lender. It is a statutory relationship which is governed by the relevant acts on collection of revenue. Further, public policy and statute requires that taxes be paid promptly when they are due and payable. In that I observed at p 160 that:

> "The relationship between the applicant and the respondent is a statutory relationship where the interest charged is intended to be compensatory for failure to pay tax on the due date. It appears to me that the relationship is in fact more than that. It is a relationship between the state and a subject, where it is in the domain of the state to tax its subjects."

At p 162 I further observed that:

> "As alluded to earlier, it is my view that the relationship between the applicant and the respondent is a statutory one and does not fall under the contracts or transactions as perceived in the decided cases. The whole purpose of the relationship between the applicant and the

respondent is to enable the respondent to raise, by way of tax, public revenue. As stated in Revenue Law Principles and Practice, C Whitehouse and Elizaberth Stuart-Buttle at p 2-4, tax is a compulsory levy imposed by the government or local authority. The money so raised is intended for public purpose i.e. for government expenditure.

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I do not believe that public policy would dictate that a taxpayer, who has defaulted in paying tax and interest thereon can benefit from the *in duplum* rule. The tax is raised for the good of the public. Judicial note is taken of the fact that tax payable in any given year forms part of the national budget. It is inconceivable to imagine what would happen to the fiscus if taxpayers were to be given the comfort that they can hold onto their money until interest due on overdue tax is equal to the capital amount and they can proceed holding onto their money thereafter until the Commissioner sues for what is due."

The above principles are consistent with s 298 of the Constitution which provides for the principles of the management of public finances. The principles are also aptly and lucidly stated in *Mayor Logistics* (*supra*) at 85 E-G where MALABA DCJ remarked:

"Whilst ss 36 of the Vat Act and 69 (1) of the Income Tax Act provides, that the occurrence of any of the specific events, shall not suspend the taxpayer's obligation to pay the tax assessed to be due and payable, they at the same time create a remedy for the amelioration of possible financial hardships faced by an individual taxpayer. They give the Commissioner the discretionary power to suspend the obligation pending the determination of the appeal by the Fiscal Court or pending the decision by a court.

Failure to fulfil an obligation may be due to a variety of circumstances. The legislature decided to place the responsibility of deciding whether or not the particular circumstances of a taxpayer, entitle him or her to a directive suspending the obligation to pay the assessed tax, on the Commissioner. A court of law would be acting unlawfully if it usurped the discretionary powers of the Commissioner and order a suspension of the obligation on a taxpayer to pay assessed tax pending determination of an appeal by the Fiscal Appeals Court." (See *Zimbabwe Revenue Authority* v *Packers International (Private) Limited* SC 28/2016 at pp8-9.)"

He further remarked at 86 H -87 B that :

"Section 36 of the Vat Act and 69 (1) of the Income Tax Act are laws of general application. Although the applicant framed the interim order on the belief that it would affect its immediate interest only, the truth of it is that the relief cannot be granted without bringing into question the efficacy of the whole revenue collection system. The interim relief would be suspending the operation of the statutory provisions for all tax payers who are under the same continuing obligation to pay the assessed tax liability as the applicant." (*Zimbabwe Revenue Authority* v *Packers International (Private) Limited* (*supra*) at pp 4-5, *PMA Real Estate Agency (Private) Limited* v *Agricultural and Rural Development Authority* (HH 236/11) 2011 (2) ZLR 355 at 365G-366A and *Foroma* v *Minister of Public Construction & National Housing & Anor* 1997 (1) ZLR 447 (HC) at 464 D-H.)"

The same views were also elaborately stated in *National Treasury & Ors* v *Opposition of Urban Tolling Alliance* [2012] ZACC 18. In that case the applicants were resisting the

implementation of the toll system and the charging of toll fees in South Africa. MOSENEKE DCJ made the following remarks:

> " [43] A little less than 40 years before the advent of our Constitution, in *Gool* v *Minister of Justice and Another* 1955 (2) SA 682 (CPD), a full bench of the Cape Provincial Division was called upon to grant an interdict restraining the Minister *pendent lite* from exercising certain powers vested in him by a statute. Ogilvie Thompson J, writing for a unanimous Court, considered the requirements of an interim restraining order announced in *Setlogelo* and said the following:
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> > "the present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of *mala fides*, the Court does not readily grant such an interdict (at 688F)
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> [47] The balance of convenience enquiry must now carefully probe whether and to what extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases" However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.
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> [63] There is yet another and very important consideration when the balance of convenience is struck. It relates to separation of powers. In *ITAC* we followed earlier statements in *Doctors for Life International* v *Speaker of the National Assembly and Others* [2006] ZACC 11, 2006 (6) SA 416 (CC) 2006 (12) BCLR 1399 (CC) and warned that:
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> > "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp the power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."
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> [64] In a dispute as the present one, this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public

power is subject to constitutional control. In an appropriate case an interdict may be granted against it. For instance, if the review court in due course were to find that SANRAL acted outside the law then it is entitled to grant effective interdictory relief. That would be so because the decisions of SANRAL would in effect be contrary to the law and thus void.

[65] When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of the division of powers. Whilst the court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

I wholly associate myself with the observations in the excerpts from *Mayor Logistics* and *National Treasury & Ors* v *Opposition of Urban Tolling Alliance*. What is clear from the excepts is that:

(a) one cannot seek an interdict from conduct that is lawful and more particularly that has already occurred;
(b) any irregularity arising from exercise of a lawful mandate does not necessarily constitute a violation of the Constitution;
(c) courts will refrain from usurping the authority of entities empowered in a statute to provide the very remedy sought before the court and particularly where the relief sought will result in breaching the principle of separation of powers, except in the "clearest of cases";

In light of the above, the conduct of the first and second respondents is above reproach. The applicant has therefore failed to establish a basis for the granting of the interdict.

It is accordingly ordered that:

1. The application be and is hereby dismissed.
2. The applicant be and is hereby ordered to pay the first and second respondents' costs of suit.

Costa and Madzonga, legal practitioners for the applicant
Kantor and Immerman, legal practitioners for the 1st and 2nd respondents