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

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 3 & 22 February 2017

Urgent chamber application

F Girach, for the applicant
A Moyo, for the 1st and 2nd respondents

MATANDA-MOYO J: The applicant, a transport company duly incorporated according to the laws of Zimbabwe brought this urgent application for 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 section 58 of the Income Tax Act [*Chapter 23:06*] from the accounts as detailed hereunder:
> 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.
> 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.
>
> 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 brief facts of this matter are that the applicant on the 23rd of 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 the 14th September 2015. The judgment was reserved and is yet to be delivered.

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 chose that route, the applicant should be advised so that it could lodge an urgent application for an interdict against such garnishee.

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.

The applicant seeks the granting of the provisional order on the basis that:

1) The first and second respondent failed to observe the law in particular s 68 of the Constitution. Alternatively the respondent acted in a manner which offends against their duty at law to act in a reasonable and fair manner as enshrined in the Administration of Justice Act.
2) The first and second respondent failed to give notice in terms of s 33 (1) of the Zimbabwe Revenue Act [*Chapter 23:11*].

Firstly the first and second respondent raised preliminary points in the following;

a) That the matter is not urgent.
b) That the citation of first respondent was improper and
c) That the applicant had used the wrong form in bringing the application.

<u>Urgency</u>

The respondent challenged the issue of urgency on the basis that the applicant had been aware of its obligations to pay the revised assessed taxes as from 23 June 2014. There was communication between the parties on the issue. In December 2014 the applicant was advised to settle the amount or to provide a payment plan, which it did not do. The urgency is self-created as it stems from the applicant's failure to abide by the law.

The respondents also submitted that they acted lawfully in appointing fourth respondent as an agent in terms of s 58 of the income Tax Act [*Chapter 23:06*]. It is lawful for the respondents to recover assessed tax in terms of s 69 of the Income Tax Act. Urgency cannot arise from possible hardship to be faced due to effects of a lawful conduct. In any case no proof of such hardships has been provided by the applicant.

The applicant on the other hand argued that this matter is urgent. The urgency stemmed from the garnishing of their accounts with the fourth respondent. From as far back as June 2014 the respondents did not act in terms of s 58 of the Income Tax Act and created an impression on the applicant that they would await the outcome of an appeal against the revised assessment by the respondents. Such appeal was argued in September 2015 and judgment was reserved. The applicant argued that the urgency was created by the first and second respondents who without notice wrongfully and unlawfully seized the applicant's monies. Such seizure led to the applicant failing to access money to meet its daily obligations including paying workers. The applicant can no longer service its monthly financial obligations. The applicant submitted that it could be forced into liquidation should the garnish persist. Its employees would suffer so would the shareholders.

The issue of whether a matter is urgent or not is now settled in our law. It is obvious that a litigant who brings his application on an urgent basis enjoys an advantage over persons whose matter await hearing in the normal course of events. For a litigant to be accorded such favour, he must show that his matter cannot wait as to do so would render any subsequent hearing of no benefit to him.

The applicant ought to therefore set explicitly the reasons which he avers renders the matter urgent. He must show why he is saying he cannot be afforded substantial redress at a later hearing. The hearing of a matter on an urgent basis is underpinned by the issue of absence of adequate remedy in the application being heard at a later stage on the ordinary roll. Whether an applicant can get substantial redress at a later stage depends on the facts of each case. The onus is on the applicant to make out his case on that basis. See *General*

Transport and Engineering (Pvt) Ltd and Ors v *Zimbank* 1998 (2) ZLR 301 H, *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 24 (H).

In the case of *Triple C Pigs and Anor* v *Commissioner-General,* ZLA 2007 (1) ZLR 27 (H) at D to F the court had this to say:

> "It is obvious, that in so far as the applicants are concerned, the day of reckoning, had arrived. They were being called upon to pay what was required by the Zimbabwe Revenue Authority or dire consequences would …… Clearly, from their perspective, the matter was urgent in that they were being put on terms to pay what the respondent claimed to be legally due to them. They are clearly intent on stopping all efforts to make them pay the sums thus demanded until the appeal lodged with the fiscal Appeal Court is determined. That in itself is not sufficient to justify granting the applicants the privilege of jumping the queue and having the matter heard ahead of a host of other litigants. When a court is considering whether or not a matter is urgent, each case is judged according to the circumstances surrounding the matter. The test is, however, not subjective ….. but objective."

The applicant must therefore show an unlawful action being perpetrated upon them by the respondent which may cause irreparable damage to them. The applicant has stated that the respondent has violated its right in terms of s 68 of the Constitution which action has the likelihood of paralysing its operations.

Section 68 of the Constitution is not applicable in this matter. The applicant has failed to show any right it has not to pay assessed taxes. I am satisfied that the matter should fail on the issue of urgency.

Even on time factor it is my finding that the applicant had knowledge from June 2014 that it should either pay the assessed tax or provide a payment plan but failed to do either of the two. The requirement to act arose then. The urgency has been self-created by the applicant's failure to provide a payment plan. See also *Zimbabwe Revenue Authority* v *Packers International (Pvt) Ltd* SC 28/16 at p 7 where the court held that:

> "A refusal to pay or failure to do so on the part of the operator would result in the imposition of a garnishee. Therefore, once the tax assessment was made, the imposition of the garnishee was a possibility. In my view no other conclusion is possible."

The respondent also submitted that there is no natural or juristic person known as the Commissioner General of the Zimbabwe Revenue Authority. I was referred to the cases of *JDM Agro-Consult & Marketing (Pvt) Ltd* v *The Editor of the Herald Newspaper and Anor* HH 61/07, and *Tregers Industries (Pvt) Ltd* v *Commissioner General of the Zimbabwe Revenue Authority,* where GARWE JP (as he then was) said:

> "In the circumstances, I find that the Commissioner General of the Authority has been wrongly cited as the respondent and it is the authority itself that should have been so cited. I accordingly uphold the point raised *in limine* by the respondent and on that basis alone would dismiss the application."

The applicant submitted that this particular point could not conclusively deal with the issue as the Authority has also been cited. I agree but find that indeed the first respondent has been improperly cited. I do not wish to deal with this matter further than this.

On the issue dealing with non-compliance with the rules the second respondent conceded that condonation be granted in terms of r 4C and I condoned such non-compliance.

In case I am wrong on the issue of urgency, I shall proceed to deal with the merits of this matter. The applicant seeks an interdict for the return of monies already debited from its account. Such amounts cannot be recovered by use of an interdict process. The second respondent has referred me to the case of *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority CCZ* 7/14 where MALABA DCJ on pp 8 and 9 of the cyclostyled judgement had this to say;

> "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."

I therefore conclude that for the monies already debited from the account, there can be no interdict. I shall look at the requirements for an interdict in connection with future debits.

In order to succeed in an application for a temporary interdict, the applicant must prove;

a) a *prima facie* right even if it is open to some doubt;

b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;

c) that the balance of convenience must favour the grant of the interdict and

d) that the applicant has no other remedy See *Sethogelo* v *Sethogelo* 1914 AD 221, *Webster* v *Mitchell* 1948 (l) SA 1186 (WLD). In *Gool* v *Minister of Justice and Another* 1955 (2) SA 682 (CPD) the court had this to say;

> "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 exercise of statutory powers. In the absence of any allegations of mala fides, the court does not readily grant such an interdict."

The applicant submitted that its rights in terms of s 68 of the constitution as read with the Administration of Justice Act have been infringed. Section 68 provides;

> "Right to administrative Justice

(i) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionately impartial and both substantively and procedurally fair."

The applicant argued that because it called upon the second respondent as far back as 19 December 2014 to indicate whether it was proceeding with an attachment, and received no response from the second respondent, to try place a and garnishee on its account some two years later is in violation of the above constitutional provisions. In the circumstances the second respondent's actions cannot be regarded as prompt or efficient or reasonable. The applicant is of the view that the second respondent acted in an unreasonable and outrageous manner contrary to s 3 (1) of the Administrative Just Act [*Chapter 10:28*]. The applicant also argued that the second respondent failed to follow the Provisions of the Revenue Authority Act [*Chapter 23:11*] in particular s 33 C, D and G.

On the other hand the second respondent argued that the applicant has failed to show any *prima facie* right. The applicant has failed to show any unlawful infringement of its rights by the second respondent. The appeal to the High Court does not suspend the applicant's duty or obligation to pay the assessed tax – s 69 (1) of the Income Tax refers. It provides;

"The obligation to pay and the right to receive any tax chargeable under this Act shall not, unless the commissioner otherwise directs and subject to such terms and conditions as he may impose, be suspended pending a decision on any objection or appeal which may be lodged in terms of this Act."

The second respondent has used its powers in terms of the law to appoint an agent for collection of taxes; s 58 (1) of the Income Tax Act refers. The applicant is not challenging the constitutionality of the above section. It agrees that is the law. All the applicant has done is to raise the issue of delay in appointing an agent.

I am of the view that in terms of s 58 (1) and s 69 of the Income Tax Act, the second respondent does not require to issue any notice. The applicant has confused the procedure above with an alternative procedure in s 33 C, D, and G of the Revenue Authority Act.

The delay in appointing an agent cannot be interpreted as offending against s 68 of the Constitution as read with s 3 (1) of the Administrative Act. The applicant enjoys no right not to pay tax once assessed. Therefore once the tax was assessed in June 2014 it became due and payable. In fact the applicant brought about its own woes by failing to provide a payment plan. The current environment requires astute business people to ensure they co-operate with Revenue Collecting agents to come up with ways of paying fiscal obligations whilst ensuring the continuity of the company. The second respondent explained to the applicant that it was

not its desire to invoke s 58 (1) of the Income Tax Act but the applicant was unreasonably arrogant.

I am of the view that the second respondent's conduct was lawful and no court can interdict a lawful process. See *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority* CCZ 7/14, and *Zimbabwe Revenue Authority* v *packers International (Pvt) Ltd* SC 28-16.

The matter thus fails on the first huddle.

The respondent's counsel also referred me to the case of *National Treasury and Others* v *Opposition to Urban Tolling Alliance and Others* [2012] ZAAC 18 where at p 22 of the judgment MOSENEKE DCJ had this to say;

> "……. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive …… of the Executive and Legislative Branches of Government unless the intrusion is mandated by the Constitution itself. ……
> ……
> ……..
> ……Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought."

Applying the above law to the facts of this matter, I have failed to find any unlawful act perpetrated on the applicant. The second respondent as a matter of public policy should not be interrupted in the collection of revenue on behalf of the government. Government relies heavily on such taxes to survive. Interruptions must be justified, lest its functions grind to a halt. It is not in the public interest to do so. There is no evidence that the second respondent acted in bad faith. Neither is there any evidence of gross unreasonability of its decision.

The applicant has failed to show a *prima facie* obligation not to pay assessed taxes.

Of course the court sympathises with the end result that the second respondent has garnished every cent coming into the account, which may result in liquidation of the applicant. I urge second respondent in similar matters to consider leaving enough funds for a company to continue operating. I do not believe this is the resultant effect desired, to kill the goose that lays the eggs. It is in the national interest that companies must be allowed to survive so that the base for collecting revenue remains wide. I however also take note of the hand extended to applicant to provide a payment plan.

Coming back to the legal issues involved, the application for an interim relief fails on the basis that the conduct of the respondent cannot be impeached.

In the result the application is hereby dismissed with costs.

Costa & Madzonga, applicant's legal practitioners
Kantor & Immerman, 1st & 2nd respondent's legal practitioners