MINISTER OF HIGHER AND TERTIARY EDUCATION
SCIENCE AND TECHNOLOGY DEVELOPMENT N.O
versus
GREEN FUEL (PVT) LTD

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 25 January 2017 & 15 November 2017

**Stated Case**

*T Magwaliba,* for the applicant
*D Ochieng,* for the respondent

HUNGWE J: This matter proceeded by way of a stated case, the parties having agreed that there were no material disputes of fact in the matter.

The agreed facts upon which the case was stated are as follows. The defendant is involved in the enterprise of sugarcane production on its Chisumbanje Estates, Masvingo Province. Defendant's activities include the planting and cultivation of sugarcane, which is eventually harvested and conveyed to a milling plant at the Estate. At this mill the defendant crashes the cane to extract cane juice from which bio-ethanol is produced. The bio-ethanol is eventually sold into the market.

In terms of the Manpower Manning and Development (Levy) Notice in Statutory Instrument 74 of 1999 ("S.I.74/99"), the applicant is entitled to raise a levy payable by the defendant. By the time the plaintiff instituted his action defendant had, over time, paid US$232 120.05 to the Zimbabwe Manpower Development Fund ("ZIMDEF") as statutory levies in terms of the law.

As such the stated case is whether or not the defendant is wholly exempt from paying the statutory manpower development levies. If l find that defendant is liable to pay, the parties agreed that the amount due to plaintiff from the defendant is US$84 176.76. If l do not so find, that the parties are agreed that the defendant is entitled to a refund of $143 921.82.

The plaintiff contends that the defendant being a manufacturer of ethanol used to blend petrol, falls outside the exemption set out in paragraph 0110 of the Second Schedule to the Statutory Instrument 74 of 1999. The defendant has previously accepted this classification by

its conduct in paying the levies demanded in terms of the law. As such the defendant cannot now seek to resile from this position by way of a counter-claim disputing liability. Put differently plaintiff argues that the interpretation given to the law accepted by both parties previously cannot be a subject of any dispute before this court in a counter-claim against a lawful demand for levies due to plaintiff. The defendant is estopped from challenging the liability to pay levies as it has previously admitted that it is liable at law to make such payments.

The defendant, on the other, hand argues that the fact that it had previously erroneously interpreted the exemption clause is no bar to the counter-claim. The defendant argues that the plaintiff's claim is ultra vires the Notice as that Notice does not provide for the recovery of a levy on only part of an employer's wage bill. Secondly, the defendant argues that the Notice provides for total exemption in the case of employers engaged in agriculture. The Notice in S.I. 74/99 prescribes the basis upon which an employer will be levied. The respondent argues that on a literal interpretation of the relevant clause, the plaintiff has no power to raise a levy on only a portion of the wage bill. The relevant clause provides:

> "…..every employer shall pay a levy assessed at one *percentum* of his total monthly wage bill".

The defendant argues that the Notice allows the plaintiff to impose a levy on the whole of the wage bill, there is no power to raise or impose a levy on only a portion of the wage bill.

I am unable to agree with this submission however attractive it sounds. On a plain and literal interpretation of the exempting paragraph, the defendant is in my view, not exempt. The ordinary principle applicable in relation to the classification of operations of an enterprise or undertaking was set out in *Border Traders (Pvt) Ltd* v *Minister of Higher Education* 2000 (2) ZLR 77 (S) where at p 80 GUBBAY CJ states;

> "In the leading case of *R* v *Sidesky* 1928 TPD 109, it was held that the character of the trade or industry is determined, not by the kind of occupation in which the employers in the trade or industry are engaged, but by the nature of the enterprise in which the employers are engaged, for a common purpose; and that, once its character is determined, all the employees are engaged in that trade or industry, whatever the actual work maybe which the employer allots them"

See also, *Amble Side Tobacco Grinding Co Ltd* v *Abrahamson N.O. Selous and Hartley Tobacco Grading Co* v *Abrahamson N.O.* 1959 (1) SA 259 (SR) where the dominant enterprises or purpose approach was applied.

In the present matter the business of the defendant is ethanol production. As an incident to the production of ethanol, the defendant engages in farming in order to obtain raw materials. It does not produce and sell sugar cane as a crop.

In any event the defendant has previously admitted to being a predominantly an ethanol producer as opposed to a farmer. As a result of this admitted status the defendant paid up to US$232 120-05 over a long period of time. In terms of the law that admission, stands as fact. It is binding on the defendant. Section 36 (1) of the Civil Evidence Act, [*Chapter 8:01*]. See also *Rex* v *Lenner* 1958 (2) S.A 583, *Industry Pensions Fund* v *United Refineries Ltd & Anor* 2012 (2) ZLR 98 (H).

As the defendant has made no application for the withdrawal of the admission, the defendant cannot resile from the admission. The counter-claim must therefore fail.

In any event, the counter-claim is not premised on any cognisable cause of action. Defendant's counter-claim is not based on a claim that the payment was made on the basis of an invalid piece of legislation. If the amount that defendant now counter-claims was made in terms of the law, there can be no basis for recovering such payments as the defendant is claiming in its counter-claim. Had it been that defendant based its counter-claim on a claim that payment was made in terms of an invalid law, then in that event, defendant could possibly recover on the basis of unjustified enrichment. In any event the defendant has not pleaded a *condictio indebiti* which would be the only possible basis for the counter-claim. See *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA).

In the event the counter-claim fails.

The final contention by the defendant is that the Notice does not provide for the recovery of a levy on only a portion of an employer's wage bill. In the *Border Timber's* case (*supra*) GUBBAY CJ, relying on *R* v *Giesken and Giesken* 1947 (4) S.A 561 (A) held that:

> "there was a common and dual purpose of the employer and his employee – they were engaged on two enterprises, each of which was to be treated as a separate trade or industry."

The plaintiff is entitled to treat the separate operators as distinct from each other for the purposes of levying the defendant. In my view the plaintiff is strictly within the law in so doing.

In the result I must answer the stated case as follows:

1. The defendant is not wholly exempt from paying the statutory manpower development levies.
2. The defendant be and is hereby ordered to pay to the plaintiff the sum of US$84 176-17 being outstanding manpower training levies.

3. The defendant be and is hereby ordered to pay interest on the sum of US$84 176, 00 from the date of summons to the date of payment in full together with costs.
4. The counter-claim be and is hereby dismissed with costs.

*Mawere Sibanda*, plaintiff's legal practitioners
*Coghlan Welsh & Guest,* defendants' legal practitioners