OMNIA FERTILIZER ZIMBABWE (Pvt) Ltd
versus
ZIMBABWE REVENUE AUTHORITY
and
STANBIC BANK
and
FIRST CAPITAL BANK LIMITED
and
STANDARD CHARTERED BANK ZIMBABWE LIMITED
and
CENTRAL AFRICA BUILDING SOCIETY
and
NMB BANK LIMITED
and
ECOBANK ZIMBABWE LIMITED
and
NETBANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE; 5 February & 10 May 2024

Urgent Chamber Application

Mr *M Tshuma*, for the applicant
Ms *E Bishi*, for the 1st respondent
No appearance for 2nd to 9th respondents

MUCHAWA J: This is an urgent chamber application for an interdict in which the order sought is spelt out as follows:

"TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms-

1. The interim order herein be and is hereby made the final order

2. The assessments issued under assessment number 1507, 1508, 1509,1510, 1511 and 1512 are hereby set aside.
3. First respondent shall pay the costs of this application on the legal practitioner and client scale.

INTERIM RELIEF GRANTED

Pending determination by first respondent to the challenge of the tax assessments filed by the applicant, the applicant is granted the following relief-

1. The first respondent be and is hereby interdicted from instituting and/or effecting any collection measures under assessment numbers 1507, 1508, 1509, 15120, 1511 and 1512 including but not limited to any garnishee orders in terms of s 58 of the Income Tax Act, on the applicant's bank accounts.
2. The second to ninth respondents be and are hereby interdicted from transferring any funds pursuant to any collection measures instituted by the first respondent."

Background

The applicant is a duly registered company which manufactures and supplies chemicals and specialized services and solutions for the agriculture and chemicals application industries.

The first respondent is an administrative authority established in terms of the Revenue Authority Act [*Chapter 23:11*] mandated to collect taxes and other statutory dues and fees.

The second to ninth respondents are companies operating as registered commercial banks. It is the second to the eighth respondents who are the applicant's bankers wherein the applicant holds banking accounts.

It is explained that the applicant earns revenue in both local and foreign currency, particularly United States Dollars and also incurs expenses in both local and foreign currency.

The applicant alleges that it duly submitted its income tax assessment for the relevant years 2020 to 2022 within the stipulated submission deadlines and settled its dues in full using the legal tender of the country being the Zimbabwe Dollar. A total amount of ZWL 183 392 906.00 was paid. In addition, a further amount of US$180 000.00 was paid in an attempt to reach an amicable settlement to this matter.

Despite the applicant's conviction that it had properly discharged its obligations, the first respondent, on 28 April 2023 issued tax assessments covering the years 2020 to 2022. These

assessments reflected that the applicant had wrongly computed all its tax payable in Zimbabwean dollars. The first respondent's figures were US$14 442 763.00 made up of the principal amount of US$12 035 635.83 and a penalty of US$2 407 127.17. The applicant was therefore required to pay the tax shortfall of US$14 442 763.00.

Upon being notified of this shortfall, the applicant and first respondent conducted round table meetings leading to the first respondent making adjustments on the initial amount assessed as owing. This was after the consideration of evidence tendered by the applicant. In the result the principal liability was assessed as US$3 246 445.10 and a penalty of US$649 289.02 totaling US$3 895 734.12.

On 4 December 2023, the applicant addressed a letter to the first respondent requesting for stay of collection in terms of s 69 of the Income Tax Act [*Chapter 23:06*]. On 6 December 2023 the applicant submitted its objection to the assessments raised. On 14 December 2023, the first respondent responded to both the initial letter and the objection and advised that as the reasons for stay of collection and those in the objection were similar, a determination by the Commissioner would deal with both at the same time. It was explained therein that the payment of tax is not suspended pending the decision on an objection lodged in terms of s 69 of the Income Tax Act. The applicant was advised to settle the tax debt of US$3 895 734.12 whilst waiting for the Commissioner's determination. There was no compliance by the applicant. The first respondent claims to have exercised its powers in terms of the Income Tax Act and proceeded to appoint the applicant's bankers, second, third, sixth and ninth respondents as agents for purposes of collecting the assessed tax by way of a garnishee order.

Despite the garnishee order, the first respondent claims that no funds have come through the applicant's banks as the third respondent advised that they only held a balance of US$1156.82. The sixth respondent gave a balance of US$6449.03 whilst the ninth respondent did not advise of the balance. The second respondent is said not to have given any response.

These are the facts giving rise to the urgent application before me. The first respondent raised preliminary points as follows:

(i) That this matter is not urgent

(ii) That the applicant has not exhausted internal remedies.

On the other hand, the applicant raised its own point which it termed an anterior issue to be determined before delving into the first respondent's points *in limine*. I heard the parties on all these points and reserved my ruling.

At the point of writing my ruling, I asked the parties to file supplementary submissions on the propriety of first dealing with the applicant's anterior issue before the preliminary points raised by the first respondent. These were duly filed. I now consider the parties submissions on all three issues including the issue I raised.

The applicant's submissions on the anterior issue

Mr *Tshuma* submitted that they are raising an anterior issue to be decided before the issue of urgency. The issue was said to be on the "Pay now argue later principle" and its inapplicability in this case.

It was averred that the dispute between the parties is whether the debt is due and therefore payable. Mt *Tshuma* argued that the common law position is that when there is a dispute over a debt, a court of law must intervene to prevent parties resorting to self-help. This is done by the court entering a decision. For this argument, the court was pointed to the case of *Lloyd Manokore* v *Law Society of Zimbabwe* SC 70/22.

Mr *Tshuma* accepted that in terms of s 69 of the Income Tax Act the first respondent has powers to insist on payment before any argument. It was however argued that whenever a litigant files an objection or appeal, the liability to pay tax is not suspended. See *ZIMRA* v *Packers International (Pvt) Ltd* SC 28/16.

The applicant's case is distinguished as one in which the applicant has not noted an appeal or objection but has approached this court to impugn the first respondent's assessments. It was averred that in essence there are no valid assessments before the court as per *Nestle* v *ZIMRA* SC 148/21 and therefore the provisions of s 69 are not applicable which provide for "paying now and arguing later." Because this is an urgent application before the High Court, it is contended that the "pay now argue later" principle does not apply, particularly as an unlawful assessment does not create an obligation to pay.

On the propriety of dealing with this anterior issue before the preliminary points raised by the first respondent, the applicant objected to the court raising this issue *mero motu* because the

first respondent had not raised issue with this and had in fact acceded to the applicant submitting on this first. It is contended that this was not an issue in dispute between the parties.

The case of *ZIMRA* v *Packers International supra* was pointed to as asserting that a court of law cannot go outside the pleadings on a dispute before it and pick a dispute for the litigants completely and utterly unrelated to the papers before it, nor can it dispose of the matter on the basis of the issue so raised by it.

The court's approach in asking the parties to file supplementary submissions was impugned as encouraging the first respondent to take issue with something that was not in dispute when oral submissions were made. It is contended that the first respondent is barred from raising issue with the propriety of the proceedings as they voluntarily participated in them and therefore acquiesced to the manner of the proceedings. It is averred that the first respondent made the proper election as it was not the *dominus litis* in this matter and there is no statutory rule which prevents the court from dealing with the anterior issue first.

It is submitted that it is trite that a point of law can be raised at any point in proceedings as per *ZIMRA* v *Chizema* SC 38/07. The point raised was said to be dispositive of the matter and that the High Court as a court of inherent jurisdiction can determine this matter as it is not prohibited by law.

The applicant's case is that there is no law which prevents the applicant from approaching the High Court and raising the point that without its "pay now argue later" powers the very filing of an extant application has the effect that the first respondent cannot continue with its collection measures whilst there is an extant application before the court.

Furthermore, it was averred that the court cannot refuse to hear a matter properly before it. Reliance was placed on the case of *Nedbank Ltd* v *Mateman & Ors, Nedbank Ltd* v *Stringer & Anor* 2008(4) SA 276(T).

<u>First respondent's submissions on the anterior issue</u>

Ms *Bishi* submitted that the "pay now argue later principle" applies in this case as the first respondent did its investigations in terms of the Income Tax Act after the applicant's self-assessment. The investigations resulted in an additional assessment in terms of the Income Tax Act. Thereafter the applicant objected to the amended assessment and such objection is pending for determination before the Commissioner General.

Section 69(1) of the Income Tax Act was interpreted to mean that the obligation to pay is not suspended if there is a pending objection or appeal. It was argued that the "pay now argue later" principle is therefore applicable.

The applicant was said to have basically raised the issue of the invalidity of the assessments and that this is the issue it is calling the court to determine on the merits.

On the propriety of determining the anterior issue first, it is averred that the applicant curiously covers this issue in paragraphs 60 to 66 of its founding affidavit wherein it argues that the "pay now argue later" principle does not apply. In the founding affidavit the applicant is said to lay out its claim and the merits on which that claim is founded. Reference was made to the text *Civil Practice: A Procedural Guide*, 3rd Ed by Stephen Pete Etal on p 707 and 195.

It is contended that in raising the anterior point the applicant seeks to have their case heard on the merits so that they get the relief sought by hiding behind what they are calling an anterior point. The raising of this preliminary point by the applicant is therefore alleged to be irregular.

The point is emphasized that the purported point *in limine* of the applicant is one of the bases on which relief is sought on the merits. The argument that the first respondent has lost its power to insist on payment because the applicant has made an application to the High Court is raised both in the anterior point and the merits.

Ms *Bishi* cautions the court against proceeding to decide the matter on the anterior point as it would mean delving into the merits of the case before determining the points *in limine* raised by the first respondent. It was contended that it is settled law that a court should not determine the merits of a case until any preliminary points raised have been dealt with.

<u>Is it proper for the court to deal with the anterior point raised by the applicant ahead of the points in limine raised by the first respondent</u>

The applicant is indeed correct that a point of law can be raised at any point as settled in *Muchakata* v *Netherburn Mine* 1996(1) 153(s).

It is correct too that a court of law cannot go outside the pleadings on a dispute before it and pick a dispute for the litigants utterly unrelated to the papers before it and dispose of the matter on the basis of the issue so raised by it as per *ZIMRA* v *Packers International supra*. Indeed, in *Proton Bakery (Pvt) Ltd* v *Mike Takaendesa* SC 126/04 the court found that it was wrong for the

court a quo to have disregarded all the evidence before it, which was essentially the merits of the case and instead make a factual finding on a matter not argued before it.

In the case of *Katsimberis v Rwodzi N.O & Anor* HH 246 /22, MANZUNZU J in determining whether the court can *mero motu* raise a procedural issue with a party, said the following:

"In *casu*, I think it is within the court's power to raise with any party what prima facie appears a non-compliance with the rules. What is crucial though is for the court not to make a determination of the issue raised without affording the parties an opportunity to be heard. In my view, a court is not expected to proceed as if it were blind folded to its own rules."

In *Chitsinde v Chitsinde & Anor* SC10/09 it was held that the court could not successfully be criticized for *mero motu* raising the issue of illegality as our law is clear that a court can do so.

The question is settled for me by the case of *Cusa* v *Tao Ying Metal Industries* [2008] ZACC 15 (CC) at para 68 where in it was held as follows:

> "The High Court raised a point of law *mero motu* as it was entitled to, if not obliged to do. This is so because if it is apparent on the papers, but the common approach of parties proceeds on a wrong perception of what the law is a court is not only entitled but is in fact obliged, *mero motu*, to raise the point of law…. Otherwise, the result would be a decision premised on an incorrect application of the law."

In casu, though the parties seemingly agreed to proceed by first addressing on the anterior issue, the court can and did raise a procedural point of law with the parties and gave them an opportunity to address the court on the point. This was because at the point of writing the judgement and indeed during oral submissions on the anterior point, it was clear that we were delving into the merits of the matter before me despite there being points in limine properly raised by the first respondent. It appears to me that the applicant is saying to me "forget the preliminary point, let us delve into the merits."

The purported point *in limine* is closely tied to the merits of the applicant's case. In the founding affidavit, the applicant questions the legality of the assessments and the collection measures put in place. The "pay now argue later" principle's application is questioned. It is my considered opinion that the applicant can fully canvass that issue in dealing with the merits of the matter or in response to the points *in limine*. The court is not refusing to deal with a matter placed before it but deferring to a settled position of our law.

In *Gwaradzimba* v *CJ Petron and Company (Pty) Ltd* 2016(1) ZLR 553(S) it was held that where an issue was raised before it, capable of disposing of the matter, the court could not ignore it or wish it away. It was obliged to decide whether the matter was properly before it.

The position is more clearly set out in *Heywood Investments (Pvt) Ltd t/a GDC Haulers* v *Pharaoh Zakeyo* SC 32/13. Therein GOWORA JA held as follows:

> "It is incumbent upon a court before which an application is made to determine it. A court before which an interlocutory application has been made should not proceed to determine the matter on the merits without first determining the interlocutory application……The refusal by the court to determine the point *in limine* is a misdirection on point of law."

This court can therefore not be diverted from dealing with the proper points in limine raised, on urgency and exhaustion of local remedies and humour the applicant by diving directly into the merits of the matter. Since the applicant is the *dominus litis* how can it then raise a point *in limine* outside the merits of its application except in a bid to avoid the addressing of the first respondent's points *in limine*.

I find that the anterior point has been improperly raised at this stage proceed to deal with the first respondent's points *in limine*.

Whether this matter is urgent and whether there are available internal remedies

Ms *Bishi* opted to abide by the papers filed of record on these points. It is averred that this matter is not urgent. The applicant's position that the matter is urgent is said to be an unfounded fear stemming from the placement of the applicant on garnishment. Urgency arising from a lawful garnishee is said not to constitute urgency and that the onus is on the applicant to show that the matter is urgent.

Regarding whether the applicant acted when the need to act arose, it is averred that the applicant knew as far back as 23 February 2023 that the first respondent was investigating its tax liability and the result of this was notified on 28 February 2023. On even date the applicant was served with the amended tax assessments and discussions ensured leading to a revised liability and a demand for payment of tax being done on 7 November 2023.

The applicant is said to have objected to the amended tax assessments on 6 December 2023. By operation of s 69 of the Income Tax Act it is contended that even though the determination on the objection is pending, tax remains due and payable. The section provides that an aggrieved

person shall still pay the tax demanded whilst an objection or appeal process is pending. The order sought by the applicant is said to fly in the face of the provisions of the law.

Furthermore, it is argued that even if the additional assessments are indeed invalid, bringing this urgent chamber application before this court is a clear approach to the wrong forum to make a determination on invalidity as the special court for Income Tax or the Fiscal Appeals court are imbued with the jurisdiction to squarely deal with such matters. These internal remedies are allegedly available to the applicant once the Commissioner has made a determination.

The recovery of tax due to the fiscus is provided for through garnishees in s 58 and s 69 of the Income Tax Act. This avenue is alleged to be open to the first respondent even when the applicant has lodged an objection. In the circumstances, it is argued that the court cannot aid the applicant as the first respondent is simply exercising its statutory given power to institute collection measures.

It is argued that the urgency in this matter is self-created as it is arising from the applicant's unlawful conduct in failing to pay tax due timeously and all the first respondent is doing is to enforce the law. It is averred that as the first respondent is acting lawfully, the court cannot intervene as prayed for.

If the court were to grant the relief sought, it is averred that would be tantamount to the court suspending the operation of a valid law and barring the first respondent from carrying out a legal obligation.

Regarding the application's allegation of irreparable harm visiting it due to financial collapse, this is dismissed as bald and unsubstantiated. This is because no evidence of such allegations in the form of books of account or bank statements have been placed before the court. This is said to be fatal to the claim of urgency.

Additionally, it is submitted that a matter cannot be treated as urgent unless the applicant does not have other suitable, adequate and alternative remedies. *In casu*, it is alleged that the applicant had an option to offer a payment plan and await the Commissioner's decision.

A further development is that the applicant's objection was disallowed and the applicant has since appealed to the Special Court by way of a letter dated 27 March 2024. (established in supplementary submissions)

Mr *Tshuma* submitted, on the contrary, that this matter is urgent. The court was pointed, inter alia to the case of *Kuvarega* v *Registrar General & Anor* 1998(1) ZLR 188H to aver that urgency arises not only where the day of reckoning is imminent, but that if at the time the need to act arises, the matter cannot wait. A primary consideration is whether the applicant will have substantial redress if its matter is not heard urgently. It is argued that a court should not refuse to hear an urgent matter solely because there has been a delay in filing of the urgent application unless the applicant has negligently or deliberately created its own urgency.

It was contended that where an applicant has taken steps to protect its interests, or resolve the matter amicably, the court cannot refuse to hear the matter as a result of a delay in filing the urgent application. The round table engagements between the parties after the issuing of an assessment was pointed to as well as the filing of an objection as steps timeously taken by the applicant, also that it filed an application for stay of collection measures in terms of the Income Tax Act.

Mr *Tshuma* argued that despite the filing of the objection and stay of collection measures, these remained undetermined at the time of filing of this application. The failure to immediately determine the application is alleged to be unlawful.

The garnishee effected on the applicant's accounts is alleged to be unlawful and a resort to self-help. Matters dealing with self help are alleged to be urgent, always. For this reference is made to the case of *Chief Lesapo v North West Agricultural Bank & Anor* [1997] ZACC 16 and *Minister of Lands, Agriculture & Rural Resettlement & Ors v Commercial Farmers Union* SC 111/01. There it is stated that the rule against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary. An example given is that of spoliation proceedings which, by nature are considered urgent.

It is suggested that the only way to interrogate whether or not the first respondent has resolved to self help is to consider the merits of this matter.

The one issue I have to first decide is whether the garnishments are lawful or whether the first respondent has resorted to self help thus justifying the lodging of this application. Related to this is a consideration of whether there was valid assessment justifying the garnishee. The applicant raised too the issue of the effect of the pending application for stay of execution.

I wish to start with s 62(a)(a) of the Income Tax Act which provides as follows:

> "(1) Any taxpayer who is aggrieved by
> (a) Any assessment made upon him under this Act; or …….
> may, unless it is otherwise provided in this Act, object to such assessment decision or determination within thirty days after the date of the notice of assessment or of the written notification of the decision or determination in the manner and the terms prescribed by this Act."

The applicant utilized this provision to lodge its objection with the Commissioner on 6 December 2023. On 14 December the first respondent advised that this was under consideration and the Commissioner's determination would be advised in due course.

In terms of s 62(4)'s proviso, the Act gives the Commissioner three months to make a decision on the objection, failing which the objection shall be deemed to have been disallowed.

Section 69(1) of Income Tax Act provides as follows.

> (1) 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 conclusions as he may impose, be suspended pending a decision on any objection or appeal which may be lodged in terms of this Act."

Indeed, the applicant took steps to protect its interests. Round table meetings were held between the parties. An objection was lodged as well as application for stay of collection measures. In terms of timing, the applicant may very well have acted timeously. I will not belabour myself on that aspect.

It is however the attempt to have this court intervene and suspend collection measures in the face of the provisions of s 58 and s 69 of the Act which this court cannot be drawn into on the premises that the first respondent has resorted to self-help. A long line of case authorities makes clear that the first respondent is simply enforcing the law. In *Murova Diamonds (Pvt) Ltd* v *ZIMRA & Anor* HH 125/20 MAFUSIRE J put it thus:

> "Objections to tax assessments are common place. Constitutional challenges of the first respondent's wide ranging and draconian powers are legion. It is a weather-beaten path. Original or innovative arguments are infrequent.?

In *Mayor Logistics* v *Zimra* CCZ 07/14 MALABA DCJ (as he then was) though dealing with a constitutional challenge observed that the provisions of s 36 of the VAT Act and 69(1) of the Income Tax Act are binding and they are "designed to remove any doubt in the mind of the taxpayer, as to whether an appeal to the Fiscal Appeal Court, or a decision of a court, would have the effect of suspending the obligation to pay the tax assessed to be due and payable." It was further held that a court

of law would be acting unlawfully if it usurped the powers of the Commissioner and ordered a suspension of the obligation on a taxpayer to pay assessed tax pending determination.

In *JK Motors (Pvt) Ltd v ZIMRA supra* the taxpayer under case number 2447/22 filed an application for an interdict on an urgent basis seeking to bar the respondent from collecting taxes as levied. The urgent application was deemed not urgent and the matter was referred to the ordinary roll. In judgment HH 762/22 the court dealt with a preliminary point and found that the matter was properly before it for the granting of a *declaratur*. In judgment HH 336/23 the matter was decided on the final relief sought. That application was dismissed. An appeal was lodged in the Supreme Court under case No SC 354/23. An order was granted by consent of the parties, setting aside judgment HH 336/23 and referring the matter for hearing before the Special Court for Income Tax. At no point was the stay of collection measures allowed.

In *ZIMRA v Packer supra*, the Supreme Court found that the pay now argue later principle was applicable and the taxpayer was obliged to pay as the actions of ZIMRA were lawful and there was no legal basis to grant an interdict.

If this court was to uphold the applicant's argument, it would simply be aiding taxpayers like the applicant who would lodge an objection and well knowing that s 69(1) obliges them to pay and argue later, would file an urgent application simply to circumvent the duty to pay. This, in my opinion is an application filed to delay payment. There can be no valid basis to hold that the garnishments are unlawful or that the first respondent has embarked on self-help.

Having made the above finding, the applicant's argument that the courts always come to the aid of a party who is at the mercy of another who takes the law into their own hands and embarks on self-help, falls away.

I find therefore that the matter is not urgent.

It is improper for taxpayers to file applications to set aside assessments in the High Court whilst also pursuing the statutory route of an objection. The Income Tax Act provides internal remedies in the special court for this as set out *TL* v *ZIMRA* HH 413/20 and in *ZIMRA v Triangle Limited* SC 59/23.

The fact that the applicant, after the objection was disallowed proceeded to appeal to the special court on 27 March 2024 shows that the applicant always had other available internal remedies open to it.

The matter is not urgent and it be and hereby struck of the roll of urgent matters in terms of r 60(18).

Mawere Sibanda Commercial Lawyers, applicant's legal practitioners
Zimbabwe Revenue Authority, first respondent's legal practitioners