CONTITOUCH TECHNOLOGIES (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY
and
CBZ BANK LTD

HARARE HIGH COURT
MANDAZA J
HARARE, 30 September 2024 & 5 February 2025

Urgent Chamber Application

Adv *Tshuma* for the plaintiff
A V Makombera, for the 1st respondent
No appearance for the 2nd respondent

MANDAZA J: This is an application for a declaratur. Initially, the applicant filed an urgent chamber application for an interdict against the respondents. The basis for the application was that the Applicant had received unlawful tax assessments from the 1st Respondent on the 6th of June 2024 which were unlawful because they are in foreign currency, despite the Applicant having never accrued or earned foreign currency as envisaged in s 4(A) of the Finance Act [*Chapter 23:04*].

The issues for determination are**:** Whether the applicant is entitled to the relief sought, whether the notices of assessments for Value Added Tax (VAT) and Income Tax issued to the applicant by the Respondent are valid and what the effect of Statutory Instrument 33 of 2019 on the contract entered by the applicant with Africa Gaming?

The Applicant is a registered company under the laws of Zimbabwe, and the respondent is the Zimbabwe Revenue Authority, an administration authority established under the Revenue Authority Act. The respondent is tasked with collecting taxes and other statutory dues and fees. The respondent conducts periodic audits and investigations and, where necessary, issues assessments on income earners.

The Applicant tried times without number to engage the first Respondent without any joy. The first Respondent acknowledged that no foreign currency was earned by the Applicant but still insisted that the Applicant proceeds to make payment in foreign currency in clear violation of both s 4(A) of the Finance Act, Finance Act (No.2) of 2019 and several judgements

of the Supreme Court. The Applicant pointed out repeatedly to the Respondent that the contract in question was entered into in 2017 and as such was converted to a local currency contract by operation of Finance Act (No.2) of 2019.

The first Respondent went on to threaten the Applicant with collection measures, which had the potential to jeopardize its business operations. The Applicant had also filed a High Court application under case number HCH 3549/24 for a Declaratur, however, despite the pending application, the first Respondent had gone on to garnish the Applicant's accounts which is self-help and cannot be permitted. That conduct had the potential to bankrupt the Applicant.

The basis for the assessments of the Applicant is a contract entered into between the Applicant and Africa Gaming. The first Respondent took the view that the contract created a tax liability for income tax and the VAT as the amounts contained in the contract accrued to the Applicant. However, that contract was a putative one and not enforceable as the parties to the contract never had any intention of creating a binding contract.

The reason for entering into that contract was that Africa Gaming, the Applicant, which is involved in sports betting was having challenges finding a correspondent bank to make offshore payments for its betting business. The contract was entered into between the Applicant and Africa Gaming to enable the processing of payments to the foreign supplier of the software that it was using. The agreement was to justify the movement of money between the two entities. Thus, the contract between the Applicant and Africa Gaming which provided for the payment of USD80 000-00 was never to be binding and no payment of USD80 000-00 was ever paid to the Applicant, nor did the Applicant ever expect to receive this sum of money. That issue had been brought to the attention of the first Respondent who remained adamant.

Initially, the Applicant had filed a declaratur against the Zimbabwe Revenue Authority under case number 3549/24. It was then agreed after case management that the two applications be consolidated and heard at once. The Applicant sought the following order from the court:

1. That the additional foreign currency Income Tax and VAT assessments for tax years 2017 to 2023 issued on the Applicant be and are hereby declared invalid.
2. Costs of this application shall be borne by the Respondent.

The facts submitted in the Urgent Chamber Application are by and large similar to the ones submitted in the court application. The Applicant stated that a contract was entered into between the Applicant and Africa Gaming to enable the processing of payments for the

software that it was using. The agreement was there to justify the movement of money between the two entities. All the Applicant did was process payments on behalf of Africa Gaming and its remuneration was recovery of the bank charges it incurred whilst processing payments for Africa Gaming.

Despite being repeatedly advised through the evidence of bank accounts that the contract was a putative one, the first Respondent still insisted that it was taxing the Applicant on the contract. A putative contract is a contract that is not legally binding because it lacks voluntary assumption of obligations. When interpreting a contract, the courts must give effect to the intention of the parties. In *Joubert* v *Enslin* 1910 AD 6, INNES J put it as follows: "The golden rule applicable to the interpretation of all contracts is to ascertain and to follow the intention of the parties". The parties intended to have a putative contract a fact which the respondent chose to ignore. The bank accounts even showed that no money was coming through. The first Respondent admitted that the Applicant received no remuneration but still insisted that it was going to be taxed based on that contract.

The Applicant further submitted that even assuming the validity of the contract between the Applicant and Africa Gaming, in terms of the law the contract was a local currency one based on the law as it had been converted to a local currency one.

An application for a declaratur ought to be considered and ventilated in light of the provisions of s 14 of the High Court Act. The requirements of a declaratory order were succinctly and aptly considered in the case of *Johnsen* v *Agricultural Finance Corporation* 1995 (1) ZLR 65. The court stated the position as follows:

> "The condition precedent to the grant of a declaratory order under section 14 of the High Court Act is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgement of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. However, the absence of an actual dispute or controversy between the parties is not a prerequisite to the exercise of jurisdiction. See Ex parte Chief Immigration Officer 1993 (1) ZLR 122 (S).

In *casu*, the applicant is an interested party. The Applicant submitted that their administrative rights contained in the Constitution and given effect to in the Administrative Justice Act have been infringed as the first Respondent had acted ultra-vires its powers. Accordingly, it was submitted that the Respondent had violated several administrative rights in that no formal assessments were issued on the Applicant and the Respondent issued amended assessments in circumstances where no original assessments were issued, the first Respondent

issued foreign currency assessments when it was entitled to local currency by operation of the law. Further, the assessments issued by the Respondent are ultra vires its powers as it has no power to issue assessments in foreign currency in circumstances where the Applicant did not receive or accrue foreign currency income.

The first Respondent submitted that it carries out periodic audits and investigations and where necessary issues assessments on the income of earners in terms of ss 46 and 47 of the Income Tax Act [*Chapter 23:06*]. The Respondent had carried out a tax investigation and discovered the contract wherein the applicant was entitled to a consideration of not less than US$ 80,000-00 per month. However, that income was not reflected in the Applicant's annual Income Tax returns. The failure by the Applicant to include the income due to it under the agreement resulted in the Applicant reporting assessed losses in its self-assessment returns ever since its inception in 2017.

After discovering the omission, the Respondent proceeded to amend the self-assessments that the Applicant had lodged. The Applicant lodged an objection under the provisions of s 62 of the Income Tax Act. The Respondent admitted that the basis of the assessments was a contract that was entered into between the Applicant and Africa Gaming. The several meetings and correspondences that followed failed to convince the Respondent that indeed there was income that was due to the Applicant from Africa Gaming. That revenue or income was admittedly never accounted for, for tax purposes by the Applicant.

The Respondent then invoked the provisions of s 47 of the Income Tax Act as well as the provisions of section 31 of the VAT Act [Ch 23:12] to issue notices of assessments to bring to taxation the amounts that had escaped taxation.

The Respondent also disputes that the contract was a putative one. If indeed it was, then the Applicant should have indicated that when it submitted the contract. To the Respondent, the contract was valid since throughout the investigations, the Applicant had never denied the existence or validity of the agreement. The putative argument is an afterthought. Both parties to the contract were performing their contractual obligations. The assessments of the amount due were thus not yet done as of 22 February 2019 as such, the provisions of SI 33/2019 and the ensuing Finance Act no. 2 of 2019 could thus not be invoked. The Respondent further submitted that the averment that the contract was converted to a local currency contract is without any legal basis. Thus, all the assessments done were lawful in terms of form and substance.

It was further submitted on behalf of the Respondent that; it carried out a valid assessment in terms of the law and as such there is no merit in the application. The Applicant is simply trying to avoid paying taxes so the argument went. There was no violation of the Applicant's administrative or legal rights at all. The Applicant does not have a right not to pay tax duly assessed and as such the application must fail.

In his submissions, Adv *Tshuma* stated that the Respondent did not tell the court as to which provision of the law they were relying on. They issued assessments in terms of s 47 of the Income Tax Act but they conceded that they did an estimation. It is common cause that they did not rely on s 45 of the Income Tax Act [*Chapter 23:06*]. He referred the court to the case of *Zimra Nestle Zimbabwe (Private) Ltd* v *Zimra* SC 290/20 where it was held that Zimra must state the provision it is relying on as it is a creature of statute. By not stating the provision, they made an error. He further emphasized that Zimra relied on a wrong provision since in terms of the Finance Act No. 2, all contracts were converted to 1:1 against the local currency. By taxing the Applicant in foreign currency, which it did not earn, the Applicant committed an error.

The law

It is common cause that the relief being sought by the applicant is an order to declare that the respondent's acts are unlawful. Section 14 of the High Court Act [*Chapter 7:06*] provides that this court can issue such an order provided that the requirements of the grant of such an order are established. The requirements for a declaratory order are that the applicant must be an interested party in the sense of having a direct and substantial interest in the subject matter and the interest must concern an existing, future or contingent right. Therefore, there is a condition precedent to bringing an application for a declaratory order. See *Mpukuta* v *Maker Insurance Pool and Others* 2012 (1) ZLR 192 (H). It is also a requirement that a person seeking a declaratur must set forth a contention as to what the alleged right is. See *Electrical Contractors Association (South Africa) and Another* v *Building Industries Federation* 1980 (2) SA 516 (T).

The Respondent failed to prove before this court that the contract was fulfilled. They could not prove that the payments of US$ 80,000-00 per month were received by the Applicant. They disregarded the law by making assessments in foreign currency when there was no evidence that any foreign currency was earned by the Applicant. That contract was converted to local currency due to the operation of the law. The Respondent ignored all the fundamentals regarding taxation and insisted on foreign currency taxation.

In his submissions, Mr Makombera for the first respondent stated that it was upon the contract that the assessments were issued. However, he did not convince the court that the contract was ever put into action. He also submitted that the amount which was paid to the Applicant was not explicit but varied from month to month. This admission confirms the court's finding that there was no evidence that indeed the Applicant received US$80 000-00. If the amount varied as per his admission, why then did they insist on assessing tax at US$ 80,000-00?

Mr *Makombera* further submitted that the Applicant failed to show what legal right it ought to protect. With respect that is not true as the legal right has been outlined in the heads. The Applicant satisfied the requirements of a declaratur. The court does not agree with him when he says the Applicant has not exhausted internal remedies. A reading of the record shows a flurry of letters which the Respondent ignored. There is evidence in the record that the applicant relentlessly tried to engage the respondent without any success.

Mr *Makombera* shocked the court when he submitted that it had no jurisdiction to entertain the matter. In his submissions, he stated that the matter would have been dealt with competently in one of the specialist's courts for example the Fiscal Appeals Court. However, the court did not agree with him as this court has jurisdiction to hear the case.

The gist of the matter is that the Respondent by its admission taxed the Applicant on a contract that was not put into operation. The matter could have been easily solved if the endless meetings that were held had yielded results. Despite being shown proof that the contract was not put into action, the Respondent still insisted on taxing the Applicant in foreign currency which it had not earned. The Respondent was insistent on taxing in foreign currency to the extent of ignoring Finance Act number 2. The respondent cannot be above the law. As such it must be visited with costs.

Costs.

What remains to be considered is the question of costs. In our jurisdiction the general approach is that costs orders should follow the result. The rationale behind this rule is that if a party is brought to court to defend a claim with insufficient merit, then it could hardly be fair to expect it to pay legal costs. The Respondent must bear the costs of this application as they raised points which did not find favour with this court.

The learned authors Hebstein and Van Winsen in the Civil Practice of the High Court and the Supreme Court of Appeal of South Africa, 5th ed, Vol 2 p954 stated the following:

> "The award of costs in a matter is wholly within the discretion of the Court, but this is a judicial decision and must be exercised on grounds upon which a reasonable person could have come

> to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties…"

It is the view of this court that the Respondent must pay costs associated with this application. Their persistence to proceed with this matter when they had no basis must be censured. The applicant tried to engage them several times to prove that no foreign currency was coming through without any success. The respondent must not be seen to be above the law.

In essence, courts should award costs at a higher scale in exceptional cases where the degree of irregularities, bad behaviour and vexatious proceedings necessitates the granting of such costs and not merely because the winning party requested them. Costs should not however be a deterrent factor to access to justice for litigants with genuine matters. Thus, it is trite that, in awarding costs at a higher scale, courts should therefore exercise greater vigilance. See AC Cilliers The Law of Costs 2nd ed.

Given the conduct exhibited by the respondent, this is one case where the court does not hesitate to exercise its discretion to award costs on a higher scale.

Disposition

In the result, I make the following order:

1. That the additional foreign currency Income Tax and VAT assessments for tax years 2017 to 2023 issued on the Applicant be and are hereby declared invalid.
2. Costs of this application shall be borne by the Respondent.

Mawere and Sibanda, applicant's legal practitioners.
Zimra Legal Department, respondent's legal practitioners.