REPORTABLE (70)

ZIMBABWE REVENUE AUTHORITY
v
NESTLE ZIMBABWE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHIWESHE JA & MUSAKWA JA
HARARE: 27 OCTOBER 2023 & 19 JULY 2024

S. Bhebhe, for the appellant

M. Tshuma, for the respondent

MUSAKWA JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) which granted a declaratory order in favour of the respondent to the effect that the appellant could not issue replacement notices of revised tax assessments. This is because the revised assessments had been invalidated and set aside in an earlier decision of this Court.

The appellant prays for the following relief:

1. The appeal be and is hereby allowed with costs
2. The judgment of the court *a quo* be and is hereby set aside in its entirety and substituted with the following order:

"The application be and is hereby dismissed with costs."

BACKGROUND

The matter before this Court relates to an interminable income tax dispute between the appellant, which is the relevant statutory body responsible for the collection of taxes in terms of the Revenue Authority Act [*Chapter 23:11*], and the respondent, which is a corporate entity incorporated in terms of the laws of Zimbabwe. Sometime in May 2016, the appellant issued several amended tax assessments to the respondent in respect of the tax years 2009, 2010, 2011, 2012 and 2013. It claimed to have discovered several anomalies that amounted to misrepresentation regarding the self-assessment declarations initially submitted by the respondent. This was disputed by the respondent, with the matter finally spilling into the Special Court for Income Tax Appeals.

The Special Court for Income Tax Appeals upheld the determination of the appellant's Commissioner to the objections filed by the respondent. This prompted an appeal to this Court under which the revised assessments issued by the appellant were held to be invalid. This Court, in *Nestle Zimbabwe v ZIMRA* SC 148/21 reasoned that the revised assessments issued by the appellant did not conform to the requirements of s 2 of the Income Tax Act [*Chapter 23:06*]. Tax assessments for 2009, 2010, 2011, 2012 and 2013 were specifically invalidated for being made subject to audit when such an endorsement was not provided for under s 51 of the Income Tax Act. Accordingly, the entire proceedings were set aside because they were premised on a nullity.

Thereafter, in January 2022, the appellant proceeded to issue novel assessments that were purportedly in compliance with the Income Tax Act. The appellant attempted to pacify the respondent by clarifying that there was no obligation to pay any further tax since the respondent had previously been making regular payments as per the nullified assessments. This it did by addressing a letter dated 17 January 2022 which reads as follows:

> "Following the Supreme Court judgment in the case *Nestle v ZIMRA* of 2021 kindly find attached assessments which comply with the relevant provisions of the Income Tax Act [*Chapter 23:06*].
>
> These assessments replace the ones issued to you on 31 May 2016. Considering that the tax was paid already on the assessed amounts, there is no obligation to pay on the newly issued assessments.
>
> I hope this settles the issue that had been in contention for some years now."

Conversely, the respondent queried the legal basis upon which the replacement assessments were issued in light of the decision of this Court under SC 148/21. In response, the appellant submitted that this Court only set aside the notices of assessment as opposed to the actual assessments defined in s 2 of the Income Tax Act. This sparked a series of exchanges between the parties. The appellant remained resolute in its stance that it was entitled to issue novel "notices of assessments". The impasse resulted in the respondent applying for declaratory relief in the court *a quo*. In its founding affidavit, the respondent averred that the replacement assessments issued were merely a scheme devised to avoid reimbursing amounts paid in respect of the invalid assessments. Thus, the respondent sought a declaration to the effect that the replacement assessments were invalid and unlawful. It was contended that the appellant could only have issued any additional assessments in the matter by dint of s 47 of the Income Tax Act which was not applicable in the present circumstances. The respondent submitted that the stipulated six-year window for issuing of revised assessments had prescribed.

In addition, the respondent contended that the notices of assessment were inconsistent with the judgment under SC 148/21 and in breach of the principle of legality. The appellant opposed the application. It proceeded to detail the procedure for issuing revised assessments in terms of the Income Tax Act. However, the appellant submitted that where there

is an invalidation of the notice of assessment, the determination of the taxable income due remains unaffected. The appellant attempted to distinguish between a notice of assessment and an "assessment". It submitted that the latter was a culmination of an audit process whilst the former was a final document issued to the taxpayer which serves to formally communicate the outstanding tax liability. In interpreting the judgment under SC 148/21, the appellant submitted that this Court only set aside the notice of assessment as opposed to the actual assessment. The crux of its argument was that the assessments could only be set aside on a consideration of their merits which was purportedly not done by this Court. Further, the appellant insisted that the replacement assessments remained valid and did not contradict the jurisprudence of this Court. The appellant also averred that the respondent had misrepresented its tax liability in respect of the relevant tax years. On the issue of prescription, the appellant submitted it was inapplicable save for the tax year 2009 since the revised assessments were issued in 2016. Notwithstanding, it asserted that it was entitled to reopen the assessment for the tax year 2009 due to the respondent's misrepresentation.

The appellant also disputed the allegation that the replacement assessments were meant to avoid reimbursing the respondent. It submitted that there was no legal basis for refunding taxpayers and that at any rate the credit was utilized on payment upon issuance of the replacement assessments in January of 2022. In replication, the respondent referenced correspondence from February 2022 as highlighting that it was the validity of the replacement assessments which was an issue between the parties. It submitted that the distinction being drawn between a notice of assessment and assessment was merely a ploy to avoid reimbursing the paid amount. The respondent also insisted that the issue of prescription was relevant since the appellant had issued novel assessments in 2022.

PROCEEDINGS BEFORE THE COURT *A QUO*

The court *a quo* granted the declaratur sought by the respondent. In its disposition, the court *a quo* ruled that the appellant could not issue the replacement notices of assessments since the 2016 revised assessments were invalidated and set aside by this Court. It reasoned that it could not review the decision of this Court and that the appellant could not circumvent the import of the judgment under SC 148/21. Irked by the determination of the court *a quo*, the appellant filed the instant appeal on the following grounds:

1. The court *a quo* erred in law in failing to find that the appellant could lawfully issue fresh notices of assessment, in terms of s 51 of the Income Tax Act [*Chapter 23:06*], to collect assessed taxes for period 2009 to 2013 after 2016 notices of assessment had been held to be invalid by the Supreme Court.
2. The court *a quo* erred in law in failing to make a distinction between an assessment and a notice of assessment as contemplated by an interpretation of s 2, 37A, 47 and 51 of the Income Tax Act [*Chapter 23:06*] and in so doing failed to determine the issue before it.
3. The court *a quo* consequently erred in finding as it did or must be taken to have done that the notices of assessment for the income tax period 2009 to 2013, issued in 2022 had no legal basis and were invalid and improperly issued by the appellant.
4. The court *a quo* erred in finding, as it must be taken to have done that the additional tax assessments, done by the appellant on the respondent in 2016, were declared null and void by the Supreme Court under judgment SC 148/21, when the Supreme Court did not make any substantive determination on the assessments themselves but on the validity of the notices of assessment issued by the appellant.

5. The court *a quo* erred in placing reliance on the Supreme Court decision under SC 148/21 when that judgment did not conclusively determine the issue that was before the court *a quo*, being whether or not there is a distinction between a notice of assessment and an assessment in terms of the Income Tax Act and consequently, whether the appellant could issue fresh and valid notices of assessment in the circumstances."

RESPONDENT'S SUBMISSIONS

Mr *Tshuma*, counsel for the respondent, raised two points *in limine*. The first point was that the document purporting to be the notice of assessment was fatally defective. Counsel submitted that there was an amount referred to as gross tax when there is no such term under the Income Tax Act. In addition, Mr *Tshuma* submitted that s 8 of the Income Tax Act only provides for gross income and not gross tax. As such, the respondent did not know what it is the appellant was referring to as gross tax and that the taxpayer cannot object to tax which cannot be ascertained. Mr *Tshuma* also submitted that the appellant cannot act outside the four corners of the enabling Act. He also submitted that every term in relation to income tax is defined either in terms of the Income Tax Act or the Finance Act [*Chapter 23:04*] and that as such, gross tax was not defined in any of them. Counsel submitted that the previous assessments were invalidated on the basis that they did not meet the requirements of s 2 of the Income Tax Act. Reference was then made to the judgment in SC 148/21 wherein the appellant conceded the notices of assessment did not conform with s 2.

The second point *in limine* raised was on issue estoppel. Mr *Tshuma* submitted that in SC 148/21, a concession was made by the appellant that the documents did not meet the

definition of income tax as per s 2 of the Act. He submitted that the court in that matter found that the assessments were null and void and it invalidated them. It was the respondent's submission that the appellant in the present matter was now calling upon the court to validate that which had already been invalidated. Counsel thus submitted that the appellant was trying to bring back an issue that had already been determined by this Court.

APPELLANT'S SUBMISSIONS

Mr *Bhebhe*, counsel for the appellant submitted that the objection was invalid as it was not made in terms of r 51 of the Supreme Court Rules 2018. He further submitted that the first point in *limine* addressed the root cause of the matter and as such, it should not have been raised as a preliminary point but should have been addressed in relation to the merits. It was the appellant's submission that the validity of the notice of assessment was what was before the court for determination and that it was addressed in the order sought by the respondent that the notice of assessment be deemed invalid and unlawful. It was therefore the appellant's contention that such a point was not a preliminary point

On the second point *in limine* counsel for the appellant submitted that the point also goes to the root of the matter and as such should not have been raised as a preliminary matter. It was also submitted that both preliminary points formed part of the notice of appeal and the appellant should be allowed to motivate its appeal. Counsel also submitted that issue estoppel did not apply as the present appeal was not based on the same subject matter that the Nestle case (*supra*) was based on. The appellant also submitted that the inclusion of the words gross tax was to give more detail to the taxpayer in relation to how the tax to be paid was arrived at. The appellant also submitted that when a court is asked to render a notice of assessment invalid, it must only

consider (i) whether all the requirements in terms of the Act are available and (ii) if the inclusion of any terms is prejudicial to the taxpayer.

APPLICATION OF THE LAW

Although the respondent raised two objections, we are of the view that the second objection on issue estoppel is dispositive of this matter. The appellant contends that issue estoppel did not apply as the present appeal was not based on the same subject matter in *Nestle* v *ZIMRA SC* 148/21. On the other hand, counsel for the respondent submitted that the appellant was attempting to bring back an issue that has already been determined by this Court.

We are of the view that the matter was already determined in SC148/21 wherein the court stated the following:

> "Given the principles upon which tax law subsists such as strict adherence to fiscal legislation and the principle of certainty, the consequences of the invalidity of an assessment are fairly obvious. The moment an assessment fails to comply with the law, it is a nullity."

The ratio *decidendi* in the above judgment is evident, the assessments issued by the appellant were held to be a nullity. There was no distinction made between a notice of assessment and an assessment in the judgment. The present appeal amounts to a review of a judgment of this Court since the "replacement notices of assessment" issued in January 2022 are anchored on assessments that were held to be a nullity.

In addition, a reading of the judgment in SC 148/21 reveals the court's clear intention without ambiguity whereby it found that the assessments were null and void. Therefore, the appellant's submission that the replacements be validated is devoid of merit. Counsel for the

appellant submitted that the notice of appeal addressed the root of the matter and as such the matter should not be disposed on the preliminary point. However, a point of law can be raised at any stage. It is trite that a new point may be advanced for the first time on appeal if it does not result in unfairness to the party at whom it is directed. AC Cilliers, C Loots and HC Nel in The Civil Practice of the High Courts, 5th ed, at pp 1246, explain it as follows:

> "A question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party against whom it is directed. A second requirement for the raising of a new point on appeal is that the point must be covered by the pleadings. Where it is not clear that the point has been fully investigated (i.e. that all the evidence which might have been placed before the court if the point had been taken was in fact led), the court will not allow a new point to be raised for the first time on appeal."

Therefore, the submission that the issue of estoppel should not be raised at this stage as it is related to the merits is of no relevance. The doctrine of estoppel prevents one from asserting a right where he has caused another to act on the basis of what one previously said or did. Concerning issue estoppel (*res judicata*) the same authors AC Cilliers, C Loots and HC Nel at p 610 have this to say:

> "In *Betram v Wood* 10 SC 177 at 180 it was held that:
>
> > 'The meaning of the rule is that the authority of *res judicata* induces a presumption that the judgment upon any claim submitted to a competent court is correct, and this presumption being *juris et de jure*, excluded every proof to the contrary. The presumption is founded on public policy which requires that litigation should not be endless and upon the requirements of good faith which, as said by Gaius (Dig. 50. 17. 57), does not permit of the same thing being demanded more than once.'"

The above excerpt negates any merit in the appellant's argument. The assessments were held to be a nullity and thus no legal consequences can arise from them. The court was clear in its language in setting aside the assessments and not simply the notices of assessment. It should

also be noted that in terms of s 37A (12) of the Income Tax Act, a return submitted by a taxpayer is treated as an assessment by the Commissioner-General. When the appellant issued the replacement assessments and wrote the letter dated 17 January 2022, there was no indication that it was assessing additional tax (s 46) or that this was an additional assessment varying or withdrawing any credits or calling upon the respondent to pay correct tax (s 47). On the contrary, the letter clearly stated that there was no obligation to pay tax on the new assessment. The letter in question did not cite the relevant provision under which the replacements were made, apart from merely stating that they were issued in terms of the Act. In any event, this court in SC 148/21 held that an assessment by the Commissioner-General consequent to self-assessment by a taxpayer is final. It follows that after nullification of the assessments in the present case, the appellant had no leg to stand on.

DISPOSITION

We find merit in the objection by the respondent. The issuance by the appellant of replacement assessments where no tax liability arises flies in the face of the principle of finality to litigation which is a pillar of the rule of law. As usual, costs will follow the result.

Accordingly, it is ordered that:

"The appeal be and is hereby dismissed with costs."

MAVANGIRA JA : I agree

CHIWESHE JA : I agree

Kantor & Immerman, appellant's legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners