TREK PETROLEUM (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 14, 17 and 25 July 2017

Urgent Chamber Application

T. Mpofu, for applicant
S. Bhebhe, for respondent

MUSAKWA J: The applicant seeks the following relief-

"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 relief be and is hereby confirmed.
2. The execution of a garnishee of accounts during contestation of tax liability be and is hereby declared unlawful.
3. Section 69 of the Income Tax Act [Chapter 23:06] be and is hereby declared unconstitutional and struck down.
4. That the respondent shall pay the costs of this suit on a higher scale of legal practitioner and client only if it opposes the application.

INTERIM RELIEF GRANTED

Pending determination of this matter, the Applicant is granted the following relief-

1. That respondent be and is hereby ordered to immediately lift the garnishee on the accounts of Trek Petroleum (Private) Limited.
2. In the event that respondent fails to comply with paragraph 1 within 24 hours of this order, the Sheriff or his lawful deputy, be and is hereby authorised to serve a copy of this judgment on each bank and secure the lifting of the garnishee from applicant's accounts."

The founding affidavit to the application was deposed to by Patricia Browell. She avers that in 2010 a company called Chaparrel Trading (Private) Limited opened its first service station and commenced to sell fuel. At that stage Trek Petroleum was only a trade

name. In June 2014 Trek Petroleum (Private) Limited was registered and commenced to sell fuel. All business that was conducted under Chaparrel Trading (Private) Limited was transferred to Trek Petroleum (Private) Limited. Although it continued to exist Chaparrel Trading (Private) Limited ceased to conduct business.

At the time Chaparrel Trading (Private) Limited transferred its business to Trek Petroleum (Private) Limited Chaparrel Trading (Private) was under investigation over its tax obligations by the respondent.

On 3 June 2014 the respondent seized documents that were on the deponent's laptop computer. From the documents that were downloaded it was assessed that Chaparrel Trading (Private) Limited owed tax in the amount of $44 263 133. 48. It is contended that the tax was assessed on an erroneous computation of profits that were made between 2010 and 2012. Chaparrel Trading (Private) Limited objected to the assessment. In the process information was supplied to the respondent to back up the disputed tax liability. The respondent subsequently contacted Chaparrel Trading (Private) Limited in August 2016 in a bid to collect the tax that was due. Then on 2 November 2016 the revised tax liability was revised to $45 220 636.28. On 9 April 2017 Chaparrel Trading (Private) Limited formally objected to the assessment. The respondent acknowledged on 8 May 2017.

On 6 July 2017 the respondent placed a garnishee on the applicant's accounts. It is contended that the law that allows the respondent to garnishee accounts against legitimate contestation is unjust. The respondent is accused of acting capriciously by seeking to collect tax without seeking a determination of the dispute before a competent court. Thus it is contended that the applicant's right to property and protection of the law has been violated. The rest of the averments dwell on why the applicant believes it was impossible for it to incur the claimed tax liability considering the volume of fuel it traded.

As to the basis of the interdict it is claimed that the applicant's right to fair and reasonable administrative justice has been violated by equating its accounts to those of Chaparrel Trading (Private) Limited. The provisions of the law on garnishee are said to be unconstitutional as they violate the basic tenets of natural justice, the right to protection of the law and the right to private property.

On irreparable harm it is contended that in the event of there being no liability the applicant may well not be able to recover as it might be thrown into liquidation on account of failure to trade.

On balance of convenience it is contended that the respondent will not be prejudiced as it will have a chance to finalise the objection or take the matter before a competent court. It is further contended that if the interim relief is not granted, the applicant might fold up.

The respondent's opposing affidavit was deposed to by its Chief Investigations Officer. It is contended that income tax is based on self-assessment by an income earner. As such there is need to maintain records of income and to periodically calculate and pay income tax. The respondent periodically conducts audits and assessment of tax payers.

It is further contended that the respondent does not call for payment of income tax that is not due. What an income earner needs to do is to deduct that portion of tax from the total income received and remit it to the respondent.

Upon accessing the applicant's documents and laptop computer it was noted that the applicant was maintaining two sets of financial statements. There was a set of financial statements which reflected higher scales of income than those previously submitted to the respondent. These statements were used to assess the applicant's tax liability. Assessment notices were presented to the applicant on 23 December 2014. The applicant objected on 9 January 2015. The respondent was not persuaded to revise its assessment by the presentation of evidence to back the objection. The applicant was advised to present a payment plan by way of a letter dated 20 March 2017.

Despite the appointment of agents to collect tax due from Chaparrel Trading (Private) Limited, nothing materialised. This is because Chaparrel Trading (Private) Limited transferred its assets and business to Trek Petroleum (Private) Limited. The respondent then invoked s 77 (3) of the Income Tax Act.

It is contended that in terms of s 58 of the Income Tax Act the respondent is empowered to appoint agents for the collection of tax. The applicant is said to have grounded urgency on the fact that the respondent managed to catch up with the applicant since both companies are related through shareholding, directorship and management. The respondent is empowered to recover assessed tax in terms of s 69 (1) of the Income Tax Act. Urgency cannot be founded on financial hardship arising from a garnishee as this a necessary and valid way of enforcing a tax obligation. The obligation to pay tax is not suspended by the lodging of an objection. The applicant has no *prima facie* right. The applicant is said to have spurned an invitation to present an acceptable payment plan.

Mr *Mpofu* made the following submissions: The cases cited in the respondent's heads of argument are irrelevant. These cases are *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue*

Authority CCZ 7-14 and *ZIMRA* v *Packers International (Pvt) Ltd* SC 28-16. The applicant is seeking interim protection pending the return date when it is sought to be argued that s 69 of the Income Tax Act is unconstitutional. The respondent cannot seek to shelter under s 58 whilst abusing s 69.

Mr *Mpofu* further submitted that if a statutory power is not exercised with *bona fides*, a party is entitled to seek an interdict. This is because public power must be exercised rationally and fairly.

Mr *Bhebhe* submitted that whether or not the assessed tax is correct is a matter for the Special Court for Income Tax Appeals. Thus he submitted that this is not a matter for determination by the High Court. He further submitted that the provisions of the relevant Act were followed in assessing the tax. The only issue centres on quantum and this is for determination by the Special Court for Income Tax Appeals.

As regards the constitutional challenge to s 69 Mr *Bhebhe* submitted that this does not constitute a *prima facie* right entitling the applicant to an interdict. In support thereof he cited the case of *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority supra.* He further submitted that tax is still payable notwithstanding the objections raised with the Commissioner General. Mr *Bhebhe* further submitted that s 69 provides a window of relief which the applicant has not pursued. That an erroneous assessment may have been made does not render the respondent's conduct unlawful. Mr *Bhebhe* also submitted that once a tax assessment has been made there is always the possibility of a garnishee. Thus he argued that the matter was not urgent. This is because as far back as March 2017 the applicant must have been aware of the possibility of a garnishee.

Mr *Mpofu* was not entirely correct in distinguishing the present case from the decisions in *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority* and *ZIMRA v Packers International (Pvt) Ltd* SC 28-16. In those two cases the Zimbabwe Revenue Authority had assessed the tax that was due from the two companies. When the tax was not paid Zimbabwe Revenue Authority proceeded to place garnishees against the companies' accounts. The only difference is that in the present case a garnishee was placed on the applicant's accounts on account of Chaparrel Trading (Private) Limited having transferred its operations to the applicant following a tax assessment. I will come to the ramifications of such an arrangement shortly.

Dealing with the issue of an interdict sought in the wake of a tax assessment MALABA DCJ (as he then was) had this to say in the case of *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority supra* at 8-9-

> "The applicant seeks an order suspending the statutory obligation to pay the amount of the tax it was assessed to be liable to pay to the fiscus, pending the hearing and finalization of the appeal in the Fiscal Appeal Court. It is in the heads of argument that the applicant reveals that the relief sought is an interim interdict. There is need to have regard to the substance and not the form of the relief sought. The fact that the applicant calls the order sought, an interim interdict does not make it one.
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> The subject of the application is not the kind of subject matter an interdict, as a remedy, was designed to deal with. An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a *prima facie* right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right.
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> 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. *Airfield investments (Pvt) Ltd v Minister of Lands& Ors* 2004(1) ZLR 511(S); *Stauffer Chemicals v Monsato Company* 1988(1) SA 895; *Rudolph & Anor v Commissioner for Inland Revenue & Ors* 1994(3) SA 771."

In the present case the applicant bases its right on the contention that no assessment was made on its operations but on a sister company, Chaparrel Trading (Private) Limited. No argument was advanced on provisions of s 77 of the Income Tax Act. S 77 (3) of the Act provides that-

> "(3) If a person by whom tax is due and payable transfers or has transferred any asset to a relation with the intention of avoiding recovery of the tax, the relation shall be deemed to be chargeable with the tax up to an amount equal to the fair market value of the asset—
> (*a*) when it was so transferred; or
> (*b*) when the relation is charged with the tax; whichever value is the greater."

Despite having objected to the assessment that was made on its operations Chaparrel Trading (Private) Limited has not lodged an appeal to the Special Court for Income Tax Appeals. It is erroneously argued that the respondent is the one that should take the tax dispute before the Special Court for Income Tax Appeals in order for the correct amount to

be determined. Under the circumstances it is Chaparrel Trading (Private) Limited which is the aggrieved party and should therefore seek redress. The same now applies to the applicant. The conduct of Chaparrel Trading (Private) Limited of transferring its business and operations to the applicant when there was an unresolved tax dispute had the consequence of placing the applicant in the cross-hairs of the tax authority. This is where s 77 (3) comes into issue. In such circumstances it cannot be said that the respondent acted capriciously or abused the law. It therefore follows that the applicant has no right to protect. The argument that it was not feasible for Chaparrel Trading (Private) Limited to have traded in such volumes of fuel on which the disputed tax is based is neither here nor there for purposes of the present application. The correctness of the respondent's assessment is a matter for determination by the Special Court for Income Tax Appeals, in the event that Chaparrel Trading (Private) Limited lodges an appeal against the assessment.

In the circumstances the application is hereby dismissed with costs.

Mushoriwa Pasi, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners