JOUBERT CRUSHERS AND TRANSPORT (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 21 May 2018 and 14 November 2018

Opposed Matter

T.C. Nenzou, for the applicant
A. Moyo, for the respondent

MUNANGATI-MANONGWA J: The applicant has approached this court primarily seeking an order setting aside the respondent's administrative action imposing a garnishee order against the applicant's bank account for a tax debt. It further seeks that the respondent be ordered to reimburse all the monies it garnished from applicant's bank account as from 31 March 2016. The applicant also seeks that the respondent be ordered to lawfully and properly conduct an audit for the 2009 and 2010 financial years. The applicant bases its application on the provisions of s 4 (1) of the Administrative Justice Act [*Chapter 10:28*] as read with s 3 thereof. It is the applicant's contention that the respondent's actions are unlawful, grossly unreasonable and infringe its legitimate expectations as well as its constitutional right to administrative justice because;

> "(i) No tax debt was lawfully raised against it before the garnishee was imposed on its bank accounts.
>
> (ii) There is a new set of audit results which were presented by the respondent who went on to demand payment but has unlawfully failed to enforce these findings.
>
> (iii) That no tax debt was outstanding as at the time of the garnishee and instead respondent owes applicant a refund."

The respondent opposes the relief sought and maintains its actions are above board, and that the garnishee orders were lawfully placed on the applicant's bank accounts after notices of assessment had been furnished to the applicant establishing a tax liability.

The issues open for determination by this court are:

(i) whether or not the applicant was furnished with notices of assessment for the years 2009 and 2010.

(ii) what is the import of the new set of audit results upon which the respondent demanded payment for the years 2009 and 2010 tax obligations.

(iii) whether or not the garnishee orders placed on the applicant's bank accounts should be uplifted and money collected through those orders be returned?

The background facts of this case are as follows;

Around July 2010 the applicant filed income tax self-assessment returns with ZIMRA the respondent. This was followed by a purported assessment from the respondent which indicates the document date as 30 April 2009 with a return date of 10 May 2011. This is Annexure C and appears on p 129 and is headed "Income Tax Companies Assessment Amended Assessment." The document showed tax chargeable as USD$70 392-60, to which a penalty was added resulting in the amount payable being USD$140 785-20.

At the same time respondent equally generated an Income Tax Assessment document for the year 2010 which has the document date reflected as 30 April 2010 which shows tax chargeable as USD$24 673-65 and a penalty of USD$23 580-22 resulting in tax payable being USD$48 253-87. This document appears on record as Annexure "D".

Apparently a garnishee order was once imposed on the applicant's bank account in 2012 presumably with no assessment report but was uplifted after parties reached a compromise. The record shows that the respondent further issued other income tax assessments duly endorsed "amended assessment" for the same years 2009 and 2010. These documents do not provide the exact date of generation maintaining the document date as 30 April 2009 and appear as Annexures "I" and "J". Annexure "I" shows income tax payable for the year 2009 together with penalties as USD$78 604-62, a reduction from USD$140 785-20 initially indicated on Annexure "C" the tax assessment for the same year. Equally Annexure J the amended assessment document for 2010 shows income tax payable as USD$32 464-63 inclusive of penalties, a reduction from USD$48 253-87 previously indicated as payable for the company tax for the same year in Annexure "D". The respondent refers to these developments in its opposing affidavits as "Final Tax" assessments for 2009 and 2010, see para 72 p112 of the record. Despite these findings, parties continued with the exchange of correspondence and counter challenges.

The respondent later wrote to the applicant on 29 October 2015 indicating that it had finalised the audit for the tax years 2009 and 2010. The figures reflected on the audit advice

document reflects income Tax payable for 2009 as USD$20 546-03 inclusive of the penalty. For the year 2010, the amount together with penalties is reflected as USD$68 588-46. The letter demanded payment of the tax liability forthwith.

After further exchange of correspondence, the respondent proceeded in March 2016 to appoint agents for the payment of taxes, claiming payment of USD$69 185-90 for Income Tax, Vat USD$28 886-60 and USD$6 765-04 for payee. This is the process which the applicant is challenging on the grounds stated earlier. The applicant denies receiving any assessments and challenges Annexures "C" and "D," initial assessments reports as fabricated. The applicant submitted in the founding affidavit that no assessment report as envisaged by s 2 read with s 51 of the Income Tax Act [*Chapter 23:06*] (hereinafter referred to as "the Act") was ever compiled by the Commissioner General before the garnishee was issued. Further the applicant was never availed with an opportunity to contest the findings before a garnishee order was issued.

It is common cause and the respondent has made it clear that the documents it has produced are extracts. The applicant on 10 April 2012 addressed a letter to the respondent's head of audits which has the following opening statement;

"This office is therefore acknowledging the final 2009 and 2010 income tax debt assessment of the said years of US$34 115.62 and US$ 78 604.02 with penalties of both 50% respectively".

The letter is signed by both the applicant's tax consultant and its two directors. See Annexure "K" p 140 of the record.

Apart from acknowledging the debt, the applicant sought an indulgence from the respondent by way of reduction of the penalty percentage from 50% to 30%. In the same vein the applicant reiterated its commitment to pay US$4000.00 per week towards reduction of its debt. Given the aforegoing clear evidence, there is no way this court can be hoodwinked into believing that the applicant did not receive the assessments appearing as Annexures "I" and "J".

It is also notable that Annexures "I" and "J" show a reduction in the amounts payable as corporate income tax in comparison to the initial assessment as reflected by Annexures "C" and "D" which showed tax payment due for 2009 as USD$140 785,20 and for 2010 as USD$48 253-87. Whilst the respondent refers to Annexures "I" and "J" as final assessments the court notes that they are headed;

"Income Tax Companies-Assessment Amended Assessment."

From a technical point of view the manner of reference would not change anything, it is clear that these are amended assessments regard being had to the change in figures.

Further, to show that there was an assessment, the applicant itself wrote to the respondent's head of audit requesting "for additional assessment" for the years 2009 to 2010 (p 42). There could be no additional assessment if there was no initial assessment to start with. That what has been placed on record are extracts of assessment is irrelevant as s 79 allows the production of such extracts as evidence of the existence of an assessment. The section reads

> "The production of any document under the hand of the commissioner or of any officer duly authorised by him purporting to be a copy of an extract from any notice of assessment shall be conclusive evidence of the making of such assessment, and except in the case of proceedings on appeal against the assessment, shall be conclusive evidence that the amount and all the particulars of such assessment appearing in such document are correct."

I hasten to add that the exception does not cover the applicant *in casu* as there is no appeal the court has been made aware of. In conclusion the court finds that there was an assessment duly conducted by the respondent for the years 2009 and 2010 and the applicant received same in 2012 as Annexures "I" and "J".

It is common cause that several correspondence (over 35 letters) were exchanged between the parties in connection with the tax debt. It is also on record that several meetings ensued between the parties with exchange of financials and documents taking place. On 29 October 2015 the respondent wrote to the applicant regarding the audit for 2009 and 2010. The opening statement reads;

"This letter serves to inform you that we have finalised the audit for tax year 2009 and 2010." Taxes for the two years were clearly tabulated as, the principal amount, penalty invoked and totals, with the interest column duly endorsed "to be advised" abbreviated as TBA.

The respondent went on to indicate that payment had to be made "forthwith" and interest was to remain payable after settlement of the debt due. Specifically, the audit refers to the principal and penalties payable for the income tax year as USD$20 546.03 for the year 2009, and USD$68 588, 46 for the year 2010. A quick comparison with what the respondent termed final assessments being Annexures "I" and "J" shows a marked difference being a reduction in amounts indicated in the final assessments. This development brings the court to the question;

"What is the import of the new set of audit results upon which respondent demanded payment for the tax due in 2009 and 2010?"

The applicant submitted that a final tax audit for the years in issue amounts to an amended assessment and wants Annexure "N" the audit result to be so considered. Mr *Nenzou* for the applicant submitted that the respondent having concluded a final audit, it is applicant's legitimate expectation that once it is established that there is an improper tax charge, it should be corrected. He argued that the respondent made it clear on 29 October 2015 that its position is final as per its audit. Given the position adopted by the respondent, imposing a garnishee in 2016 not based on its latest findings is unlawful and unreasonable. It was further argued that the respondent should not have resorted to its previous findings in light of the latest audit. Such actions amount to abuse of discretion. The applicant contended that the garnishee orders against the applicant's bank accounts were thus unlawfully imposed without the raising of a tax debt through a tax assessment as envisaged by s 51(2) of the Act. Section 51 (2) states:

> "Notice of assessment and amount of tax payable, where tax is payable shall be given to the tax payer assessed."

The applicant submitted that such notice has a format and informs the tax payer what to do and same was not given to applicant after the audit results.

Mr *Moyo* for the respondent submitted that the actions of the respondent must be put in context. Whilst it had indicated its final position by way of annexure "K" the audit report, the applicant had further challenged the audit. This does not suspend the obligation to pay. This position is clear from provisions of Section 69 of the Act which provides as follows:

> **"69 Payment of tax pending decision on objection and appeal**
> (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 conditions as he may impose, be suspended pending a decision on any objection or appeal which may be lodged in terms of this Act.
> (2) If any assessment or decision is altered on appeal, a due adjustment shall be made, for which purpose amounts paid in excess shall be refunded and amounts short paid shall be recoverable."

Mr *Moyo* further submitted that, since the applicant disputes the final position as presented, they cannot rely on s 48(1) of the Act as there is a dispute. The section stipulates;

> "**48 Reduced assessments and refunds**
> (1) If it is proved to the satisfaction of the Commissioner that any person has been charged with tax in excess of the amount properly chargeable under this Act, the Commissioner shall issue an amended assessment reducing the tax so charged and, if necessary, authorize a refund to such person of any tax overpaid:
> Provided that—
> (i) any such amended assessment issued by the Commissioner shall not be subject to any objection and appeal;

> (ii) any tax payable in accordance with the practice generally prevailing and accepted by such person at the time when any assessment was made shall be deemed to have been properly so chargeable;
> (iii) the Commissioner shall not authorize any reduction or refund under this subsection unless the claim thereof is made within six years after the date of the notice of assessment in question."

Mr *Moyo stated that only the commissioner can issue an amended assessment or authorise a reduction. In essence* Mr *Moyo* submitted that the final tax assessments as in annexures "I" and "J" apply *in casu* and not the purported audit of 2015.

The court has already made a finding that 2009 and 2010 Income Tax assessments were furnished to the applicant by way of Annexure "I" and "J" in 2012. However the court rejects the respondent's stance that it can resort to the 2012 final assessments "until such time the current audit review is finalised and new tax assessments generated" (see p 115 para 87 of respondent's opposing affidavit.

This is because 3 years after furnishing applicant with assessment as in annex "I" and 'J" the respondent in a letter addressed to applicant's Public Officer dated 17 September 2015 stated as follows;

> "You are therefore required to come to my office, ZIMRA Mutare Office and obtain the audit results and respond to those results forthwith. Failure to come within 7 days from the delivery of the letter will leave me with no choice but to treat the findings as <u>final assessments</u>" (the underling is mine).

This statement in itself gives insight into the manner in which the respondent viewed the audit findings that is "as final assessments."

This is confirmed by Annexure "N" itself the audit. It in no uncertain terms, calls the audit for 2009 and 2010 as 'final' and proceeded to claim payment forthwith for the debt due. Given this position taken by the respondent, to revert to the findings of 2012 in light of its own current findings would be tantamount to abuse of authority. A legitimate expectation is created in the mind of the applicant that once it is established that there is an improper tax charge and same is corrected, the applicant's liability should only be to that extent. Thus to revert to an old position in light of a newly established position which favours the applicant would not only be *unreasonable and unfair but would be unlawful* as well. Such conduct defies logic when officials decide to ignore their own current findings and seek to rely on old information when the position has since changed. The respondent tendered its own audit results which reduce the applicant's tax liability and hence cannot adopt an old position which is prejudicial to the applicant, that amounts to abuse of power.

Given the audit results now in its possession, respondent could then have generated as it is obliged in terms of s 48 (1) of the Act, amended assessments. No doubt a debt can only be established or reflect on an account of a tax payer when there is a tax assessment that has been raised and issued to a tax payer. Having come up with an audit, the results of which it termed final, nothing bars the respondent from generating and issuing new tax assessments with the information at hand. The court takes note of the fact that the respondent in an affidavit filed on its behalf on 14 April 2016 which appears as Annexure B on p 26 para 31 the respondent averred that there has to be finality to an audit hence the position taken in the letter of 29 October 2015 was final. If applicant was aggrieved it had to raise an objection in terms of the Income Tax Act.

As the applicant aptly puts it "what therefore boggles the mind is how did the respondent resurrect and issued a garnishee on the findings of the 2012 audit in the face of the review which was later conducted for the financial year 2009 to 2010 and revealed different results…when the respondent acknowledged its 2015 findings as its final position…".

The court also exercised its mind on the question posed. It brings the court to the pertinent issue of the exercise of official power by administrative authorities. As MATHONSI J stated in *Telecel Zimbabwe (Pvt) Ltd* v *Potraz and Others* 2015(1) ZLR 651(H);

The concept of administrative justice is now embedded in our constitution. It provides the skeletal infrastructure within which official power of all sorts affecting individuals must be exercised. The elements are:

1. Lawfulness in that official decisions must be authorised by statute, prerogative or the Constitution.
2. Rationality in that official decisions must comply with the logical framework created by the grant of power under which they are made.
3. Consistency in that official decisions must apply legal rules to all those to whom the rules apply.
4. Fairness in that official decisions should be arrived at fairly, that is impartially in fact and appearance giving the affected persons an opportunity to be heard.
5. Good faith in making of decisions in that the official must make the decision honestly and with conscientious attention to the task at hand having regard to how the decision affects those involved."

Regard made to the facts of the matter, the court finds that the garnishee was

unlawfully and indeed unprocedurally imposed as no new tax debt as envisaged by s 51 (2) of the Act had been raised in the face of the current audit findings.

Further, failure to issue an amended tax assessment where it is clear that applicant had been charged tax in excess of what was properly due is being irrational. It was imperative that an amended assessment so reducing the tax be issued in terms of s 48 (1) of the Act. The decision to proceed to invoke s 58 of the Act and impose a garnishee in the circumstances constitutes irrational behaviour on the part of the official making the decision. Equally the decision could not have been made in good faith given the new audit findings. The decision cannot pass the test of fairness and impartiality given the admission that the audit results in the letter of 29 October 2015 refers to the results as final yet the respondent reverted to using outdated information in seeking to extract payment from the applicant.

The court is alive to the provisions of s 69 of the Act and to the position taken by the Supreme Court in *Zimbabwe Revenue Authority* v *Packers International (Private) Limited* SC 28/16 to the effect that the obligation to pay and the right to receive tax chargeable under the Act shall not, unless the Commissioner otherwise directs, and subject to any terms and conditions the Commissioner may impose be suspended pending a decision on any objection or appeal which may be lodged in terms of the Act. The distinguishing fact *in casu* is that the court has made a finding that the respondent has acted unlawfully in imposing a garnishee and in appointing an agent for the collection of tax when no assessment document had been properly and lawfully generated and furnished to applicant as per available information. The decision not being in good faith, it being unreasonable and irrational the respondent's actions cannot stand. The actions of the respondent have been successfully challenged by the applicant who has been able to prove that the respondent has not acted lawfully or in terms of the powers granted by the Act and what it has done amounts to abuse of the bestowed powers.

Suffice that the applicant has not put forward its case as failure or inability to fulfil its obligation, it is not seeking reprieve but it is challenging the failure to do an assessment as per available information. Applicant is challenging the failure to implement the audit findings, and the action by respondent of proceeding to implement a garnishee order ignoring due process. The applicant is not pleading for reprieve, nor pleading that payment will ground its operations. The court is clear that it is within the respondent's powers to place garnishee orders but in doing so, due process has to be followed beginning with the availability of a tax assessment creating a tax obligation. Where the discretion endowed on an administrative authority is employed in an unreasonable, irrational and unlawful manner the courts as the vanguard of a

constitutional democracy where accountability, openness and fairness take precedence, will, intervene and defend those precepts. This is because the right to administrative justice is enshrined in the supreme law of the land under s 68 of the Constitution of Zimbabwe which embodies the provisions of s 3 of the Administrative Justice Act [*Chapter 10:28*] and hence must be jealously guarded.

This court is mindful that in reviewing the decisions of an administrative body it must guard against usurping such body's functions. In *Affretair (Pvt) Ltd & Anor* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) at p 22 MCNALLY JA stated as follows:

> "The duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently."

The court went on to say if courts are satisfied that the authority has done that (carried its functions fairly and transparently) they will not interfere simply because they will not approve the authority's conclusion. Equally in my view, where the functions have not been carried out fairly and transparently, and the decisions arrived at are not lawful and are irrational and not justifiable, it is the court's duty to then move in and interfere as in *casu*.

On the basis of the reasons furnished in the aforegoing paragraphs, the garnishee orders imposed on applicant's bank accounts cannot stand and accordingly have to be set aside and are hence incidentally uplifted forthwith.

The applicant seeks the return of all the monies garnished from its bank account as from 31 March 2016. Once there is a finding that the respondent's decision to impose a garnishee was not lawfully and reasonably made it follows that what was gotten through the unlawful act has to be returned. Hence monies garnished from applicant's bank account as from 31 March 2016 by respondent have to be returned.

The applicant has put in argument that it does not owe the respondent any monies. It has tried to demonstrate through Annexures T3 to T14 that the respondent has not adequately captured all payments made. Proof of bank deposits has been provided and a demonstration made of respondent's failure to capture all payments in its new accounting system which payments appear in the respondent's old accounting system. Some payments seem to be missing from the respondent's records altogether. The respondent has not been able to rebut these allegations at all or to a satisfactory extent. The court is not in a position to find that no monies are owing as this will involve full reconciliation of the figures involved and the court has not been asked to do that, neither will it be in a position to do so given the aforementioned

issue of assessments dealt with extensively in the aforegoing paragraphs. Tied to this, the applicant requires that respondent be ordered to lawfully and properly conduct the audit for 2009 and 2010 financial years.

It is common cause that on 29 October 2015 respondent had indicated that what it was presenting was a final audit. The applicant continued to raise issue. Subsequently, respondent dispatched a letter to applicant being annexure "Q" dated 11 February 2016 wherein respondent advised *vis* the audit for 2009 and 2010 that the case was still being worked on and the applicant was to be advised in due course. Needless to say there is need for finality to this issue. Judging by the figures pertaining to applicant's income, applicant is a small company and audit of its income and obligations for 2 years (2009 and 2010) cannot take more than 6 years. Thus respondent must act decisively and do so within the precincts of the law. The court believes that as a revenue collector, respondent should not be bogged down by a single entity which continuously challenges its findings by continuously filing new documents. In that regard, an order for the finalisation of the audit is proper in the circumstances. This will resolve the issue of whether or not the applicant still has a tax obligation to meet for the years 2009 and 2010. Having achieved that task, the authority can then find protection in the vast provisions provided by the Act to ensure that revenue which the *fiscus* desperately requires flows therein.

It is but for technicalities and the arbitrary way in which the respondent handled this income tax issue that applicant has been able to succeed. Nonetheless, having been successful there is no reason why costs should not be granted in applicant's favour. The award for costs on a higher scale is not justified and Mr *Nenzou* has not made any submissions that sway the court to grant such an onerous order. Accordingly the following order is made:

1. The decision by the respondent imposing garnishee orders against the applicant's bank accounts be and is hereby set aside and all the garnishee orders which were issued by respondent are hereby uplifted forthwith.
2. The respondent be and is hereby ordered to return all the monies it garnished from applicant's bank account as from 31 March 2016.
3. The respondent be and is hereby ordered to finalise the applicant's tax audit for the years 2009 and 2010 financial year considering all payments made towards the tax obligations.
4. The respondents to pay costs.

Chibaya and Partners, applicant's legal practitioners
Legal and Corporate Services Division, respondent's legal practitioners