DELTA BEVERAGES (PVT) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY (ZIMRA)

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 30 November 2016 and 1 December 2016

Urgent chamber application

D Tivadar, for the applicant
S Bhebhe, for the respondent's

MWAYERA J: The applicant approached the court through the urgent chamber book seeking the following relief.

TERMS OF FINAL ORDER SOUGHT

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

1. That the respondent be and is hereby finally interdicted from instituting any collection measures against the applicant in respect of any assessments issued by the respondent which are the subject of the appeal pending before the special court for Income Tax Appeals under case No. ITCO7/16;
2. Respondent shall pay the costs of this application.

INTERIM RELIEF GRANTED

Pending the granting of the final order as a foresaid, the applicant is granted the following relief-:

1. The respondent shall, pending the granting of final order in this matter, refrain from issuing garnishee directives and / or notices of appointment of agents served or to be served upon any of the applicant's banker, or instituting any collection measures against the applicant.

The facts giving rise to the urgent chamber application can be summarised as follows:

On 14 April 2016, the respondent, an administrative authority established in terms of Revue Authority Act [*Chapter 23:11*], and tasked among others with collection of revenues

dues, confirmed a tax assessment, together with penalty and interest, totalling $30 060 623.16. The respondent communicated the claim to the applicant, a company carrying on business in Zimbabwe of manufacturing alcoholic and non alcoholic beverages.

The assessment came after an investigation into taxes due from 2009 to 2014. A letter advising the applicant of the initial assessment tax plus interest and penalty, dated 14 April 2016 p 42, reflected a total figure of $42 374 254.63. On 9 May 2016, after engaging the tax due was reassessed giving a total amount inclusive of penalty and interest at $30 060 623.16. The applicant in terms of s 62 of the Income Tax Act objected to the assessment. The respondent did not accede to the objection. The respondent's position on 9 May 2016, as discerned from papers filed of record and oral submissions, was that the assessed tax was due and payable. The respondent wrote reminding the applicant of its obligation despite their right of appeal to the Fiscal Court in terms of s 65 of the Income Tax Act. On 21 November 2016, the respondent wrote (p124) in relation to the tax debt which had come down to $26 897 509.50 due to the payment of 3 000 000 000.00 effected to the respondent by the applicant. The respondent, in that letter, intimated intention to institute recovery measures if the outstanding amount was not paid by 25th November 2016. It is not in dispute that after the tax assessment, the applicant lodged an appeal in terms of s 65 of the Income Tax Act [*Chapter 23:06*]. It is apparent from the wording of s 69 of the Act, an Appeal to the Fiscal Court or any pending decision of any objection to the Commission does not suspend the obligation on the tax payer. Section 69 (1) of the Act provides

> "The obligation to pay and right to receive any tax chargeable under this Act shall not, unless the Commissioner otherwise directs and subject to such terms as he may impose, be suspended pending a decision on objection or appeal which may be lodged in terms of the Act.
>
> (2) If any assessment or decision is altered on an appeal, a due adjustment shall be made, for which purpose amounts paid in excess shall be refunded and amount short shall be recoverable."

The applicant, upon receipt of the letter of 21 November 2016 suggesting recovery measures were to be employed, approached this court on an urgent basis on 24 November 2016, leading to the present proceedings. The applicant argued that the matter was urgent as there was no other remedy available and that they sprung to action when the need to act arose upon receipt of the letter of 21 November 2016. The applicant argued that the only remedy was to grant the relief sought, interdicting the respondent from employing recovery measures. When asked to explain whether or not a payment proposal for the outstanding tax was an

option given the same process had been employed for the payment of USD3 million which despite having been paid, formed part of the pending appeal in the Fiscal Court, which appeal was in relation to the whole amount, Mr *Tivadar* argued that, that course was not a remedy. He stressed that the applicant was not going to engage the respondent with a payment proposal for the outstanding Income Tax because the assessment had no legal standing and as such was a nullity so nothing could emanate or stem from it. This argument was presented against the backdrop that the respondent, as an administrative authority, was empowered by the relevant Act to assess Tax due and also in terms of s 58 is empowered to appoint agents and to garnish the applicant's bank accounts so as to recover outstanding income tax. This is despite the existence of pending objection or litigation. If the assessment is in terms of the law and the enforcement measures are in terms of the law, then the argument by applicants that there is no legal basis for the assessment hence no need for coming up with a payment plan flies in the face of the law. This is more so when one considers that the applicant has an obligation to satisfy as legally required.

In my view the legislative intention in enacting provisions of the Income Tax Act is to ensure prompt payment of tax in the national and public interest. For the respondent to assess the tax, it is the tax payer, in this case the applicant who will not have remitted Income Tax as and when it is due. The spirit of the Act is to penalise and encourage compliance. The dirty hands principle that if anyone fails to comply with the law they cannot then seeks to easily enforce their right for the obvious reasons, it is subject to doubt and limitation. Given the nature of relief sought and the cause of action, the matter is hinged on assessed income tax stretching over a period. The income tax act requires returns and remittance as and when revenue is earned.

In the circumstances of this case, the applicant ought to have remitted income tax in compliance with the law. Given the follow up assessment by the respondent, and knowledge of the inevitable, as early as May 2016, to only seek redress on an urgent basis in November 2016 disqualifies this application as falling under the urgent realm for the following reasons. It is settled a matter is viewed as urgent if the party seeking redress treats the matter as urgent. This naturally relates to time and space of action. In *Kuvarega* v *Registrar-General and Anor* 1998, (1) ZLR 188, the court made pertinent remarks on urgency when it remarked:

> "What constitutes urgency is not only the imminent arrival of the reckoning, a matter is urgent if at the time the need to act arises, the matter cannot wall. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rule".

In *casu* the indication of intention to employ enforcement measures by appointing agents and or garnishing bank account communicated on 24 November 2016, was not the commencement of threat to the applicant's right, but rather the end in that such intention to employ enforcement measures is akin to attachment and or removal of property in execution of a long passed judgment. The applicants were aware of the assessed income tax and the ultimatum as far back as 14 April 2016, but did not seek to protect their right. The applicant raised objections with the commissioner and also lodged an appeal with the Fiscal Court and ended there, in the face of clear legal provisions that such recourse would not suspended the tax obligation. The facts as presented, show deliberate abstention until dooms day. The applicant's failure to submit a payment plan on the basis of their opinion that the assessment has no legal basis and as such is a legal nullity, is the signal of a death knoll to urgency. The applicant did not timeously seek to protect its rights by availing a payment plan, which option would not stop their appeal in the fiscal court, but would avail a remedy to the intended garnish. The assessment came first, signalling the tax obligation, and this was way before the notification of enforcement measures setting in.

The circumstances of this case depict in a very vivid manner self-created urgency occasioned by sluggard approach to a financial situation. In the face of alternative remedies again the application is dealt a heavy blow for not meeting the requirements of urgency. Even if one was to accept an amount of USD27 million is a huge sum of money by a stretch of imagination and that this would occasion financial hardship or harm, certainly in the face of the remedies available such harm cannot be defined as irreparable harm. Moreso given the available option of coming up with a payment plan, or in the event that the applicant succeeds in the appeal being a business concern, the amounts paid will be factored in or even refunded. A matter is accorded preferential treatment of being dealt with on urgent basis if the cause of action and nature of relief sought is such that waiting for the ordinary roll instead of dealing with the matter urgently would render hollow or meaningless the relief sought.

See D*ocument Support Centre* v *Mapuvire*. *Tripplel C Pigs and Anor* v *Commissioner General ZIMRA* HH 7/07 and *Dilwin Investments (Pvt) Limited T/A Formscaff* v *Jopa Engineering Company Ltd* HH 116/96.

In Tripple C Pigs case *supra* GOWORA J as she then was emphasised the need for the court to judicially exercise its discretion in deciding whether or not a matter is urgent. She stated:

> "….. As courts, we therefore have to consider in the exercise of our discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest if not redressed immediately would not be the cause of harm to the litigant which only relief in the future would render a *brutum fullmen*".

All the cases referred to above are clear on the need to accord matters that meet the requirements of urgency preferential treatment while those that fall short of the clear requirements should be a preserve for the ordinary roll.

The requirements of urgency can be summaries as:

1. That the nature of relief or cause of action sought is such that if not granted would render subsequent action hollow.
2. That if the relief is not granted the applicant will suffer irreparable harm
3. That when the need to act arose the party sprung to action and treated the matter as urgent.
4. That the urgency is not self-created.
5. That the balance of convenience favour granting relief sought.

In this case the assessment was in April 2016. Objection raised were attended to and the reassessed figure of USD 30 060 623.16 communicated. As early as 20 May the applicant was aware of the tax obligation hovering over their head. The applicant chose to settle some part of the assessment and distinguished it from the outstanding USD26 897 509.50. In respect of the latter, the applicant chose to hold a view that the assessment was unlawful and therefore a nullity, despite knowledge that noting an appeal did not suspend the tax obligation. The applicant with knowledge of the ultimate and that the avenue of coming up with a payment plan was open to it to choose sit on their laurels.

The applicant only rose to action upon intimation of enforcement procedures of appointment of agents and garnishee of bank account being imminent. Such conduct certainly falls short of treating the matter as urgent on the party of the applicant. The circumstances of the matter as perceived show that the applicant did not prudently and diligently manage its affairs. The enforcement measures may cause financial hardship on the part of the applicant but this is clearly the applicant's making given the reluctance to regularise the situation in the face of the natural consequences that would flow from the non-remittance of revenue in terms of the law. The applicant chose not to avert enforcement measures by coming up with payment plan as the applicant argued the assessment was unlawful. Appeals and objections to tax assessment claims do not suspend the tax obligation. See *Fairdrop Trading (Private)*

Limited v *The Zimbabwe Revenue Authority* HH 68-14. The applicants created problems for themselves by not managing their business affairs prudently in the face of tax assessment. From April 14, 2016 the tax assessment was brought to the attention of the applicants. A revised assessment was issued on 20 April 2016 and naturally the consequence of law would end in recovery. At the time of assessment the need to act arose and that is about 6 months back. The applicants did to seek to regularise and avoid the inevitable enforcement only to approach the court under the umbrella of urgency when it was apparent enforcement was to be effect per the letter from the respondent of 20 November 2016. In the circumstances of this case given the cause of action and relief sought the matter does not fall under the criteria of urgent requirements. I subscribe to the sentiments echoed in *Reverend Tony Tshuma and Others* v *Clement Nyathi and Others* HB 133/15 where it was held

> "In conclusion the respondents submitted that the applicants did not treat the matter as urgent as they sat on their laurels from November 2014 to June 2015 a period of 7 months. A matter does not become urgent because the day of reckoning has arrived. The problems of the applicants are of their own making and the urgency is self-created".

These remarks aptly apply to the circumstances of this case where for about 6 months the applicants conscious of a tax assessment did not seek to redress the obvious enforcement till the day of reckoning arrived. Urgency is not an avenue available to assist otherwise sluggard litigants. The applicants ought to have appreciated the legal consequences emanating from a tax assessment despite lodging of an appeal or objection enforcement would follow unless suspended by the Commissioner in terms of the law, upon provision of an acceptable payment plan. The applicants were adamant they would not supply payment plan for what they viewed as an unlawful assessment. They cannot cry foul on a self-created problem. In the case of *Zimbabwe Revenue Authority* v *Packers International (Pvt) Ltd*. SC 28-16 at p 7 the court stated:

> "A refusal to pay or failure to do so on the part of the operator would result in the imposition of a garnishee. Therefore, once the tax assessment was made, the imposition of the garnishee was a possibility."

In my view the law is clear that after the tax assessment one can raise objections and or appeals for revised assessment but that does not suspend the tax obligation. In any event in this case it was conceded that in carrying out tax assessment the respondent was acting in terms of the law. It would be folly to suspend the obligation on the basis that there is a pending appeal for the reason that whatever the outcome the applicant has other remedies at its disposal. The lawful conduct of the respondents of assessing tax in terms of the law cannot

be interdicted on urgent basis. In the present case the requirements of urgency have not been met. In the case of *Mayor Logistics (Pvt) Ltd* v *ZIMRA* CC7 2014. MALABA DCJ stressed the clear legal position that an appeal to the Fiscal Court on objection to tax assessment does not suspend the tax payer's tax obligation. When he remarked:

> "Failure to fulfil an obligation may be due to a variety of circumstances. The legislature decided to place the responsibility of deciding whether or not the particular circumstances of a tax payer, entitle him or her to a directive suspending the obligation to pay the assessed tax on the commissioner. A court of law would be acting unlawfully if it usurped the discretionary powers of the commissioner and ordered a suspension of the obligation on a tax payer to pay assessed tax pending determination of an appeal by the Fiscal Court."

The relief sought by the applicant on urgent basis further deals the application a fatal blow. The applicant is seeking an interim relief which is substantially the same as the final order. That in itself is incompetent. The relief sought is contrary to the Income Tax law in that it is tantamount to subverting the Income Tax Legislative Provisions on urgent basis. The Administrative Act carried out by the relevant authority of assessing tax and threatened resort to enforcement measures of appointing agents and garnishing bank accounts is lawful. There is no justification for preventing the lawful recovery measures on urgent basis. The applicant in part 7 of the certificate of urgency and para 20 of the founding affidavit conceded the respondent's permitted by law to institute the recovery measures in respect of tax obligations. The glaring question is then what justifies urgent intervention to stop a lawfully instigated process.

The applicant was aware of this process of tax investigation and assessment since April 2016. The assessed figure was revised and communicated to the applicant some 6 months back. The applicant objected to USD26 897 509.50 million, lodged an appeal with the Fiscal Court, which does not suspend the tax obligation. The applicant did not submit any payment plan to the Commission which is the remedy available in terms of the law to suspend the tax. Instead the applicant was adamant the assessment was a legal nullity and when it was brought to its attention enforcement measures which are inevitable after tax assessment were nigh the applicant then approached this court on purported urgency. Clearly urgency does not arise from mere commercial hardship. The applicant ought to have discharged the obligation of tax on receipt of income. This is what led to the assessment. From the time of assessment the applicant ought to have organised its tax affairs to avert the inevitable enforcement and appointment of agents and garnish of bank accounts. The

applicant waited from April 2016 and only approached the court seeking an incompetent order in circumstances where the requirements of urgency have not been met.

The application is not urgent and accordingly it is ordered that:

1. The application be and is hereby struck off the urgent roll.
2. The applicant shall bear the costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners