

TREK PETROLEUM (PRIVATE) LIMITED
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
HARARE, AUGUST 10 and 11, 2017

T. Mpfu with N. T. Mutemi, for the applicant

H. Muromba with G. Sithole, for the respondent

IN CHAMBERS

Judgment No. SC 56/17
Chamber Application No. SC 547/17

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MAVANGIRA JA: This is an urgent chamber application in which the applicant seeks relief in the form of an order firstly, to the effect that the appeal that it has noted in SC 546/17 against a judgment of the High Court, shall be heard on an urgent basis and secondly, that pending determination of that appeal, the respondent be ordered to immediately lift the garnishee that it effected on the applicant's accounts.

Before the High Court, which it also approached by way of an urgent chamber application, the applicant sought as interim relief an order that the respondent immediately lift the garnishee on its accounts and in the event of failure by the respondent to comply therewith, for the Sheriff or his lawful deputy to be authorised to take the necessary steps to secure the lifting of the garnishee.

On 25 July 2017 the High Court dismissed the application with costs. The instant urgent chamber application was filed on 2 August 2017.

The background to this matter may be gleaned from the following excerpt of the judgment of the court *a quo*:

“The founding affidavit ... 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) Limited 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 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 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.”

THIS APPLICATION

It is the applicant’s contention that the respondent, in breach of the law, thumb-sucked a figure which it sought to pass as an assessment of income tax due and payable by the applicant in terms of the Income Tax Act, [*Chapter 23:06*], (the Act) and that it is on the basis of that thumb-sucked figure that it garnished the applicant’s banking accounts. The applicant further contends, in its founding affidavit, that the figures relied on by the respondent show that it did not apply its mind to the issues at all as they are objectively incapable of attainment.

In the founding affidavit figures and quantities are quoted on the basis of which the applicant contends that the figures relied on by the respondent would mean that the applicant’s predecessor or sister company’s one service station had in 2009 achieved sales of more than 10 times those that were thereafter achieved by its 18 service stations put together. The figures would also mean that the one service station for the 6 months that it operated in 2009 sold more fuel than the figure that was reported as the total national fuel usage for the year 2010.

In his oral submissions Mr *Mpofu* for the applicant submitted that there was no assessment done by the respondent and that the respondent therefore had no justification, in terms of the Act, to impose a garnishee on its accounts. He submitted that whilst it is true that the applicant’s documents and or computer were found to reflect two sets of figures or accounts, one set presented figures that tally with the reality of its income of fuel sales while

the other doesn't. The other set of figures, so the explanation went, was meant for presentation to investors with projections of how the applicant's sales could be improved and was not a reflection of the reality of its income or sales. He submitted that despite the applicant's explanation for the existence of the two sets, the respondent arbitrarily opted to use the set with unrealistic figures in its assessment of the income tax due and payable by the applicant.

Mr *Mpofu* further submitted that what the respondent did in *casu* was abdication of statutory authority, and not an assessment as required by the Act. This, he submitted, the Act does not protect as there was no legitimate exercise of authority or functions. He submitted that there having been no exercise of statutory authority by the respondent as evidenced by the unattainable figures of the assessment, it meant that the garnishee was unlawfully imposed.

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It was also Mr *Mpofu*'s submission that the applicant is seeking neither to interdict the exercise of a statutory function or power by the respondent nor to suspend the law which relates to garnishees. On the other hand, the applicant's contention is that the respondent which is governed by s 68(1) of the Constitution and s 3(1) of the Administrative Justice Act [*Chapter 10:28*]¹ has not exercised its statutory functions in terms of the law and has produced a bizarre result which does not relate to or have anything to do with an objectively attainable income, thereby rendering the garnishee that it imposed, liable, on the authority of *ZIMBABWE REVENUE AUTHORITY v PACKERS INTERNATIONAL (PRIVATE) LIMITED* SC 28/16, to interference by the court.

¹ The sections provide for fair and reasonable administrative justice.

Mr *Mpofu* further submitted that as the applicant seeks in the pending appeal to persuade the Supreme Court to find that the garnishee was unlawfully imposed, the applicant's rights pending the resolution of the appeal are deserving of protection as it has good prospects of success. It is therefore entitled to the relief that it seeks.

The respondent on the other hand contends that it did not thumb-suck any figures as alleged as the figures that it worked with to come up with the assessment were obtained from the applicant's own documents and computers. This is so, it contends, in accordance with the respondent's income tax assessment system which relies on self-assessment by tax payers. What the respondent does is to carry out periodic assessments or checks to ensure that income earners are remitting the correct income tax due. It further contends that for a period spanning over a year, the applicant had been asked for an explanation as to why it was denying its own figures and no reasonable explanation had been proffered.

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Mr *Muomba*, for the respondent submitted that in terms of s 79 as read with s 62(5) of the Act an assessment is conclusive evidence of a tax payer's income tax indebtedness. Furthermore, that the assessment, which is based on the applicant's figures, remains correct until set aside by the Special Court for Income Tax Appeals. He also submitted that what the applicant seeks is in essence an interlocutory interdict in circumstances where the application does not meet the requirements for the same to be granted as the applicant has not established a *prima facie* right. Such, or any other, right cannot arise out of the consequences of a lawful act.

Mr *Muomba* submitted that the applicant has no right not to pay assessed income tax which tax, in terms of the Act, is due and payable even if the applicant believes that it is not or disputes the correctness thereof.

It was Mr *Muromba*'s further submission that the mere filing of an appeal by the applicant is not justification for the granting of an interdict especially because the alleged prejudice arises from a judgment of a court of competent jurisdiction. The respondent having acted in terms of the law as confirmed by the High Court, there is no unlawful conduct to justify the granting of an interdict.

In addition, Mr *Muromba* submitted, in terms of s 69(1) of the Act, the obligation to pay and the right to receive any tax chargeable under the Act shall not be suspended pending any decision on any objection or appeal which may be lodged in terms of the Act, unless the Commissioner otherwise directs and subject to such terms and conditions as he may impose.

The respondent's legal practitioner made the further submission that the applicant's position is worsened by the fact that no appeal against the tax assessment has been lodged with the appropriate court, a fact stated in the judgment of the court *a quo* and not disputed by the respondent. He submitted that there was no justification for the granting of the relief sought by the applicant.

It is trite that an interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief.² The relief sought by the applicant in this application is in effect an interdict. The same relief was sought in the High Court. The High Court found, *inter alia*, that the applicant had no right to protect and dismissed the application with costs.

² *Airfield Investments (Private) Limited v The Minister of Lands, Agriculture and Rural Resettlement and 4 Others SC 36/04* at p 8 of the cyclostyled judgment.

The applicant's contestation that the assessment done by the respondent was not done in terms of the Act is premised on the contention that the respondent thumb-sucked figures and ended up with unattainable if not bizarre results in terms of trade or sales achieved by the applicant's sister company and predecessor. This contestation is met with the respondent's contention that its assessment is based on the applicant's own figures that were obtained from the applicant's own documents and computer and that this is in accordance with the Act in terms of which the tax system is based on self-assessment by the tax payer. It is also met with the allegation that the applicant failed, over a period of over a year, to give a satisfactory explanation as to why it was denying its own figures.

Effectively, therefore, the real dispute between the parties, or at least the genesis of it, appears to be the correctness of the assessment that was made. The applicant is aggrieved by the assessment made by the respondent. It is for this reason that the applicant lodged an objection with the respondent as it is empowered or permitted to do in terms of the Act. The objection having apparently been disallowed, a garnishee was placed on the applicant's accounts.

Where an objection is disallowed the Act provides for an appeal by an aggrieved person. Section 62(5)(b) provides:

“If an objection to an assessment or the determination of a reduction of tax has been disallowed or withdrawn;
the assessment or reduction shall, subject to any adjustment made in terms pursuance of this Part, be final and conclusive.”

Section 64 provides:

“64 Special Court for Income Tax Appeals and proceedings on appeal

(1) For the purpose of hearing and determining appeals in accordance with section *sixty-five* or any proceedings incidental thereto or connected therewith, there is

hereby established a court which shall be a court of record and be known as the Special Court for Income Tax Appeals.”

Thereafter s 65 provides:

“(1) Any taxpayer entitled to object and who is dissatisfied with the decision or deemed decision of the Commissioner in terms of subsection (4) of section *sixty-two*, may, in accordance with the rules set out in the Twelfth Schedule, appeal therefrom either –

- (a) To the High Court; or
- (b) To the Special Court.”

The applicant has not disputed the allegation that it has not lodged the appeal that it is clearly entitled to do on a reading of s 62(5)(b). On the face of it, its objection to the assessment was patently done in terms of the relevant provisions of the Act. Without availing itself of the remedy of an appeal as provided for by the same Act, the applicant opted to apply firstly to the High Court and now to this Court for an order lifting the garnishee placed on its accounts.

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A garnishee is only a measure or a mode of collection that the Act authorises the respondent to employ in fulfilling its tax collection mandate. In *casu* the respondent appointed the applicant an agent of Chaparrel Trading (Private) Limited and proceeded to place a garnishee on the applicant’s bank accounts. This, the respondent is empowered to do by virtue of s 58 of the Act which provides:

“58 power to appoint agent

- (1) The commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent of such other person for the purposes of this act, and, notwithstanding anything to the contrary contained in any other law, may be required to pay any tax due from any moneys in any current account, deposit account, fixed deposit account or savings account or from any other moneys, including pensions, salary, wages or any other remuneration, which may be held by him for, or due by him to, the person whose agent he has been declared to be.”

The provisions of s 59 are also pertinent:

“59 Remedies of Commissioner against agent and trustee

Against all property of any kind vested in or under the control or management of any agent or trustee the Commissioner shall have the same remedies and in as full and ample a manner as he has against the property of any person who is liable to pay tax.”

The assessment that was made by the respondent is the foundation on which the garnishee rests. Without the assessment the respondent would have no justification for imposing the garnishee. In terms of s 62(5) of the Act, the assessment shall, subject to the decision of a court on appeal, stand final and conclusive. The applicant has not appealed against the assessed tax liability which stands final and conclusive until and unless a court on appeal finds otherwise. There is no such appeal pending in any court. The appeal that is pending before this Court and upon which this court assumes jurisdiction in this application is an appeal against the judgment of the High Court whereby it refused to grant an application to lift the garnishee.

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The provisions of s 79 are also pertinent:

“79 Evidence as to assessments

The production of any document under the hand of the Commissioner or of any officer duly authorized 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.” (my emphasis)

On a consideration of ss 58, 59, 62 and 79, amongst others, the respondent, on the face of it, acted in terms of the law, to wit, the Act, in imposing the garnishee now sought to be lifted. In addition the provisions of s 69 weigh in to the following effect:

“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.” (my emphasis)

In casu the Commissioner has not directed otherwise. There is no indication of the applicant having sought the Commissioner’s indulgence for him to “otherwise direct” in terms of this section; another possible remedy available to the applicant as the Act allows for it to request the respondent to direct the suspension of the obligation to pay the assessed tax.

In terms of the law, therefore, the applicant has no right not to pay the assessed tax. Dealing with similar provisions of the Value Added Tax Act, [Chapter 23:12] in *ZIMBABWE REVENUE AUTHORITY v PACKERS INTERNATIONAL (PRIVATE)*

LIMITED SC 28/16 at p 7 of the cyclostyled judgment, GOWORA JA stated: Judgment No. SC 56/17
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“Packers lodged an objection in terms of s 42 of the VAT Act and when the objection did not wholly succeed, it filed an appeal after the garnishee order had been placed against its account. The learned judge found that although Packers was challenging the appointment of an agent by the Commissioner to collect the VAT assessed as being due and owing, ZIMRA had acted lawfully in relation to the appointment of FBC Bank as such agent for the collection of tax. In considering this issue the court *a quo*, in my view correctly, came to this conclusion:

‘This obligation on the part of the appointed agent is not subject to any other law except s 48. Section 48 overrides anything that is contrary to it which may be set out in any other law.’

In my view the issue of the appointment of the agent and the garnishee order are intrinsically linked and the law in respect to the two is critical in the resolution of this inquiry. Section 48 provides as follows: ...³

...
... In a proper and logical construction of the provision, payment by the agent is by means of a garnishee against any account to the taxpayer’s credit held with the agent.... 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 no other conclusion is possible. (This finding by the court ought to have put paid to the inquiry into the lawfulness of the garnishee.)”

³ (Section 48 of the VAT Act is similarly worded to s 58 of the Income Tax Act)

Once it is found, as is the case in *casu*, that the imposition of the garnishee by the Commissioner was lawful, the relief sought by the applicant herein eludes it. As was aptly articulated by MALABA JA, as he then was, in *AIRFIELD INVESTMENTS (PVT) LTD v THE MINISTER OF LANDS AGRICULTURE & RURAL RESETTLEMENT & 4 ORS (supra)* at p 10 of the judgment, “An interim interdict is not a remedy for prohibiting lawful conduct.” Until the applicant establishes, as it contends, that on the facts of this matter there had in fact been no valid or legitimate assessment, the presumption can only be that the respondent conducted itself in accordance with the terms of the law as set out in the Act. The Act allows for the applicant to engage the respondent for relief, as discussed earlier, but the applicant did not make use of the possible avenues open to it.

In my view the applicant has not established a case for the immediate lifting of the garnishee.

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The applicant also seeks an order that the pending appeal in SC 546/17 be heard on an urgent basis. It is settled that it is only in exceptional circumstances that the Chief Justice will order that a matter should be heard on an urgent basis. See *MAYOR LOGISTICS (PVT) LTD v ZIMBABWE REVENUE AUTHORITY CCZ 7/14*.

The applicant claims that its business has come to a halt on account of the garnishee as it is unable to purchase any stock and its business cannot otherwise be conducted. It claims that if the garnishee is not lifted immediately it must lay off its employees to the prejudice of some 300 families. It contends that there is no basis for it to suffer all this harm as it is fully paid up and has no tax liability. Furthermore, its predecessor

also owed no obligation to the respondent. It contends that there is need for what it calls a patent illegality and incidence of abuse of statutory authority to be arrested.

The applicant also takes issue with the constitutionality of s 69(1) of the Act for giving effect to an assessment in the face of a challenge, however merited. In the urgent chamber application before the court *a quo* paragraph 3 of the terms of the final order sought was for s 69 to be declared unconstitutional and to be accordingly struck down.

In the *MAYOR LOGISTICS* case (*supra*), it was stated at p 16 of the judgment that the subjective desire for a remedy is not in itself a factor on the basis of which an order affording a party the privilege of jumping the queue and have his or her matter heard ahead of other litigants in a similar situation can be granted. More importantly, the following was also stated at pp 16 - 17:

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“The question of validity of ss 36 of the VAT Act and 69 (1) of the Income Tax Act which is the subject matter of the constitutional proceedings is to be decided from the point of view of the Constitution. It cannot be regarded by having regard to the legality of the conduct of the respondent. The effect on the applicant’s business of the tax recovery measures adopted by the respondent, would be irrelevant to the consideration of the question whether the statutory provisions are constitutionally valid or not. A legal basis has not been established for an order that the main application be heard on an urgent basis.”

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The applicant has also failed to establish the exceptional circumstances why an order that the pending appeal should be heard on an urgent basis ought to be granted in this case.

The application is found to be devoid of merit. Costs will follow the cause. It is for these reasons that on 11 August 2017, the application was dismissed with costs.

Mushoriwa Pasi Corporate Attorneys, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners