SHEARWATER ADVENTURES (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 14 November 2022

Date of judgment: 15 March 2023

Pre-trial hearing

M. Tshuma, for the appellant
E. Bishi, for the respondent

MAFUSIRE J

[1] This judgment is about who bears the wasted costs in an appeal which has been abandoned. The appeal had been poised for trial. In these kind of matters, despite the term "appeal", they are in reality trials *de novo* before this court. Disgruntled tax payers invariably appeal to this court most decisions by the respondent. In the present matter, the appeal was about the appellant's liability for its alleged failure to withhold non-resident tax on fees [NRTF] on retentions by non-resident tour operators, also known as consolidators or travel agents. These retentions are in respect of the services rendered by these travel agents to foreign tourists utilizing the facilities or goods or services offered by entities such as the appellant.

[2] The appellant is a service provider in the tourist industry. Among other things, it offers tourist facilities like helicopter rides over the Victoria Falls; boat cruises and game drives. The details are not important. But quite a number of cases involving NRTF on foreign travel agents have been to this court and the High Court. Most of them have ended up on appeal in the Supreme Court. This particular appeal was scheduled for a pre-trial hearing [PTH] before me in this court on 20 July 2022. The purpose of a PTH, like a pre-trial conference [PTC] in a civil trial in the general division of the High Court, is for, among other things, settling the issues for determination at trial. In this matter the PTH did not happen. It

was first deferred. Eventually it was abandoned altogether and the appeal ultimately withdrawn.

[3] The reason why the PTH hearing scheduled for 22 July 2022 was first deferred as aforesaid was because at that time an appeal was pending in the Supreme Court in respect of two other matters in which the issues for determination were identical to those in the present matter. Those two matters were *WC of Zimbabwe (Pvt) Ltd v Zimbabwe Revenue Authority* ITC 1-21 and *VFSLH (Pvt) Ltd v Zimbabwe Revenue Authority* ITC 7-20. In May 2022 I had delivered a composite judgment under HH 295-22 holding service providers like the appellant herein liable for the NRTF. Seeing that the issues in those cases were identical to the issues in the present matter, the parties decided and agreed that instead of proceeding with the PTH and eventually go to trial, it was prudent to await the appeal outcome in the Supreme Court. The appeal outcome came in October 2022. The appeal was struck off the roll with no order as to costs. Further, the proceedings of this court were set aside. There has been no judgment by the Supreme Court. However, the parties are agreed that the appeal was struck off the roll because the Supreme Court took the point that there had been no valid assessment by the respondent against which the appellant could have properly taken on appeal. The parties are agreed that this approach by the appellate court was informed by a decision that it had taken earlier on in a previous matter, *Nestle Zimbabwe (Pvt) Ltd v Zimbabwe Revenue Authority* SC 148-21.

[4] Following the outcome in the Supreme Court as aforesaid, the appellant decided to proceed with the appeal. I set down the matter for a PTH on 14 November 2022. At that PTH, the appellant indicated it was prepared to withdraw the appeal but on condition that the respondent paid its wasted costs. On the other hand, the respondent flatly declined to tender costs. There was a deadlock. Since the parties were unbending in their respective stances, the appellant insisting on costs but the respondent refusing to tender, I directed that they should file heads of argument on why I should grant or refuse the costs. They did.

[5] The appellant argues that it is entitled to the costs of the withdrawal of its appeal because in general costs follow the event. The successful party is usually awarded costs. The appellant further argues that the issue of invalid tax assessments has been raised by the courts in a number of cases going as far back as 2014, that is, well before the *Nestle* judgment

above. As such, the appellant argues, the respondent has always been aware that the courts require that there be valid assessments before they can relate to an appeal. In this matter the respondent took a bargain that its assessment would not be invalidated. That conduct is unreasonable and irrational.

[6] On the other hand, the respondent argues that the question of costs is in the discretion of the court and that in terms of s 65(12) of the Income Tax Act (*Chapter 23:06*) no order as to costs shall be made except where the respondent's claim is held to be unreasonable or where the grounds of appeal are frivolous. The respondent denies that its conduct in the present case could in any way be branded unreasonable. It further argues that until the Supreme Court outcome in October 2022, the appellant had not itself raised the issue of the invalidity of the assessment. At any rate, when the appellate court struck the matter off the roll, it did not make any order as to costs.

[7] It is trite that the general rule about costs is that they follow the event. The loser is generally ordered to pay the winner's costs. It is also trite that the award of costs is in the discretion of the court. The discretion is exercised judiciously, not capriciously. In the present matter, the appellant's claim for costs is plainly without merit. It has won nothing. The matter has not been determined at all, let alone on the merits. In fact, given the decision of this court under judgment no HH 295-22 aforesaid, the appellant's appeal was doomed to fail. Until the *Nestle* judgment by the Supreme Court in SC 148-22, both parties herein had been content to prosecute their respective cases on the merits without in any way touching on the invalidity or otherwise of the assessment by the respondent. Neither the appellants in the two cases above nor the appellant herein had at any time raised the question of the invalidity of the assessment, either at all, or in the respects picked by the Supreme Court. Thus, in those two cases, this aspect had never been interrogated before this court. I am advised that it was the appellate court which took the point *mero motu*. Therefore, by insisting on costs under such circumstances, the appellant wants to claim a victory and a reward in circumstances in which none of them stemmed from its own industry. That is unreasonable. But there is more.

[8] The approach of the courts on the question of costs in fiscal matters is required by legislation to be slightly different from the general rules on costs espoused above. Contrary to the general rules that costs follow the event and that the loser pays the winner's costs, in tax

matters, costs are generally not awarded, whatever the outcome, unless special circumstances exist. That can only be the import and purport of s 65(12) of the Income Tax Act. The provision reads:

> "The High Court or the Special Court to which an appeal is made under this section shall not make any order as to costs save when the claim of the Commissioner is held to be unreasonable or the grounds of appeal therefrom to be frivolous." (*Underlining for emphasis*)

[9] What the above provision means in other words is that, after this court or the High Court has determined an appeal against any decision of the second respondent's Commissioner, the matter ends there. No costs are awarded. But if the court should be persuaded to make an award, it must use different yardsticks depending on which party the award is aimed at. If it is aimed at the Commissioner, practically the second respondent herein, then the yardstick is the unreasonableness or otherwise of his / her decision. If it is aimed at the tax payer, the appellant herein, the yardstick is the frivolity or otherwise of the appeal. Whether these two concepts mean the same thing, or different things, is not the scope of this judgment. But looking at unreasonableness in particular, which is the calliper to use against the Commissioner, it cannot be seriously suggested that he /she was unreasonable to pursue recovery of the NRTF in question given that it had succeeded in two previous cases. The appellant's apparent success on appeal in the Supreme Court in those two other cases was on a technical point that neither the parties themselves nor this court had interrogated before. As the respondent points out, it is instructive that in striking off the appeal from the roll, the appellate court itself made no award of costs. However, in the absence of a judgment by that court, this court cannot ascribe a reason for that approach save to comment that it seems, with all due deference to the apex court, it was the fairest course.

[10] Another relevant factor to consider is that immediately after the appeal in the two cases aforesaid was struck off, the respondent accepted that its assessment in this matter was invalid in the eyes of the law. But the appellant was bent on preceding with the appeal in its original form. This was despite the fact that the success or otherwise in the Supreme Court had not been on the merits. The appellant sought no amendment to rely on the question of the invalidity of the tax assessment. To insist on an award of costs under such circumstances is

manifestly being unreasonable. Such a stance fails to appreciate the apparent philosophy of the legislation on the question of costs. That philosophy must be this. Costs of suit should not be an impediment to the respondent's legitimate pursuit of recovery of an outstanding tax. Reasonable mistakes that it may make in the process should not attract an adverse order of costs. Conversely, taxpayers should not be impeded in their efforts to seek relief from tax burdens that may not be due by unnecessary awards of costs where they might also have made mistakes. Only when the Commissioner's actions have been patently unreasonable, or where the taxpayer's appeal has been manifestly frivolous, will the court impose the costs burden on the party liable.

[11] The appellant has no case. Its claim for costs is hereby dismissed. The matter is hereby removed from the roll with no orders as to costs.

15 March 2023

Dube Manikai & Hwacha, appellant's legal practitioners
ZIMRA Legal Services Division, respondent's legal practitioners