AFROCHINE SMELTING (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE; 7 June & 28 November 2024

Urgent Chamber Application

T Mpofu, for the applicant
K Manika, for the respondent

MUCHAWA J: This is an urgent chamber application for an interim interdict and a declarator made in terms of s 14 of the High Court Act. The provisional order sought is set out as follows:

"TERMS OF FINAL ORDER SOUGHT

1. The provisional order be and is hereby confirmed.
2. An order declaring that mining royalties owed in terms of the Mines and Minerals Act cannot be enforced by garnishee under s 58 of the Income Tax Act [*Chapter 23:06*].
3. The garnishee order respondent obtained against applicant in terms of s 58 of the Income Tax Act [*Chapter 23:06*] be and is hereby declared null and void and is hereby set aside.
4. Respondent shall pay costs of suit on an attorney client scale.

INTERIM RELIEF GRANTED

Pending the confirmation of the final order, it is ordered that;

1. The operation of the garnishee obtained by the respondent in terms of the letter dated 16th May 2024 by the respondent against applicant be and is hereby suspended pending the return date.

The brief background to this matter is as follows: On 29 February 2024 I dismissed a court application for a declaratory order which was sought by the applicant against the respondent.

The applicant is a private company with limited liability which is duly registered in terms of the laws of Zimbabwe. It is a large – scale producer and exporter of ferrochrome, an alloy of chromium iron and carbon used in steelmaking.

The respondent is a statutory body created in terms of the Revenue Authority Act [*Chapter 23:11*] which is responsible for assessing, collecting and accounting for revenue on behalf of the state through the Ministry of Finance.

I was called upon to interpret the provisions of s 244 and 245 of the Mines and Minerals Act as read with s 37 of the Finance Act to determine the correct legal framework for calculation of royalties. It was the respondent's position that the applicant had under declared the royalties and should have paid royalties on minerals based on the gross sale value as shown in the sales schedule from 2019 to 2021. The applicant was said to have erred in declaring royalty on the dace value of the invoice based on the ex- works price of 10 cents less than the Fast Markets Ferro Alloys price.

It was my finding that the applicant had indeed erred in declaring royalty on the face value of the invoice based as it was on the ex – works price of 10 cents less than the fast markets Ferro Alloys price. I further found that the deduction of 10 cents from the gross fair market value of the cost of freight is proscribed by S 37 (9) of the Finance Act. Finally, I concluded that the reference in s 37 (5) of the Finance Act to "double the amount of royalties payable "as the primary civil penalty means 200% penalty over and above the royalty due."

Consequently, I dismissed the urgent court application with costs. Following my judgment in case HCH 6881/23 set out above, the applicants lodged an appeal against same. That appeal suffered an incurable irregularity in the relief sought and the matter was struck off the roll. Thereafter the applicant attended to the irregularity and filed a chamber application for condonation and extension of time within which to appeal. This was pending at the time of the hearing of this current application.

Before the Supreme Court, the applicant is challenging the tax assessment for unpaid royalties plus penalty levied against it by the respondent which is around US $ 2 million.

What spurred the applicant into action is a letter penned by the respondent on 16 May 2024, advising that it had garnished certain funds held by it which were due to the applicant as VAT refunds in order to settle the mining royalty obligation in terms of the Mines and Minerals Act [*Chapter 21:05*].

In response, the applicant advised, on 17 May 2024 that it had no outstanding tax obligations under the Income Tax Act and therefore the respondent could not use the garnishee

remedy under the Income Tax Act as it was not available for enforcement of mining royalty obligations as these are collectable under S 366 of the Mines and Minerals Act.

The applicant averred that the garnishee had not been effected but the applicant's fear was the threat of such garnishee as the applicant was due to file VAT returns every month. The applicant then requested that the respondent retract the garnishee order by 20 May 2024 but this was not done.

This current application was lodged on 29 May 2024.

These terms of the order sought are as follows;

"TERMS OF FINAL ORDER SOUGHT

1. The provisional order be and is hereby confirmed.
2. An order declaring that Mining royalties owed in terms of the Mines and Minerals Act cannot be enforced by garnishee under s 58 of the Income Tax Act [*Chapter 23:06*].
3. The garnishee order respondent obtained against applicant in terms of s 58 of the Income Tax Act [*Chapter 23 :06*] be and is hereby declared null and void and is hereby set aside.
4. Respondent shall pay costs of suit on an attorney – client scale.

INTERIM RELIEF GRANTED

Pending the confirmation of the final order, it is ordered that;

1. The operation of the garnished obtained by respondent in terms of the letter dated 16 May 2024 by respondent against applicant be and is hereby suspended pending the return date.

I heard this matter on 7 June and reserved my ruling. It is regrettable that my ruling is coming extremely out of time and may very well have been overtaken by the appeal which was pending before the Supreme Court. I invited the parties and pointed this out and they graciously accepted my apology for the delay.

THE APPLICANT'S SUBMISSIONS

The parties were agreed on the need to focus on whether the applicants have a right as they accepted that one cannot interdict a lawful act as per the case of *Mayor Logistics v Zimbabwe Revenue Authority* CCZ 7/2014.

Mr *Mpofu* submitted that the construction to be placed on revenue statutes should never have ambiguity – the *contra fiscum* rule as set out in *Glen Anil Development Corporation Ltd* v *Secretary for Inland Revenue* 1975(4) SA 715A @ 727 F.

The approach to be followed in granting interim relief was pointed to be set out in the case of *Balasore Alloys Ltd* v *ZimAlloys Ltd & ORS* HH 228/18 where only a *prima facie* case has to be established and this was said to be much lower that proof on a balance of probabilities.

Regarding the proper construction of s 58 of the income Tax Act s 58(1) is said to provide for three parties who are:

(i) The revenue collector- principal.

(ii) The agent – declared by revenue collector.

(iii) Payer of revenue who has relationship with agent.

S 58 (2) is said to define an agent and it is argued that this excluded ZIMRA as this relationship has to have 3 parties and ZIIMRA cannot designate itself as an agent and the court cannot extend the provision to give ZIMRA powers of an agent.

Reference was made to Black's Law Dictionary which describes an agent as one who acts for and on behalf of another. It was contended that it is impossible for a principal and agent to be in one body.

Mr *Mpofu* therefore argued that ZIMRA has not acted in terms of the law to appoint itself as an agent and its exercise of power in this respect is unlawful and it should be interdicted.

Furthermore, it was contended that royalties are not tax and cannot be garnished under S 58. The definition of tax in S 58 (2) was said to exclude royalties.

S 244(1) of the Mines and Minerals Act was alleged to be the charging regime as it refers to the provision fixing the rate. It was argued that royalties are not paid in terms of the Finance Act but in terms of the Mines and Minerals Act which levies upon the winner an obligation to pay royalties.

S 245(1) of the Mines and Minerals Act is said to be the one fixing the rate by saying the Finance Act will state the rate which is amended. So all the Finance Act does is fix the rate and it does not empower the respondent to collect disputed royalties arising from a different piece of legislation. Mining royalties are said not to fall under the definition of taxes as per the Income Tax Act.

The respondent's classification of mining royalties as a tax is said to lead to the unlawful utilization of the Income Tax Act to implement unilateral garnishment.

The correct route to be utilized by ZIMRA in the collection of royalties is alleged to be in terms of s 366(1) of the Mines and Minerals Act under which the Mining Commissioner must

sue for royalties. The collection of royalties was said not be self-executing as in the Income Tax and VAT Acts. If this interpretation was not accorded, Mr *Mpofu* argued that S 366(1) of the Mines and Minerals Act would become superfluous.

The principle of legality was referred to in arguing that a public authority must act on a law. In this case it was questioned what the legal basis for the garnishment is given the arguments above.

Furthermore, the applicant insisted that as at 17 May 2024 ZIMRA did not hold any of its money and a VAT refund would only arise at the month-end. The money they were holding in 2023 was said to have been applied to ZESA payment as per the applicant's instructions. If they did not act as instructed and retained the money, this was said to be conduct which runs contrary to s 3(1) of the Administrative Justice Act and s 48 of the Constitution of Zimbabwe in that the respondent would have failed to act fairly, reasonably and transparently.

Because of all the above reasons, Mr *Mpofu* concluded that the garnishment is not a lawful maneuver and it can be interdicted.

RESPONDENT'S SUBMISSIONS

On the other hand, Mr *Manika* submitted that the applicant seeks to suspend an act already done by ZIMRA. It was argued that if such act is found to be lawful, then there is no basis to grant the relief sought. The court was referred to the case of *Stumble Block Zimbabwe Private* v *Mthabisi Ncube & Anor* HH 92/23.

On the lawfulness of the respondent's conduct, it was averred that the Income Tax Act defines what a charging Act is and this means an enactment by which credit and rate of tax are fixed.

For the Mines and Minerals Act s 245(1) was said to be fixed in Chapter 7 of the Finance Act which therefore becomes the charging Act.

S 4 A(i)(f) of the Fnance Act is said to deal with payment of royalties by persons specified in the Finance Act. By virtue of this the applicant is alleged to have been brought under S 58 of the Income Tax Act.

Whilst conceding that interpretations should be in favour of the tax payer, Mr *Manika* referred to s 4A (7) of the Finance Act which it is alleged provides that for the avoidance of doubt, it is declared that all provisions of the Income Tax Act shall apply to all including subsection (f). It is argued that this argued that this therefore means that a royalty is a tax and that all provisions of taxes shall apply to royalties. This would thus include s 58(1) of the Income Tax Act.

On the factual issue of whether VAT refunds are available it was explained that the process of claiming refunds is governed by s 44 of the VAT Act. The tax payer should apply for refund and the Act gives 6 years within which the application should be made and if no application is made the amount remains available till the time of application.

Furthermore, it was explained that the applicant applied to have their ZESA debt paid in January 2024 but the refunds due to client were not expended and remained available. In September 2023 the applicant is alleged to have been entitled to VAT in the amount of $ 2 543 129.95. The applicant then instructed that $ 1 861 717.15 be paid out to ZETDC. The balance remaining refundable was said to be $ 681 412.80 It is alleged that there was no instruction for VAT for August 2023 whose amount was $ 1 550 558 as shown on p 96 of the opposing affidavit (Annexure E 2). The total VAT refund for August and September is said to come to $ 2 231 970.98. The debt for the mining royalties is set at $ 1 8 31 493.95. The respondent avers that it deducted the mining royalties from the funds available.

Regarding whether ZIMRA can garnishee money in its accounts, Mr *Manika* said that the definition of a "person" is provided in the Income Tax Act for purposes of a garnishee. As a body corporate, ZIMRA is said to full squarely within the definition of an agent. It was postulated that it would be ridiculous for ZIMRA whilst holding taxes not to be allowed to collect taxes due to it. This was said to be so as ZIMRA is performing a public service and it was contended that ZIMRA is entitled to garnishee or levy sum payable in terms of the charging Act. The action by ZIMRA was said to be lawful.

Another argument put forward is that the act sought to be stayed is no longer imminent as collection was already done. The court was reminded that it cannot stay a completed act.

The conduct of the applicant was impugned for failure to be candid with the court. On the strength of the case of *Nehanda Housing Cooperative Society* v *Simba Moyo* HH 469/15 it was argued that a party should disclose all material facts and if they do not, then they should be denied the relief sought.

It was averred that the applicant should have been truthful that at the time of filling the present application there was no appeal pending before the Supreme Court as well as for the application for condonation. It was clarified that the garnishee was placed on 8 May 2024 when nothing was pending before the Supreme Court. The defective application for condonation was said to have been filed on 20 May 2024 after the garnishee had been affected on 8 May 2024. The lack of candidness was said to be a good ground to dismiss the application.

THE APPLICANT'S REPLY

Mr *Mpofu* reiterated that ZIMRA cannot be both a principal and agent at the same time. This was said to be clear under common law.

In terms of statute both s 2 and s 58 of the Income Tax Act are said not to explicitly say that ZIMRA can be an agent.

Section 37(1) of the Finance Act was said to squarely deal with the rate and not the principle of charging which is covered under s 244 of the Mines and Minerals Act.

Section 4 A (7) of the Finance Act is alleged not to be saying that royalties are taxes nor giving ZIMRA the power to garnish.

It was disputed that the act of garnishment has taken place yet and ZIMRA was challenged to show that it has 6 million dollars.

Furthermore, it was stated that the applicant does not have the ZIMRA garnishee and there is no proof before the court that monies were actually garnished.

On the conduct of the applicant complained of by the respondent, it was submitted that the applicant gives full disclosure on the proceedings before the Supreme Court where the real dispute has been placed.

ISSUES FOR DETERMINATION

The two issues emerging from the parties' submissions which call out for resolution are as follows;

(i) Whether the interdict sought is properly before me, if the garnishee sought to be interdicted has already been effected.

(ii) Whether the garnishment by Zimra is lawful conduct. Under this one needs to consider whether ZIMRA can lawfully be an agent for purposes of s 58(1) of the Income Tax Act. In addition, it will be necessary to decide whether mining royalties are tax which can be garnished under s 58 of the Income Tax Act

I deal with these issues, in turn below

WHETHER THE INTERDICT SOUGHT IS PROPERLY BEFORE ME

In the case of *Mayor Logistics* v *Zimra CCZ* 7/2014, it was held as follows;

> "An interdict cannot be granted against past invasion of a right nor can there be an interdict against lawful conduct."

This position was put more graphically in the case of *Stumbel Block Zimbabwe (Pvt) Ltd* v *Mthabisi Ncube & Anor* HH 92/23 wherein it was stated that one cannot interdict something that has already been done as it is akin to attempting to close the stables when the horse has already bolted.

Yet still, the learned authors Herbstein & Van Winsen in *The Practice of the High Court of South Africa*, 5th ed & p 1465 state this,

> "An interdict is appropriate only when future injury is feared. This means that when the wrongful act giving rise to the injury has already occurred either it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated…….. if the infringement is one that *prima facie* appears to have "occurred once and for all and is finished and done with", then the applicant should allege facts justifying a reasonable apprehension that the harm is likely to be repeated."

The first respondent lays out the sequence of events leading to the effecting of the garnishee as follows:

(i) That on 7 March, 2024, following the dismissal of the urgent chamber application under 6991/23, they wrote a letter to the applicant demanding settlement of the outstanding amount.

(ii) On 12 March, 2024, the applicant filed an appeal in the Supreme Court under SC 139/24 which was subsequently struck off the roll-on 6 May 2024.

(iii) On 8 may 2024, the respondent instituted collection measures for recovery of the outstanding amount. The notice of appointment of agency of even date is attached as annexure B.

(iv) A letter was addressed to the applicant on 17 May 2024 advising that the garnishee had already been affected well before this date.

(v) The applicant instituted a chamber application for condonation and extension of time within which to appeal in the Supreme Court under case No SC 267/24.

It is argued that at the time of appointment of an agent and the effecting of the garnishee, there was no litigation pending between the parties. It is averred that the debt has already been collected in full and there is no future or continuing injury.

On the other hand, the applicant insisted by letter of 17 May 2024 that the garnishee was a mere threat as ZIMRA did not hold an amount due to the applicant at the time of the alleged effecting of collection measures and feared collection would be on future obligations.

It is explained by the respondent that for December 2023, January 2024 and February 2024 they had written to ZIMRA Instructing that they apply the VAT refunds to applicant's ZESA obligation. Proof of such communication is availed. It is questioned why the respondent has not specified when it garnished the applicant's VAT refunds, amount garnished and the remaining balance. The lack of such information is alleged to point to some form of deceit and a ploy to garnishee future refunds.

Mr *Manika* explained that in September 202, the applicant was entitled to a VAT refund of US $ 2 543 129 .95 and the client instructed that US $ 1861 717.15 be paid to ZETDC which left a balance of US 681 412.80 refundable. It is stated that there was no instruction for VAT for August 2023 which was US $ 1550 558 as shown on Annexure E 2 filed by applicant. The total amount held for August and September 2023 is said to come to US $ 2 231 970. 98 whilst the debt for mining royalties amounted to US $ 1831 493.95. It is explained that the refunds due to applicant remained available and were not depleted even after the January instruction as the respondent is allowed to keep funds for 6 years whilst awaiting instructions. It is argued that the collection measures were therefore effected from monies which were indeed available.

After the detailed explanation, I am convinced that by the time of the lodging of this application, the garnishee had already been affected. This even had occurred once and for all and was finished and done with. In other words the belated attempt to get the court to interdict is akin to attempting to close the stables when the horse has already bolted.

It is my finding therefore that the application for an interdict is not properly before me. An interdict is inappropriate in the circumstances.

WHETHER THE GARNISHMENT BY ZIMRA IS LAWFUL CONDUCT

Having already found that I cannot interdict what has already occurred, there is no need for me to detain myself on the lawfulness or otherwise of the conduct by respondent.

In any event, the interim relief was focused on the interdict whilst the final relief was concerned with the declarator. This was really about the lawfulness of the respondent's conduct.

It is trite that a declarator cannot be sought and granted by way of urgent action. Had the interim relief been granted then the respondent would have had an opportunity to properly oppose such application and only then would the court fully engage with the issues.

In the circumstances this issue suffers the fate stated by *LORD DENNING IN Macfoy* v *United Africa Company* Ltd (West Africa), (1961) ER 1165, where he said "You cannot put something on nothing and expect it to stay there. It will collapse'

The issue of the lawfulness or otherwise of the ZIMRA conduct does not now fall for determination, the interim relief being unsustainable. I will not detain myself on it.

DISPOSITION

The application for interim relief is without merit.

Costs generally follow the cause.

I accordingly order as follows:

1. The urgent chamber application for an interim interdict and a declarator be and is hereby dismissed for lack of merit.
2. The applicant is to pay costs.

Mushoriwa Moyo, applicant's legal practitioners
Zimbabwe Revenue Authority, respondent's legal practitioners