

REPORTABLE (48)

ZIMBABWE REVENUE AUTHORITY
v
PACKERS INTERNATIONAL (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & HLATSHWAYO JA
HARARE, FEBRUARY 12 , 2015 & NOVEMBER 24, 2016

E T Matinenga, for the appellant

A J Manase, for the respondent

GOWORA JA: The appellant, (hereinafter referred to as “ZIMRA”) is an administrative authority established in terms of the Revenue Authority Act, [*Chapter 23:11*]. It is tasked with the obligation to collect taxes and other statutory dues and fees under various legislative instruments including the Value Added Tax Act, [*Chapter 23:12*], the “VAT Act” and the Income Tax Act, [*Chapter 23:06*], the “Taxes Act”.

The respondent (hereinafter referred to as (“Packers”)) is a private limited company duly registered as such under the laws of Zimbabwe. It operates fast food outlets and grocery shops throughout the country and is a registered operator in terms of the VAT Act.

The system of collection of VAT, as embodied in the VAT Act, involves the imposition of tax at each step along the chain of manufacture of goods or the provision of services subject to VAT. Consequently, every registered operator is required in terms of s 28

of the VAT Act, to submit returns to the Commissioner of Taxes every month, calculate the VAT due on the return and make payment of such calculated VAT. Due to the sheer volume and complexity of the VAT collection system, ZIMRA lacks the capacity and manpower to effectively monitor each and every transaction liable to VAT and as a consequence it is heavily reliant on the self-assessment process by registered operators. However, in order to ensure that operators comply with the requirements to render returns and collect VAT, ZIMRA conducts periodic investigations as well as audits.

ZIMRA and Packers have had a dispute on the manner in which the latter has been performing its obligations to file returns and render VAT to the Commissioner under the VAT Act. As a consequence, during the period extending from 20 May 2013 to 12 March 2014, ZIMRA requested Packers to submit returns for the period extending 2009 to 2013. On 12 March 2014, ZIMRA gave notice to the effect that failure by Packers to comply with its request by 17 March 2014 would result in assessments being estimated and issued. On 17 March 2014 ZIMRA advised that it was in the process of compiling the assessments in question and that in due course it would advise Packers of its obligations in relation to VAT, income tax and P.A.Y.E. Ultimately, the assessments were issued and sent to Packers.

On 2 May 2014 Packers filed an objection to the assessments with the Commissioner who upheld one of the objections and dismissed the rest. Packers did not pay the assessed taxes resulting in ZIMRA placing a garnishee against a number of bank accounts of Packers held with FBC Bank for collection of an amount of USD 19 696 645-44. When Packers got wind of the garnishee it launched the urgent chamber application which is the subject of this appeal, in which Packers sought the setting aside of the garnishee order and an order stopping ZIMRA from interfering with 'applicant's business operations'. The application was accompanied by a Provisional Order in terms of which was sought

interim and final relief as appropriate. Subsequent to this, Packers appealed to the Fiscal Appeals Court challenging the decision of the Commissioner in rejecting the objections.

On 25 June 2014 the High Court issued a final order in the following terms:

IT IS HEREBY ORDERED THAT:

1. The respondent uplifts and suspends the garnishee order placed on applicant's accounts with FBC Bank, immediately and forthwith, until the appeal that is pending before the Fiscal Appeals Court is finalised.
2. The respondent shall allow a period of seven working days to elapse after the upliftment and suspension of the original garnishee order, where-after it shall replace it with a fresh garnishee order for the sum of USD 905 801-32(Nine Hundred and Five Thousand Eight Hundred and one Dollars and thirty two cents), which shall remain in place until the appeal is finalised or payment is made in full, whichever comes first.
3. The respondent shall not unlawfully interfere with applicant's business operations and its day to day activities, including the placing of its officers at applicant's business premises

In determining the urgent application, the High Court found that the liability on the part of a registered operator under s 36 of the VAT Act remains extant and is not extinguished by the noting of an appeal unless the Commissioner directs that the obligation falls away pending finalisation of the appeal. The court further found that the appointment of FBC Bank as agent in terms of s 48 had been done lawfully. It therefore refused to accede to the request to revoke the appointment.

However, in an apparent *volte face*, the court *a quo* went on to consider the reasonableness of the exercise of discretion by the Commissioner as viewed against the provisions of the Constitution and the Administrative Justice Act [*Chapter 10:28*].

ZIMRA was aggrieved by the order and has appealed to this court on a number of grounds.

ISSUES ON APPEAL

The issues raised by ZIMRA for the appeal may be summarised as follows:

- Whether ZIMRA is entitled at law to issue garnishee orders and appoint agents for the payment of value added tax.
- Was the court *a quo* entitled to *mero motu* pick a dispute on behalf of the parties and determine the matter on the same.
- was the court *a quo* at law empowered to remove the garnishee order and impose an interdict against ZIMRA.

Whether ZIMRA is legally entitled to issue garnishee orders for the payment of taxes assessed as being due and owing.

It was contended on behalf of ZIMRA that the court *a quo* deviated from the cause of action as pleaded by Packers and gave relief framed on alleged unreasonableness on the part of ZIMRA which was raised by the court *mero motu*. It was contended further that if the court *a quo* had confined itself to the lawfulness of the conduct of ZIMRA, it would have correctly found that the actions of the latter were lawful and consequently it would have declined the prayer to issue the interdict.

The VAT Act provides a detailed mechanism for vendors to keep certain records and to periodically calculate, account for and pay value added tax to the Commissioner. The Act as a whole and, in particular, its provisions relating to assessments and the payment recovery and refund of tax provisions found in Part VII of the VAT Act are indispensable tools for the prompt collection of tax due. From an economic point of view,

the provisions of the VAT Act are meant to ensure a steady, accurate and predictable stream of revenue for the *fiscus*.

These provisions are an embodiment of the principle “Pay Now Argue Later”, suggesting that an appeal would not have the effect of suspending payment. The principle is aimed at discouraging frivolous or spurious objections and ensures that the whole system of tax collection in the country maintains its efficacy. This serves the fundamental public purpose of ensuring that the *fiscus* is not prejudiced by delay in obtaining finality in any dispute. I examine hereunder the principal provisions.

Section 6 of the VAT Act provides:

“Subject to this Act, there shall be charged, levied and collected, for the benefit of the Consolidated Revenue Fund a tax at such rate as may be fixed by the Charging Act on the value of-

- (a) The supply by any registered operator of goods or services supplied by him on or after the 1st January, 2004, in the furtherance of any trade carried on by him.
- (b)not relevant.”

Payment of tax under the relevant Act is provided for in terms of s 28 which reads:

“28 Returns and payments of tax

- (1) Every registered operator shall, within the period ending on the twenty-fifth day of the first month commencing after the end of a tax period relating to such registered operator or, where such tax period ends on or after the first day and before the last day of a month, within the period ending on such last day—
 - (a) furnish the Commissioner with a return in the prescribed form reflecting such information as may be required for the purpose of the calculation of tax in terms of section 15; and
 - (b) calculate the amounts of such tax in accordance with the said section and pay the tax payable to the Commissioner or calculate the amount of any refund due to the registered operator. [Subsection substituted by Act 5 of 2009 and amended

by Act 10 of 2009, by Act 3 of 2010, by Act 5 of 2010 and by Act 9 of 2011] (1a)... [Subsection repealed by Act 5 of 2009]

- (2) Every registered operator who is registered in terms of Part IV shall within the period allowed by subsection (1) of this section furnish the return referred to in that subsection in respect of each tax period relating to such registered operator, whether or not tax is payable or a refund is due in respect of such period.
- (3) The Commissioner may, having regard to the circumstances of any case but subject to section *thirty-eight*, extend the period within which such return is to be furnished or such tax is to be paid.”

Section 27 sets out four categories of operators and tax periods for the submission of returns and payment of assessed VAT by the operator are then regulated according to the category of the respective operators. Tax periods for the four categories range from one calendar month to two, or such other period as may be approved by the Commissioner in relation to category D.

The anchor to the provisions on recovery of tax is s 36 of the VAT Act which excludes the suspension of payment of tax upon the noting of the appeal. Section 36 provides in relevant part:

“36 Payment of tax pending appeal

The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the Fiscal Appeal Court or such court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate (but subject to section forty-six) and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received, and amounts short-paid being recoverable with penalty and interest calculated as provided in subsection (1) of section thirty-nine.”

The learned judge construed the provision in question thus:

“My reading of s 36 is that the liability to pay remains extant until the appeal is finalised or in the alternative, unless the Commissioner directs that the obligation to

pay falls away until the pending appeal is finalised. **Applicant in this matter has not argued that the effect of the noting of the appeal is to extinguish its obligation to pay.** Section 33 of the VAT Act provides for the circumstances in which an aggrieved person can appeal to the Fiscal Appeals Court, against the exercise of discretion by the Commissioner. The right to appeal against the exercise of discretion by the respondent's officers to the Commissioner is provided for in terms of s 32 of the VAT Act." (my emphasis)

Packers lodged an objection in terms of s 32 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:

"48 Power to appoint agent

- (1) For the purpose of subsection (2)— "person" includes—
 - (a) a bank, building society or savings bank; and
 - (b) a partnership; and
 - (c) any officer in the Public Service; and
 - (d) any prescribed person in relation to a prescribed service.
- (2) 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 amount of tax, additional tax, penalty, or interest due from any moneys in any current account, deposit account, fixed deposit account or savings account or any other moneys—

- (a) 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; or
- (b) that the person so declared an agent receives as an intermediary from the other person.”

Thus, the sharp end of the VAT system is s 48 of the Act which allows the appointment of an agent. 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. In any event, tax under the VAT Act consists of monies that have been taxed on goods and services paid by consumers for onward transmission to the Commissioner. All that is required of an operator is to calculate the amount so paid, submit a return and make payment. 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 enquiry into the lawfulness of the garnishee.)

Packers had alleged before the court *a quo* that the garnishee imposed a hardship on its operations. In my view, s 36 creates a remedy for the amelioration of possible financial hardship faced by an individual taxpayer and allows the Commissioner to suspend payment pending an appeal. However, the Commissioner cannot exercise the discretion *mero motu*. He can only do so upon consideration of facts presented to him by a taxpayer who wishes to benefit from the exercise of discretion by the Commissioner. As a consequence, the taxpayer bears the *onus* to place the necessary facts before the Commissioner regarding the hardships facing him should the obligation to pay not be suspended. For as stated by the learned DEPUTY CHIEF JUSTICE in the case of *Mayor Logistics (Pvt) Ltd v ZIMRA SC 7/14*:

“As the facts on which the Commissioner would exercise the discretion would be within the exclusive knowledge of the taxpayer he or she must place them before the Commissioner.”

It follows therefore that, whilst s 48 of the VAT Act is concerned with the Commissioner’s power to appoint an agent for purposes of collection or recovery of tax, s 36 of the same Act enshrines the taxpayer’s duty to pay tax. The two are inextricably linked in that the decision to use one method of recovery is determined by whether or not any facts have been placed before the Commissioner on whether or not there exist hardships which would justify a suspension of the obligation to pay assessed tax by a taxpayer. What was before the court *a quo* was a plea for mercy as opposed to the enforcement of an existing right. Once the discretion in s 36 is exercised in favour of the suspension of the obligation to pay tax, then by parity of reasoning, it follows that the discretion to appoint an agent in terms of s 48 falls away.

The obligation to pay the amount of tax assessed as being due and payable is imposed by s 38 of the Act. In considering the VAT collection system in general the following observations emerge. Section 36 does not serve to protect any right of the taxpayer but to preserve the right of the Commissioner to be paid and to collect the revenue. It also secures the obligation of the operator to pay unless such obligation is suspended by the Commissioner upon request. As a consequence the discretion to suspend payment in terms of the said section is that of the Commissioner. In *Mayor Logistics (Pvt) Ltd v ZIMRA (supra)* his Lordship MALABA DCJ, had this to say:

“Failure to fulfil an obligation [to pay tax] may be due to a variety of circumstances. The legislature decided to place responsibility for deciding whether or not the particular circumstances of a taxpayer 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 powers of the Commissioner and ordered a suspension of the obligation on a taxpayer to pay assessed tax pending the determination of an appeal by the Fiscal Appeals Court.”

It is not in dispute that the court *a quo* made a finding that the actions of ZIMRA were lawful. As a consequence, it should have been obvious that there was no legal basis upon which to grant an interdict. S 48 is not subject or subservient to any other law. This is clearly expressed in the provision itself. It is my conclusion therefore that in terms of the wording of the section, the Commissioner's power under s 48 cannot be subject to s 14 of the Fiscal Appeal Court Act. Once a person is declared an agent in terms of s 48 the person so appointed is duty bound to pay the assessed taxes notwithstanding the provisions of any other law.

As a consequence, it follows that ZIMRA is entitled not only to appoint an agent for the collection of assessed tax, it is also entitled to garnishee the taxpayer's account through the agent for the collection of tax. The decision by the court *a quo* to discharge the garnishee in the circumstances of this case was contrary to the law and constitutes a misdirection.

Whether the court was entitled at law to pick a dispute on behalf of the parties and determine the dispute on that basis.

It is contended on behalf of ZIMRA that the learned judge in the court *a quo* went beyond what was asked of the court and reframed the issues for determination on behalf of the parties. At issue is the decision by the court to delve into the following questions:

- (i) What the court *a quo* perceived to be the unreasonableness of ZIMRA's conduct despite its lawfulness.
- (ii) The failure on the part of ZIMRA to adhere to the provisions of the Administrative Justice Act in the exercise of its discretion presumably in the assessment and the placement of the garnishee against the account of Packers's bankers.
- (iii) The failure by ZIMRA to have regard to the provisions of s 68 of the Constitution in the exercise of its discretion rendering its actions unreasonable, disproportionate or substantially unfair.

The court *a quo* considered that it was necessary to review the actions of the respondent and it stated:

“It is my respectful view that s 48 does not oust this court’s inherent power of judicial review of an administrative body, to scrutinize the exercise of discretion by that body, at any time and to ensure, on the limited grounds provided in s 68 of the Constitution and s 3 of the Administrative Justice Act, that there has not been any element of ‘Wednesbury unreasonableness’.”

It seems to me that the criticism of the approach taken by the learned judge is not entirely unwarranted. Having dealt with the lawfulness of the actions of ZIMRA, the court *a quo* then deviated and sought to review the imposition of the garnishee on the basis of alleged un-reasonableness. In its cyclostyled judgment, the court *a quo* remarked:

“I propose to start by looking at what the highest law in the land has to say about the exercise of discretion by an administrative body. Section 68 of the Constitution of Zimbabwe provides that Section 3 of the Administrative Justice Act provides as follows Section 2 provides for Interpretation and application. Respondent by his own description in para 5 of its notice of opposition is an administrative authority. My reading of the interpretation section of the Administrative Justice Act is that any action taken by the respondent or any of its employees, is administrative action, and that in exercising discretion in any administrative action, the conduct must be reasonable, and substantively and procedurally fair. Applicant has not denied that the respondent’s actions were lawful. My understanding of applicant’s contention is that the exercise of discretion by the respondent was not reasonable, in the sense of violating the provisions of s 3 (1) (a) of the Administrative justice Act, and s 68 of the Constitution, in the sense that the exercise of discretion was not reasonable, or proportionate, or both substantively or procedurally fair to it.”

Once it was conceded by Packers that the conduct by ZIMRA was lawful, such concession effectively defeated its cause of action as it rendered the perceived unlawfulness of ZIMRA’s actions nugatory. If the court found as a fact that the appointment of FBC Bank was properly made in terms of s 48 of the relevant Act, it begs the question in what circumstance the discretion to appoint the agent may become subject to review on the basis of alleged unreasonableness. Despite this, the court was however persuaded to consider whether or not the actions of ZIMRA were reviewable.

The court proceeded to examine what it considered to be the irrational attitude of ZIMRA in having issued a garnishee for an amount of twenty million US Dollars, and it concluded by stating:

“Imposing a garnishee order of twenty million on applicant’s account was not procedurally fair because s14 of the fiscal Appeals Act stipulates that the disputed amount of the tax assessment be suspended pending the determination of the appeal. It was not substantively fair because there is no provision, in s 32 of the VAT Act for objection to the Commissioner against the imposition of a garnishee order.”

The court found that Packers had a *prima facie* right conferred on it by s 68 of the Constitution and by extension, in terms of s 3 of the Administrative Justice Act to conduct that is reasonable, proportionate and both substantially and procedurally fair. As a consequence, it resolved to interfere with the exercise of discretion by the Commissioner to impose a garnishee.

The basis of the application in the High Court was that ZIMRA had bestowed upon itself powers that it did not have and that it was as a result acting as if it was a court of law in issuing a garnishee. It was further alleged that in issuing the garnishee ZIMRA was acting in an unconstitutional manner as the figure upon which the garnishee was premised had been arrived at in an arbitrary manner. It was alleged that there was no law that empowered ZIMRA to act in the manner that it did and that if such law existed then the law required realignment with the constitution. It was contended that the court had the power in terms of s 14 of the Fiscal Appeal Court Act to suspend payment of tax which was not due.

An application such as the one before the court *a quo* must be disposed of on the basis upon which it is made. Thus, it stands or falls on its founding affidavit. The application sought to challenge the lawfulness of the garnishee of Packers’ accounts. It is evident that Packers did not make an application to the High Court to review the Commissioner’s decision to impose a garnishee.

Notwithstanding the fact that Packers did not at any stage of the dispute claim a right founded on administrative law, which is evident from the nature of the pleadings, the court *a quo* on its own went on to determine the issue on that basis. It was never contended by Packers that the decision by the Commissioner to impose a garnishee was procedurally unfair.

As regards the question of lack of constitutionality that the court *a quo* dealt with, the essence of the complaint of Packers is stated thus:

“The Respondent’s conduct is clearly unconstitutional as the figure it is claiming has been made arbitrarily without any justification whatsoever. It is arbitrary in the sense that the Respondent estimates the figure it feels Applicant should pay and proceeds to garnish the same. Respondent has deliberately ignored the figures given by the Applicant voluntarily and chose to rely on an unjustified estimate.”¹

A court of law cannot go outside the pleadings on a dispute before it and pick a dispute for the litigants completely and utterly unrelated to the papers before it nor can it dispose of the matter on the basis of the issue so raised by it. Packers did not raise an alleged violation of a constitutional right and yet the court *a quo* went on to invoke the provisions of s 68 of the Constitution and fashioned a remedy in favour of Packers out of the same. There is persuasive authority to support the principle that a court cannot at law pick a dispute on behalf of litigants. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*² the court held:

“Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action. I turn now to deal separately with the three grounds upon which the applicant sought leave to appeal.”

¹ Page 12 of the record, paragraph 14 of the founding affidavit.

² 2004 (4) SA 490 (CC) 507B-D

The court *a quo* proceeded on the premise that the question of the reasonableness or otherwise of the appellant's lawful actions in performing a lawful function was before it. It was not. Therefore, the question of substantive fairness adverted to by the court *a quo* has no basis at law. Packers did not challenge the administrative functions of ZIMRA by way of review. The 'reasonableness' upon which this case was decided was not an issue before the court because the issue was never about ZIMRA being an errant administrative authority. The Administrative Justice Act was not the basis of the application before the court *a quo* and the court *a quo* ought not to have determined it on that basis. Its determination of the dispute on an issue not properly before it was a gross misdirection.

In addition, the court *a quo* inferred from the papers filed by Packers that s 68 of the Constitution was apposite in the determination of the dispute before it. It ought not to have made such inference. It was up to Packers to plead its case properly. In addition, whether or not the sums had been arrived at arbitrarily was a dispute properly placed before the Fiscal Appeals Court as an appeal. The court *a quo* was not empowered at law to determine the quantum due and owing. The whole judgment of the court *a quo* was underpinned by findings which constituted a misdirection warranting interference by this court.

Whether the court *a quo* was at law empowered to remove the garnishee order

The power of ZIMRA to make Value Added Tax assessments is to be found in s 31 of the Value Added Tax Act. Subsection (3) of the same provides:

(3) Where —

- (a) any person fails to furnish any return as required by sections twenty-eight, twenty-nine or thirty or fails to furnish any declaration as required by section thirteen; or
- (b) the Commissioner is not satisfied with any return or declaration which any person is required to furnish under a section referred to in paragraph (a); or

- (c) the Commissioner has reason to believe that any person has become liable for the payment of any amount of tax but has not paid such amount; or
 - d) any person, not being a registered operator, supplies goods or services and represents that tax is charged on that supply; or
 - (e) any registered operator supplies goods or services and such supply is not a taxable supply or such supply is a taxable supply in respect of which tax is chargeable at a rate of zero *per centum*, and in either case that registered operator represents that tax is charged on such supply at a rate in excess of zero *per centum*; the Commissioner may make an assessment of the amount of tax payable by the person liable for the payment of such amount of tax, and the amount of tax so assessed shall be paid by the person concerned to the Commissioner.
- (4) In making such assessment the Commissioner may estimate the amount upon which the tax is payable
- (5) The Commissioner shall give the person concerned a written notice of such assessment, stating the amount upon which tax is payable, the amount of tax payable, the amount of any additional tax payable in terms of section *sixty-six* and the tax period, if any, in relation to which the assessment is made, and—
- (a) where the assessment is made on a seller referred to in subparagraph (i) of paragraph (b) of subsection (2), send a copy of that notice of assessment to the owner referred to in that subsection; or
 - (b) where the assessment is made on an owner referred to in subparagraph (ii) of paragraph (b) of subsection (2), send a copy of that notice of assessment to the seller referred to in that subsection.
- (6) The Commissioner shall, in the notice of assessment referred to in subsection (5), give notice to the person upon whom it has been made that any objection to such assessment shall be lodged or be sent so as to reach the Commissioner within thirty days after the date of such notice.

The power to make the assessments which are the substance of this dispute is not in doubt. Indeed, the court *a quo* made a finding that the actions of ZIMRA right up to the appointment of an agent under s 48 of the VAT Act were lawful. However, notwithstanding the finding by the court *a quo* that the Commissioner had acted lawfully in

all respect, the court went ahead and imposed an interdict against the collection of any sums in excess of USD 905 801.32. This was on the premise that it was the amount of tax which Packers acknowledged as being due and owing. In addition, ZIMRA, in consequence of the order by the court *a quo*, could not collect on the stated sum before the expiry of a week from the date of the order.

The decision to remove the garnishee and impose an interdict against the placing of further garnishees was based on what the court stated to be an irrational exercise of the discretion bestowed upon the Commissioner under the VAT Act.

ZIMRA has argued, correctly in my view, that in stating so the court *a quo* misdirected itself.

An interdict serves to protect a right not an obligation. The papers filed on behalf of Packers did not identify any right that ZIMRA had threatened. The court *a quo* found as a matter of fact that ZIMRA had acted in terms of the law in assessing VAT which remained unpaid. Once this finding was made including the further finding that the agent had been appointed lawfully, there was no lawful justification at law for suspending payment for a week.

I am fortified in this view by the remarks of the learned DEPUTY CHIEF JUSTICE MALABA in the Mayor Logistics case (*supra*) to the following effect:

“The subject of the application is not the kind of subject matter an interdict, as a remedy was designed to deal with. An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a *prima facie* right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right. It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also axiomatic that the *prima facie* right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an

interdict against lawful conduct. *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S0; *Stauffer Chemicals v Monsato Company* 1988 (1) SA 895; *Rudolph & Another v Commissioner for Inland Revenue & Others* 1994 (3) SA 771.

The applicant accepted in the founding affidavit that the respondent acted lawfully in enforcing the obligation to pay the tax notwithstanding the noting by it of the appeal to the Fiscal Appeal Court against the correctness of the assessment. It did not allege any unlawful conduct on the part of the respondent which would justify the granting of an interdict. It also accepted that at the time the respondent put in place measures to collect the tax, the provisions of ss 36 of the VAT Act and 69(1) of the Income Tax Act were binding on it. That means that the applicant had no prima facie right in existence at the time not to pay the amount of tax it was liable to pay to the *fiscus*. Sections 36 of the VAT Act and 69(1) of the Income Tax Act protect a duty, not a right”

The fact that Packers had launched an appeal with the Fiscal Appeals Court against an assessment is not such right as would justify interference by the court. The court could only act to protect a litigant if it was established that the Commissioner had acted illegally in assessing taxes, imposing a garnishee and appointing an agent for the collection of the tax so assessed. In addition the appeal was launched after the garnishee was imposed and, even assuming that the garnishee was illegal, the interdict could not serve to protect conduct that had already been effected and was thus in the past.

The import of the provisions of s 48 is to provide a mechanism by which the Commissioner is enabled to collect taxes due and remit the same to the *fiscus*. Its import cannot be, as found by the learned judge in the court below, to protect registered operators from what is described as “litigation in terms of other laws for the act of forwarding money in their clients’ accounts to the respondent.”

In addition, the issue of the quantum of tax due was not before the court *a quo*, and as a consequence it could not lawfully replace the garnishee properly issued with one for a lesser sum. It could not at law preclude ZIMRA from acting lawfully, after making the

finding that at law, the Commissioner is permitted to garnishee a taxpayer after assessment of taxes.

Secondly, contrary to the finding by the court *a quo* that there is no room to lodge an objection against the imposition of the garnishee, a perusal of s 32 confirms that such right exists and is available to a registered operator. The imposition of a garnishee is not a bar to the raising of an objection. The garnishee order is not the substantive tax assessment, it is merely a collecting mechanism. As a result, the objection can be directed against the tax assessment and if the objection finds favour with the Commissioner of Taxes, the garnishee can be adjusted or revoked and amounts so collected can be returned to the taxpayer with interest.

In construing the powers of ZIMRA under the VAT Act, the court perforce had to examine the provisions of s 14 of the Fiscal Appeal Court Act which reads:

“14 Payment of tax pending appeal

Where any person has given notice of intention to appeal in accordance with section *eleven* or *thirteen* payment of so much of the tax which he has been called upon to pay as would not be payable by him if the appeal were allowed shall be suspended until the appeal has been decided, unless the Commissioner whose decision is the subject of the appeal otherwise directs.”

The court *a quo* concluded that in view of the provisions of s 14, Packers should not be required to pay the amount reflected on the garnishee, the reason being that the noting of the appeal suspended the actual payment of the portion that Packers was disputing. The court found that the Commissioner was required to state in specific terms and in writing to the operator that notwithstanding the noting of the appeal, he was directing that the full sum being demanded be paid. The court opined that by imposing a garnishee it was arguable that the Commissioner had directed that the full sum be paid.

It was common cause that the appeal had been noted after the garnishee was imposed. Even assuming that the appeal was noted before the garnishee was imposed, the statement by the court *a quo* in relation to the provisions of s 14 of the Fiscal Appeal Court Act was in direct contradiction to its earlier finding in its construction of s 36 of the VAT Act. The two sections could not be construed in isolation from each other. Whilst s 36 of the VAT Act applies strictly in relation to the VAT Act, s 14 of the Fiscal Appeal Court Act applies to all relevant Acts in terms of which ZIMRA is empowered to assess and collect taxes and other dues on behalf of the *fiscus*.

The dispute before the court *a quo* was premised on the powers of ZIMRA as exercised under the VAT Act. In light of the seeming contradiction of the sections, the court had to consider the dispute in the light of the two sections. The court *a quo* could not lawfully have made a determination of the dispute on the premise of the two sections without construing them together. The court *a quo* however, dealt with the two Acts and the two sections in isolation. The result of this decision was that the two Acts appeared to be in conflict with each other. As a consequence, the court went on to find that the actions of ZIMRA were lawful in relation to s 36 of the VAT Act, and, that those same actions were unlawful when viewed against s 14 of the Fiscal Appeal Court Act. What was in issue was the powers bestowed on ZIMRA by the legislation and the court failed to properly construe the legislation which dealt with those powers. The misdirection is in my view obvious.

Having found that the actions of ZIMRA were lawful, the court *a quo* could not bar the appellant from performing a lawful function. Thus the interdict issued against ZIMRA is an unlawful interference with its powers under the VAT Act.

The nature of the relief sought in the Provisional Order

Finally, it falls upon this court to examine the nature of the relief sought by Packers as against the order actually issued by the court *a quo*.

The relief sought both in the main and in the interim is substantially the same. This is a practice by litigants that is strictly discouraged by the courts and the law on this point is set out *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) wherein CHATIKOBO J held:

“Before concluding this judgment I must deal with a procedural matter which, regrettably, seems to present difficulty to many practitioners.

.....

..... The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. This, to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day.”

I fully associate myself with this interpretation of the law. The court *a quo* should not have related to the application before it in the face of this apparent and fatal defect. What it did was to grant an order which had the effect of a final order on the strength of a *prima facie* case. The parties before it were not asked to argue on the final order. They argued only on the interim order and the court *a quo*, regardless, proceeded to grant an order which was neither prayed for nor argued upon. The Zimbabwean legal system remains adversarial and the dispute is between the parties. On this basis as well, the order of the court *a quo* begs vacation.

DISPOSITION

In my view, the court *a quo* allowed itself to be preoccupied by the catastrophe that could potentially befall Packers and dealt with the matter on that basis

without determining the true dispute between the parties as pleaded in terms of the relevant law.

In doing so the court seriously misdirected itself. Its decision cannot be allowed to stand and must of necessity be vacated. In the premises the following order will issue.

IT IS ORDERED THAT

1. The appeal be and is hereby allowed with costs.
2. The order of the court a quo be and is hereby set aside and in its place the following is substituted:

‘The Application be and is hereby dismissed with costs.’

ZIYAMBI JA: I agree

HLATSHWAYO JA: I agree

Kantor & Immerman, appellant’s legal practitioners

Manase & Manase, respondent’s legal practitioners