TRIANGLE LIMITED

Versus

ZIMBABWE REVENUE AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 14 DECEMBER 2010 AND 10 FEBRUARY 2011

N Mazibuko, for the applicant
P. Ncube with Ms S. Ncube for the respondent

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order in the following terms:

"Terms of final order sought

That you show cause why a final order should not be made in the following terms:

1. That it be declared that the respondent's assessment dated 7th July 2010 for the tax payable of US$822 379,12 be and is hereby deemed to have been received by the applicant on 25th October 2010.
2. That the applicant's objection to the respondent dated 28th October 2010, be and is hereby deemed to have been filed within time.
3. It be and is hereby declared that the letter by W. Madya dated 30th November 2010 dismissing the applicant's objection dated 25th October 2010 be and is hereby declared to be null and void as it was not drafted and signed by, or , on behalf of the Commissioner-General of the respondent.
4. The respondent be and is hereby ordered, through its Commissioner-General, to consider the applicant's objection dated 28th October 2010 and to respond in detail thereto.
5. It is declared that applicant shall thereafter be entitled to file an appeal in terms of the Income Tax Act against the Commissioner-General's decision in the event the applicant will be dissatisfied with the said decision.
6. That pending the resolution of an appeal against the Commissioner-General's decision in the event such appeal is filed, the respondent shall be stopped from placing a garnishee on any of the applicant's bank accounts.
7. That in the event that the Commissioner-General does not give his written response within three months from the 28th October 2010, then it be and is hereby declared that

the applicant's employees' tax liability on the total amount of R12 884 079,00 shall be deemed to be no more that R2 273 798,51 and the respondent be and is hereby ordered to refund to the applicant, within seven days of the granting of this order, the excess paid to it by the applicant.

8. That the respondent shall pay the costs of suit on the legal practitioner client scale.

Interim relief granted

Pending the return date and finalization of this matter, the applicant is granted the following interim relief:

(a) The garnishee order placed by the respondent through its Chiredzi Branch on the applicant's Standard Chartered Bank account held with the Chiredzi Branch, be and is hereby suspended and the bank officials of the aforementioned bank be and are hereby ordered to ignore the directive to garnishee the applicant's account by the respondent.
(b) In the event that the garnishee has been effected, it be and is hereby ordered that it be reversed and the respondent is hereby ordered to transfer back to the applicant's Standard Chartered account held with the Chiredzi Branch, the monies transferred to it via the garnishee, within 24 hours of the granting of this order."

The background facts of this case are the following. The applicant is Triangle Limited a limited liability company carrying on business in Triangle. The respondent is the Zimbabwe Revenue Authority [hereinafter referred to as "ZIMRA"]. In May 2010, ZIMRA carried out a pay-as-you-earn ("PAYE") audit on the applicant. The audit is still on-going. While conducting the audit ZIMRA's officers got a tip off that applicant's Executive Management had received part of their remuneration from the applicant's parent company, Tongaat Hullet which is based in South Africa during the period ranging from March 2008 to February 2009. These amounts did not form part of the applicant's payroll and were it not for the tip-off such remuneration would never have been discovered by ZIMRA. ZIMRA then wrote an e-mail to the applicant's Human resources Director, one F Nyangwe, on 10 May 2010 enquiring about this alleged remuneration which was not being declared. On 17 May 2010 Tongaat Hullet's Tax manager, a Mark Sandiford, responded to the enquiry of 10 May 2010. He admitted that indeed certain key managers of the applicant and Hippo Valley received payments from Tongaat Hullet. He further stated that the said payments were for "required provision of services" by the said employees of applicant and Hippo Valley to Tongaat Hullet in South Africa which is outside Zimbabwe. He then argued that since the services were performed in South Africa the affected persons were subject to tax in South Africa. A schedule was presented of the amounts paid to these individuals and the taxes paid to the South African Revenue Service in that regard. By letter dated 20 May 2010, ZIMRA responded to the applicant advising that since managers in question

had not been resident in South Africa for a period of 183 days rendering the alleged services, the remuneration was subject to taxation only in Zimbabwe in terms of the provisions of Article 1X (2) of the Double Taxation Agreement between Zimbabwe and South Africa. In the circumstances ZIMRA computed the tax payable and prepared a schedule. The said letter and the schedule were presented by Ms Chasi, of ZIMRA to Mr Nyangwe of the applicant on 20 May 2010. These documents were explained to Mr Nyangwe by Ms Chasi and the former undertook to respond on behalf of the applicant in due course. By 7 July 2010, the applicant had not yet commented on the schedule and the letter. Neither had it paid the amounts due in terms of the schedule. ZIMRA then issued out two assessments to the applicant which were again served on Mr Nyangwe on 7 July 2010. The first assessment being number 91076005 was for withholding tax in terms of section 10(1)(a) of the 13th Schedule of the Income Tax Act. The second assessment was number 91076115 for penalty in terms of section 10(1)(b) of the 13th Schedule, *supra.* The applicant did not pay the tax assessed resulting in ZIMRA resorting to garnishees to recover the tax. A garnishee was placed on the applicant's above-mentioned bankers for the full amount of tax comprising the principal amount and the penalty amount. The amount demanded was ZAR 12 606 072. Tongaat Hullet offered to pay the principal amount for the garnishee to be withdrawn on condition that the parties engage in dialogue on the issue of the penalty. ZIMRA withdrew the garnishee and the applicant indeed settled the principal amount.

The respondent has raised a point *in limine* that the matter is not urgent. I propose to firstly deal with this issue and consider the other issues if need be. Because of the point *in limine* I have to determine whether the applicant has established that it will suffer irreparable harm if this applicant is not treated urgently – *CABS* v *Ndlovu* HH-3-06.

Looking at the certificate of urgency, paragraphs 1 and 2 are irrelevant as they pertain to the merits and are therefore, the province of hearing of the main matter. Paragraph 3 of the certificate of urgency is pertinent as it is the only one that alleges urgency. Paragraph 3 reads:

> "3. The urgency however arises especially from the fact that applicant's account has now been garnished meaning therefore that the applicant will not be able to access its funds from its account which will cripple its operations. Since the applicant is a company domiciled in Zimbabwe with assets in Zimbabwe it seems to me that the respondent's action is rather drastic and borders on vindictiveness and for that reason I submit that it is in the applicant's interest for, at the very least, an interdict to be granted suspending the operation of the garnishee to enable the applicant to continue operating whilst challenging the respondent's decision to dismiss its objection."

In paragraph 21 of the founding affidavit the applicant avers:

"21. If the garnishee is given effect to, it will totally cripple the applicant's cash flow and will render them unable to operate."

This is the sole ground advanced by the applicant. The deponent to the applicant's founding affidavit is not an employee of the applicant but a tax expert engaged in an effort to resolve the tax problem between the parties. What she is stating in the affidavit is hearsay. Further, no supporting facts have been tendered to confirm, even on prima facie basis, that indeed if garnishee is effected, operations of the applicant will be crippled. There is no cash flow statement. There is no allegation how much applicant requires on a daily or monthly basis to operate. It has not been shown that the applicant's bank account has very little funds so much that once ZIMRA gets what it is demanding in the garnishee the applicant will be left broke. The applicant has not disclosed the amount of money that is in that bank account to prove the crippling effect of the garnishee that was placed on the account. The applicant has just made a naked statement, and as such the court has no material to work with to satisfy itself that there will be irreparable harm. In the circumstances, it cannot begin to exercise the discretion without the benefit of that crucial information – *Silver Trucks and Anor* v *Director of Customs* 1999 (1) ZLR 490 (H) at 491G-H and 492A. There is a direct link between urgency and irreparable harm. It is clear from the provisions of section 58(2) of the Income Tax Act that the definition of tax includes penalties under the Act. It is therefore, competent to garnishee a bank to recover penalties under the Act – *Edgars Stores Ltd* v *Commissioner of Taxes* 1996(2) ZLR 747 (S).

Further, section 69 of the Act clearly states that the obligation to pay and the right to receive any tax chargeable under the Act shall not be suspended pending the decision of any objection or appeal unless the Commissioner directs otherwise. This clearly shows that the Act safe guards and protects the interests of the fiscus more where assessed taxes are still being disputed, than it does the interest of the tax payer. The tax payer has to pay first and should a decision against ZIMRA be made by a court later, then ZIMRA will have to refund any amounts that would have been found to have been not due. The applicant seeks, under a certificate of urgency, an order to override the statutory provisions in section 69(2) of the Act. This is incompetent – 1, 2, 3 *Combined Harare Residents Assn and Anor* v *Registrar-General & Ors* 2002 (1) (ZLR 83 (H) at 86C.

From the foregoing, it is clear that the applicant has failed to satisfy the court that it will suffer irreparable harm if the matter is not dealt with under a certificate of urgency. This court cannot exercise its discretion to hear the matter on urgent basis when there is no such foundation.

Accordingly, the application is dismissed with costs for want of urgency.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Coghlan & Welsh, respondent's legal practitioners