MAYOR LOGISTICS (PVT) LTD
v
ZIMBABWE REVENUE AUTHORITY

CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, JULY 11 & 22, 2014

L Uriri, for the applicant
U Sakhe with him *A Moyo*, for the respondent

MALABA DCJ: In Chambers.

This Urgent Chamber Application was placed before me because the Chief Justice was not available to hear it. The application raised two questions for determination. The first question is whether an interim order suspending the operation of legislation compelling payment by a taxpayer of the amount of tax liable to be paid notwithstanding an appeal to the Fiscal Appeal Court or pending a decision of a court should be granted pending the hearing and determination of the main application challenging the constitutional validity of the legislation by the full bench of the Constitutional Court. The second question is whether an order should be made directing that the main application be heard on an urgent basis.

The facts which gave rise to the questions for determination are these. The applicant is a company incorporated under the laws of Zimbabwe carrying on the business of supplying transport services and selling of fuel. The respondent is an administrative authority established in terms of the Revenue Authority Act [*Chapter 23:11*]. It is entrusted with the responsibility of assessing taxpayers for tax liability and collecting revenue due to the fiscus in terms of the Value Added Tax Act [*Chapter 23:12*]("the VAT Act") and the Income Tax Act [*Chapter 23:06*] ("the Income Tax Act").

The applicant has been a registered operator in terms of the VAT Act since October 2010. As from 2010, the applicant has been supplying transport services to and purchasing fuel for sale at its service station from an entity called Sakunda Energy. It has always been aware of its obligation to charge value added tax on the invoices for the transport services supplied to Sakunda Energy. Instead of submitting returns of value added tax based on the invoices on the transport services supplied, the applicant set off the costs of fuel purchased from Sakunda Energy against the invoices for the transport services and submitted returns for value added tax in respect of the balance.

The respondent commenced investigations into the tax affairs of the applicant in October 2013. Upon examination of the applicant's books of account, the respondent concluded that the applicant had under-declared the value added tax charged on the invoices on transport services supplied to Sakunda Energy, as a result of the setting off of the cost of fuel purchased against the value of the invoices for the transport services. The applicant was advised of the under declaration on 11 December 2013. The respondent was of the view that the value added

tax on the invoices, was liable to be paid to the fiscus regardless of the purpose for which transport services were supplied.

On 7 February 2014, the respondent issued the applicant with an assessment of value added tax liability in an amount of US$1 619 161.32 including penalties and interest. According to the respondent, it was what the applicant and Sakunda Energy were doing in their business transactions as revealed by the examination of books of account, which produced evidence of tax evasion.

The applicant was dissatisfied with the tax liability assessment arguing that it did not owe the whole amount of the value added tax assessed to be due and payable. On 27 February 2014, the applicant lodged a formal objection with the Commissioner against the correctness of the assessment in terms of s 32 of the VAT Act. The allegation was that the respondent had adopted a wrong method of assessing the applicant's tax liability. The respondent was accused of having misunderstood the nature of the applicant's business operations. Correspondence was exchanged on the matter between the parties between 14 and 17 March 2014. The Commissioner disallowed the objection in respect of the assessment of value added tax liability on 13 May 2014. The applicant noted an appeal to the Fiscal Appeal Court against the correctness of the assessment on 23 May 2014.

On 27 May 2014, the Commissioner reminded the applicant of its continuing obligation to pay the amount of the tax assessed to be due and payable, notwithstanding the noting of the appeal to the Fiscal Appeal Court. On 30 May 2014, the applicant's tax consultant

simply expressed a view to the respondent that it would be prudent to await the outcome of the appeal.

Concurrently with the review of the applicant's value added tax affairs, the respondent carried out an assessment of the applicant's income tax liability. The respondent assessed the applicant's income tax liability to be an amount of US$2 066 652.84 including penalties and interest. On 3 June 2014 it sent to the applicant, a complete tax computation for both value added tax and income tax. The respondent threatened to put in place measures to recover the taxes in terms of s 48 of VAT Act should the applicant fail to pay the money voluntarily. It later appointed three of the applicant's bankers and Sakunda Energy as agents for the payment of the value added tax assessed to be due and payable.

On 5 June 2014, the applicant filed an application with the Constitutional Court in terms of s 85(1) of the Constitution, challenging the validity of ss 36of the VAT Act and 69(1) of the Income Tax Act. The allegation is that the legislative provisions violated the applicant's fundamental right of access to the courts enshrined in s 69(3) and the right to administrative justice guaranteed under s 68(1) of the Constitution. The applicant sought, as the relief, a final order declaring ss 36 of the VAT Act and 69(1) of the Income Tax Act to be *ultra vires* ss 68(1) and 69(3) of the Constitution and therefore void.

Simultaneously with the filing of the main application, the applicant filed the urgent chamber application seeking an order that the main application be heard on an urgent basis. It also sought interim relief in the following terms:

"**INTERIM RELIEF GRANTED**

1. Pending the hearing and finalization of Applicant's appeal in the Fiscal Appeal Court, Applicant's obligation to pay value added tax and income tax be and is hereby suspended.
2. Respondent be and is hereby ordered to forthwith provide written reasons for its decision to compel payment of value added tax and income tax pending Applicant's appeal to the Fiscal Appeals Court."

Section 36 of the VAT Act provides:

"**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 recoverable with penalty and interest calculated as provided in subsection (1) of section thirty-nine."

The obligation to pay the amount of tax assessed to be due and payable is imposed by s 38 of the VAT Act.

Section 69 of the Income Tax Act provides:

"**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."

The obligation to pay income tax assessed to be due and payable is imposed by s 71(1) of the Income Tax Act.

Mr *Sakhe* for the respondent took a point *in limine*. It is that s 167(5)(a) of the Constitution makes provision for the making of Rules of the Constitutional Court allowing a person to bring a constitutional matter directly to the Constitutional Court with or without leave of the Constitutional Court, when it is in the interests of justice to do so. He argued that the makers of the Constitution did not envisage a situation where a person alleging that a fundamental right or freedom enshrined in [Chapter 4] has been, is being or is likely to be infringed can approach the Constitutional Court for appropriate relief without first showing, on an application, that it was in the interests of justice to do so.

Mr *Sakhe's* contention is based on the fact that whilst the Constitutional Court has jurisdiction to decide only constitutional matters and those matters reserved for its exclusive jurisdiction under s 167(2) of the Constitution, it certainly is not the only court with jurisdiction to decide constitutional matters. The Supreme Court and the High Court have jurisdiction to decide constitutional matters.

Mr *Uriri* relied on the broad terms of s 85(1) of the Constitution giving any of the persons listed under the section the right to approach "a court" alleging that a fundamental right or freedom enshrined in Chapter 4 has been, is being or is likely to be infringed. Mr *Sakhe's* contention finds support from a decision of the Constitutional Court of South Africa in *Satchwell v President of the Republic of South Africa & Another* 2003(4) SA 266(CC).

Not only was the decision in *Satchwell* supra based on the construction of s 167(6)(a) of the Constitution of the Republic of South Africa 1996 which has the same wording as s 167(5)(a) of our Constitution, it was arrived at in the light of s 38 which lists persons with the right to approach "a competent court" alleging infringement of a fundamental right or freedom in the same manner as s 85(1) of the Constitution.

The fact that s 167(1)(a) of the Constitution defines the Constitutional Court as "the highest court in all constitutional matters" may suggest that its competence is to ensure the uniform application of law and equal justice to all on constitutional matters and should exceptionally decide the matter as a court of first instance.

Whatever, the merits or demerits of Mr *Sakhe's* argument there is no doubt that it raises an important constitutional question. It is a matter for determination by the full bench of the Constitutional Court.

As a judge sitting in chambers, I have no competence to make a pronouncement on the matter. It is after all a constitutional matter. I now turn to decide the first question. It is important to mention that the purpose of these proceedings is not to determine the correctness or otherwise of the tax assessments made by the respondent. That is the question to be determined by the Fiscal Appeal Court in the appeal lodged by the applicant. On the question before this Court, the decision is that a case has not been made for the granting of the relief sought. The reasons for the decision follow:

There is no doubt that a judge of the Constitutional Court may grant interlocutory relief by way of an interim order pending determination of a constitutional matter by the full bench of the court. Section 166(3) of the Constitution provide for interlocutory matters to be heard by one or more judges of the court. See *Williams & Anor v Msipha N.O. & Ors* 2010(1) ZLR 552(S) at 562H-563A.

The applicant seeks an order suspending the statutory obligation to pay the amount of the tax it was assessed to be liable to pay to the fiscus, pending the hearing and finalization of the appeal in the Fiscal Appeal Court. It is in the heads of argument that the applicant reveals that the relief sought is an interim interdict. There is need to have regard to the substance and not the form of the relief sought. The fact that the applicant calls the order sought, an interim interdict does not make it one.

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(S); *Stauffer Chemicals v Monsato Company* 1988(1) SA 895; *Rudolph & Anor v Commissioner for Inland Revenue & Ors* 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 provisions are designed to remove any doubt in the mind of the taxpayer, as to whether an appeal to the Fiscal Appeal Court, or a decision of a court, would have the effect of suspending the obligation to pay the tax assessed to be due and payable.

Sections 36 of the VAT Act and 69(1) of the Income Tax Act provide that the Commissioner may, by a directive in appropriate circumstances give the appeal to the Fiscal Appeal Court the effect they prohibit on the obligation to pay the assessed tax. The Commissioner may, in the exercise of discretion, and upon consideration of the facts presented to

him by the taxpayer, direct that the obligation to pay the tax be suspended pending determination of the appeal by the Fiscal Appeal Court or pending a decision by a court of law.

Whilst ss 36 of the VAT Act and 69(1) of the Income Tax Act provide, that the occurrence of any of the specified events, shall not suspend the taxpayer's obligation to pay the tax assessed to be due and payable, they at the same time create a remedy for the amelioration of possible financial hardships faced by an individual taxpayer. They give the Commissioner the discretionary power to suspend the obligation pending the determination of the appeal by the Fiscal Appeals Court or pending the decision by a court.

Failure to fulfill an obligation may be due to a variety of circumstances. The legislature decided to place the responsibility of 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 unlawful if it usurped the discretionary powers of the Commissioner and ordered a suspension of the obligation on a taxpayer to pay assessed tax pending determination of an appeal by the Fiscal Appeal Court.

The effect of the interim order sought by the applicant, has a direct relevance to the determination of the question whether the obligation imposed on a taxpayer to pay the amount of the tax assessed to be due and payable, infringes the taxpayer's fundamental right of access to a court and the right to administrative justice enshrined in ss 69(3) and 68(1) of the Constitution respectively.

Mr *Sakhe* put the matter in its proper context. He said that what the applicant is seeking is an interim order suspending its statutory obligation to pay the amount of the tax assessed to be due and payable pending an anticipated declaration by the Constitutional Court of constitutional invalidity of ss 36(1) of the VAT Act and 69(1) of the Income Tax Act. The question is therefore not whether the respondent is likely to act unlawfully in future so as to be interdicted. It is whether an interim order should, in the circumstances, be granted suspending the operation of provisions of Acts of Parliament pending the hearing and determination by the Constitutional Court of the question of the constitutionality of the statutory provisions.

There is no basis on which the interim order sought may be granted except the possibility relied on by the applicant that the existing legislation would be held unconstitutional. Any court faced with an application challenging the constitutionality of a statutory provision, is required to proceed on the presumption that the legislation is constitutionally valid until the contrary is clearly established.

The principle of presumption of constitutional validity of legislation pending determination of the main application is an important limitation to the exercise of judicial power. *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983(2) ZLR 376(S) at 382B-D. By observing the principle, due respect is accorded to the legislative branch of Government consistent with the fundamental principle of separation of powers. The task of the Constitutional Court is to declare legislation invalid only after thorough examination of the factual and legal issues. A finding has to be made first that there has been, a contravention of a fundamental right or freedom.

The legal consequences of a decision by the Constitutional Court that a law, a regulation or some of their provisions, are unconstitutional are that they lose their legal force on the day of the publication of the Constitutional Court decision. Until then, the law, regulation or any provision has legal force. An impression should not be created in the minds of right thinking members of the public that the outcome of the hearing by the Constitutional Court of the question of constitutionality of legislation has been pre-determined.

Sections 36 of the VAT Act and 69(1) of the Income Tax Act are laws of general application. Although the applicant framed the interim order on the belief that it would affect its immediate interests only, the truth of it is that the relief cannot be granted without bringing into question the efficacy of the whole revenue collection system. The interim order would be suspending the operation of the statutory provisions for all taxpayers who are under the same continuing obligation to pay the assessed tax liability as the applicant. All such taxpayers would obtain relief from the statutory obligation premised on the presumed constitutional invalidity of the legislation contrary to s 167(3) of the Constitution. The section makes it clear that only the Constitutional Court has the power to make the final decision whether an Act of Parliament is constitutional.

The order would create uncertainty and confusion about the status of the provisions of the Acts of Parliament. In *MEC Development Planning & Local Govt. v Democratic Party* 1998(4)SA 1157 at para. 61 the Constitutional Court of South Africa on a similar issue said:

> "It is sufficient to point out here that considerable difficulties stand in the way of the adoption of a procedure which allows a party to obtain relief which is in effect

> consequent upon the invalidity of a provision of an Act of Parliament without any formal declaration of the invalidity of that provision."

Sections 36 of the VAT Act and 69(1) of the Income Tax Act make provision for a remedy, compliance with which is designed to give effect to the protection of the fundamental rights the applicant claims have been infringed. See *Metcash Trading Ltd v The Commissioner for the South African Revenue Service and Another* 2001(1) SA 110(CC).

The fact that the statutory provisions give the Commissioner the discretionary power to direct that the continuing obligation to pay the tax, be suspended pending an appeal to the Fiscal Appeal Court means that a mechanism was put in place to ameliorate financial hardships experienced by individual taxpayers as a result of the enforcement of the "pay now, argue later rule". Suspension of the operation of the "pay now, argue later rule" can be decided and should be decided by the Commissioner. He cannot act *mero motu*. As the facts on which the Commissioner would exercise the discretionary power would be within the exclusive knowledge of the taxpayer he or she must place them before the Commissioner.

In this case the Commissioner was not formally requested by the applicant to direct the suspension of the continuing obligation to pay the charged tax pending determination of the appeal by the Fiscal Appeal Court. No decision was made by the Commissioner on the matter. The respondent cannot be ordered to give reasons for a decision it did not make. The applicant merely expressed an opinion that it would be prudent for the respondent not to demand payment of the tax pending determination of the appeal. The respondent cannot be ordered to give reasons for reminding the applicant of its statutory obligation.

The decision on the second issue is that the facts ascertained have not established that the main application should be heard on an urgent basis. An order that a constitutional matter should be heard on an urgent basis is an extraordinary remedy designed to be granted in the clearest of cases.

The principle of equality of treatment requires that a litigant whose case is pending hearing in a court must be subjected to the same procedure as is applied to others for the determination of the question whether his or her case is ready to be set down for hearing by the court. The decision that a case should be set down for hearing by the Constitutional Court is made by the Registrar. It is only in exceptional circumstances and upon an application on a certificate of urgency signed by a legal practitioner, that the Chief Justice will order that a matter should be heard on an urgent basis.

A party favoured with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be accorded the preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike.

The certificate of urgency should show that the legal practitioner carefully examined the founding affidavit and documents filed in support of the urgent application for facts which support the allegation that a delay in having the case heard on an urgent basis would

render the eventual relief ineffectual. See *Pickering v Zimbabwe Newspapers* (1980) Ltd 1991(1) ZLR 71(H); *Dilwin Investments (Pvt) Ltd v Jopa Engineering Company (Pvt) Ltd* HH-116-98; *Triple C Pigs & Anor v Commissioner General, Zimbabwe Revenue Authority* 2007(1) ZLR 27(H).

An examination of the founding affidavit reveals that the applicant basis its claim for an order that the main application be heard on urgent basis on the allegation that the respondent wrongly assessed its tax liability. The allegation is that payment of the tax will destroy the applicant's business. The applicant sees in the appeal before the Fiscal Appeal Court, or the constitutional proceedings a remedy that will secure for it, immediate release from the burden of having to pay tax it claims is not due to the fiscus.

The certificate of urgency gave as grounds for having the matter treated as urgent the tax recovery measures the respondent was about to put in place. It also alluded to the need to prevent financial hardships the applicant would suffer as a result of payment of the tax.

Paragraphs 5 and 6 of the certificate of urgency refer to the threatened tax recovery measures and their possible effects:

> "5. This collection is imminent and due to happen any time soon and if it happens not only will the outcome of the appeal be rendered academic but the collection may quite literally destroy Applicant's business in such a manner that Applicant will never recover even if the appeal is successful. This is especially so given the huge amounts of money involved.
>
> 6. Whilst the need for Respondent to be able to collect taxes efficiently and effectively is acknowledged, it is imperative that this Honourable Court clarify the constitutional issues that are raised by Respondent's arbitrary and summary procedures

> whose effects on small businesses such as that of Applicant and indeed across Zimbabwe may be ominous and permanent."

Mr *Sakhe* argued that the applicant has not advanced any cogent reasons on the papers as to why the constitutional matter should be heard on an urgent basis. The certificate of urgency is clearly unhelpful. It does not assist the court to decide whether or not to exercise its discretion in favour of the applicant. Not only does the certificate of urgency make bald and unsubstantiated allegations of imminent financial ruin befalling the applicant should the tax recovery measures be effected some of the statements are false. It is making a false statement to say that by adopting the tax recovery measures thbe respondent is enforcing "arbitrary and summary procedures". The respondent is authorized by the law to adopt the tax recovery measures.

What is clear from the applicant's papers is that it is intent on stopping dead all efforts to make it pay the tax demanded by the respondent. 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.

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 determined 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.

It is ordered that:

(1) The constitutional application challenging the validity of ss 36 of the Value Added Tax [*Chapter 23:12*] and 69(1) of the Income Tax Act [*Chapter 23:06*] is not urgent.

(2) The application for an interim order suspending the obligation imposed on the applicant to pay the tax assessed to be due and payable pending the hearing of the appeal by the Fiscal Appeal Court or the constitutional matter filed in Case No. CCZ 41/14 be and is hereby dismissed.

(3) The applicant is to pay the costs of the urgent chamber application.

Machingura Legal Practitioners, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners