

REPORTABLE (20)

STANDARD CHARTERED BANK ZIMBABWE LIMITED
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & ZIYAMBI AJA
HARARE, MAY 22, 2017 & MARCH 20, 2018.

AP de Bourbon, for the appellant

T Magwaliba, for the respondent

ZIYAMBI AJA:

[1] This is an appeal against a judgment of the High Court sitting as an Appeal Court in terms of s 65 of the Income Tax Act [*Chapter 23:06*] (hereinafter referred to as “the Act”). It concerns certain income tax assessments made in respect of the appellant by the respondent with regard to the years 2009, 2010 and 2011. Of the four issues which were raised in the High Court, three were decided against the appellant and form the subject of this appeal. They are:

“Whether or not the appellant was entitled to claim the costs of a staff reduction exercise in the year in which the offer was made to the staff to take voluntary retirement; whether the appellant was correctly held to have earned interest in respect of offshore loans made to various customers in each of the three years of the amended assessments; and whether the charges debited against the foreign *nostro* accounts of the appellant by the bank operating such accounts were liable to withholding tax in terms of s 30, as read with the 17th Schedule, of the Act.”

I deal with each of these issues in turn.

Whether or not the appellant was entitled to claim the costs of a staff reduction exercise in the year in which the offer was made to the staff to take voluntary retirement.

[2] The parties were agreed that if the staff reduction exercise constituted a retrenchment in terms of the Labour Act then the costs of such a scheme would properly be written into the taxable income of the year in which the retrenchment took place. They were also agreed that the definition of “retrench” in section 2 of the Labour Act¹ was broad enough to include the exercise undertaken by the appellant. The question which fell to be decided was whether the exercise constituted a retrenchment in terms of the Labour Act. I did not understand the appellant to dispute the submission made on behalf of the respondent that the retrenchment would take effect from the date of its approval by the Minister.²

[3] The background facts are largely common cause. The appellant, a Commercial Bank operating in Zimbabwe, embarked on a staff reduction exercise during the year 2009. By resolution of its Board of directors dated the 26 November 2009, the appellant undertook “a voluntary retrenchment exercise to reduce its staff head count by up to two hundred and fifty-two (252) staff members.” The rationale for the decision taken by the Board was the downturn in economic activity which triggered a drastic fall in business volumes from average monthly transactions of US\$1.9m in 2008 to US\$380 000.00 in 2009 in the face of static staffing levels in excess to capacity. All interested staff were required to submit formal applications by 31 December 2009. The appellant reserved the right to approve or decline such applications.

[4] Between 3 and 31 December 2009, a total of 74 applications were received by the appellant. However, the confirmation certificates, wherein each applicant affirmed freely and voluntarily terminating employment, were all signed by the 74 during the period 7 to 14 January 2010. Each employee was given 3 months’ notice of termination of his employment from the

¹ [Chapter 28:01]

² Kadir & Sons (Pvt) Ltd v Panganai and Anor 1996 (1) ZLR 598(S) @604C

date of acceptance of his application. The gross costs of the ‘voluntary retrenchment’ exercise was US\$1 995 402. A further 27 staff members submitted applications in January and February 2010, but this appeal does not relate to them. It is confined to the exercise in respect of the 74.

[5] In the return for the tax year ending 31 December 2009, the appellant submitted applications in respect of each of the 74 employees to the respondent for a tax directive. It claimed a deduction for staff retrenchment costs in terms of s 15 (2) (a) of the Act as an expenditure incurred for the purpose of trade and for conducting its business and earning income in that year of assessment. The respondent disallowed the deduction but included it in the amended assessment for the 2010 tax year.

[6] The appellant contended that the deduction ought to have been allowed in the year 2009 which is the year in which the expenditure was incurred. Mr *de Bourbon* submitted that the exercise was a voluntary retirement scheme to which the provisions of s 12C and 12D of the Labour Act did not apply. By accepting the applications of the 74 on or before 31 December 2009, the appellant had incurred an unconditional legal obligation to make payment to the 74. Therefore, the obligation to pay the 74 arose in December 2009 and should be deducted in the assessment year 2009.

[7] On behalf of the respondent (“Zimra”), Mr *Magwaliba* countered that the exercise constituted a retrenchment in terms of the Labour Act. He accepted the legal position that in terms of s 15(2)(a) of the Act, the costs of the exercise were deductible in the year of expenditure, *viz*, the year in which the expenditure is incurred³ even if paid in a subsequent

³ *Caltex Oil (SA) Ltd v Secretary for Inland Revenue* 1975 (1) SA 665 (A) at 674.

year. He submitted, however, that in the instant case, the assessment was properly made in 2010 which is the tax year in which the expenditure was incurred.

[8] At page 6 of its judgment the court *a quo*, in arriving at its conclusion that the exercise constituted a retrenchment in terms of the Labour Act said:

“The onus to show on a balance of probabilities that the scheme was not a retrenchment exercise fell on the appellant. The discharge of the onus was complicated by the sole witness called by the appellant on this aspect. He conceded under cross examination that the scheme constituted a retrenchment exercise. His attempt to correct the picture in re-examination failed to paper the cracks. His prevarication on the point did not paint him as a credible witness in that respect only. The documentation emanating from the appellant is replete with reference to retrenchment exercise, retrenchment costs and retrenchment expenses”.

[9] As it was submitted on behalf of the respondent, the appellant itself referred to the exercise as a retrenchment. In his heads of argument before this Court, Mr *de Bourbon* explained those references away by describing them as ‘inappropriate’. Para 2 of the appellant’s heads of argument reads:

“At the end of November 2009, the appellant resolved to undertake what it termed a *voluntary retrenchment exercise* (record 55) ...”

And at Para 4:

“For the purposes of its accounts, the appellant claimed the whole costs of the voluntary separation scheme (*often using the inappropriate term retrenchment*) as a cost of its business in the tax year ending 31 December 2009.” (My emphasis).

[10] It is common cause that the appellant submitted, for approval by the Retrenchment Board, a list of the employees affected by the exercise. Such a procedure is necessary only where employees are being retrenched⁴. In four letters dated between 12 January and

⁴ Labour Act s12C

2 February 2010, the appellant was advised by the Minister of the Board's approval of the retrenchment exercise in relation to 94 employees, including the 74, in the following terms:

“Re: Retrenchment of [the names of the staff members]. The retrenchment Board acknowledges receipt of correspondence referring to the Works/Employment Council Agreement in Form LRR2. Please proceed as per agreement.” (My underlining)

[11] It is evident that the appellant followed the retrenchment procedure set out in the Labour Act right down to the use of the forms. The approvals were granted by the Board in 2010. In the light of the above, the conclusion reached by the learned Judge that the staff reduction exercise constituted a retrenchment in terms of the Act was inescapable. I therefore agree with Mr *Magwaliba* that the commitments made by the appellant to the employees were conditional upon the approval of the Minister of Labour and Social Services and that since the approvals were only granted in 2010, the expenditure could not be deducted in the tax year ending 2009 but was properly deducted in the tax year 2010.

Whether the appellant was correctly held to have earned interest in respect of offshore loans made to various customers in each of the three years of the amended assessments.

[12] On 6 October 2009, the appellant (sometimes referred to herein as “the Bank”) obtained authority from the External Loans Co-ordination Committee of the Reserve Bank of Zimbabwe (“ELCC”) to borrow offshore funds on behalf of its clients. The letter of approval read, in part:

“Re: Standard Chartered Bank Pre and Post Shipment Finance Facility USD100Million.

Please be advised that your application for the approval of a pre and post shipment finance facility to the tune of USD100 million has been approved by the External Loans Co - ordination Committee (ELCC)...”

The lender was stated to be Standard Chartered Bank PLC London and the borrower Standard Chartered Bank Zimbabwe Limited. The approval related to an ordinary non-tobacco pre and post shipment finance facility in the sum of US\$50 million as well as a further US\$50 million for tobacco financing. The facilities expired on the 31 August 2010. However, on the 9 September 2010, the ELCC approved an enhanced ordinary non-tobacco pre and post shipment finance facility increasing the loan from US\$50 million granted on 6 October 2009 to US\$100 million sought by the appellant from the offshore related party at an interest rate of Libor plus 4%. The tobacco pre-and post-shipment facility was also increased from US\$50 million to US\$100 million with an interest rate of Libor plus 3% expiring on the 31 August 2011.

[13] During the period 2009 to 2012, the appellant extended loan facilities to 6 onshore customers of which 3 were tobacco companies. The remaining 3 comprised of a cotton company, a cement manufacturing company and a manufacturing and distributing conglomerate. In terms of each of the facility letters the appellant stated itself to be the lender and the customer the borrower. Each agreement specified the amounts borrowed, the period of repayment, the provision of security to the appellant and the manner of calculation of interest. Save for the conglomerate in respect of which in one instance, (the facility dated 2011 for US\$200 million) the courts of England were to have jurisdiction, the courts of Zimbabwe were to have jurisdiction to settle any dispute arising in connection with the facility letters. In terms of the facility letters, all amounts paid to the Bank in repayment of the facility would be applied firstly to the payment of interest accrued and any fees or charges due and thereafter to the reduction of the capital amount.

One tobacco company was required to open an Evidence Account with the appellant into which account repayments would be made. Any balance in that account after the repayment of the facilities would be applied toward the reduction of “any other offshore loans made available by the Bank on the due date of such loans”. Any residual surplus balance in the Evidence Account would be paid to the borrower. Interest was to be debited to the borrower’s account at a ‘day convenient to the bank’.

[14] The respondent took the view that the interest in terms of each loan agreement had been earned by the appellant and therefore became part of the appellant’s taxable income. On this basis, the respondent wrote back into the appellant’s taxable income for the three years under mention, the interest paid by the 6 onshore borrowers. The appellant’s objection to the assessments was disallowed by the respondent and its appeal to the High Court was dismissed.

Submissions on appeal

[15] It was contended by Mr *de Bourbon*, on behalf of the appellant, that interest accruing on the loans had been paid directly to the offshore lender, namely, Standard Chartered Bank PLC London. Regarding the 3 tobacco companies and the cotton company, which were in a separate category by virtue of the Exchange Control (Tobacco Finance) Order 2004⁵ and the Exchange Control (Cotton) Order, 2008⁶ the appellant had neither received, nor accrued the right to, any interest and that the finding of the court *a quo* to the contrary was wrong.

Regarding the loans to the conglomerate and to the cement company, these were external loans paid externally and the agreements were subject to the laws of England. The

⁵ S.I 161/2004 as amended by SI 229/2004

⁶ S.I 150/2008

only factors linking the appellant to the matter are the facility letters which were drawn in the name of the appellant but even that did not establish that the appellant either received or accrued the right to interest on these loans as all payments were made directly to the offshore bank Standard Chartered PLC in London.

[16] On behalf of the respondent Mr *Magwaliba* submitted that the real issue for determination was whether the appellant had discharged the onus of establishing, on the evidence placed before the court, that there was no *causa* for the payment of interest to it by the onshore borrowers and that such interest was in fact not earned by the appellant. That onus, he submitted, was not discharged by the appellant. He drew the court's attention to the unsatisfactory nature of the evidence led by the appellant from its head of corporate banking, Mr Young, as found by the court *a quo*, in particular, the following remarks at page 25 of the judgment:

“There was a plethora of disquieting features in the testimony of the head of corporate banking. He disputed that any money was paid to the appellant by the offshore lender contrary to the stipulation in clause 3 of the MRPA. He disputed that the appellant borrowed funds from the offshore lender, again contrary to all the approvals he produced that emanated from the central bank. The lender was clearly indicated as the offshore related party and the [appellant] the borrower and in later approvals the beneficiary as the appellant. The unexplained discrepancy between the first facility letter and the acceptance agreement in respect of the first tobacco company did not engender confidence in his testimony. More importantly, the failure to produce the acceptance agreements of all the other facility letters save for the one in respect of the conglomerate, exhibit 7, and rate fix documents in respect of all the facility letters undermined his credibility. The impression left in my mind was that the appellant was deliberately hiding information in corporate underbrush. Similarity of all the letters save for the first two for the first tobacco company with the ones the appellant admitted were provided with local funds undermined the appellant's case. There was no reference to any evidence account in these facility letters. The choice of law clause conferred jurisdiction on the local courts. The calculation of the computation of the interest rate in respect of the cement manufacturer demonstrated that it was receiving onshore finance from the appellant.

In my view, it was simply incredible that the appellant did not have the capacity to fund the requirements of the conglomerate. It admitted to funding the conglomerate in the aggregate sum of US\$30 million from onshore funds. In any event it held approvals from the ELCC to on lend funds borrowed offshore to both tobacco and seed cotton

merchants and other non-tobacco customers. I was satisfied that the head of banking, for reasons best known to himself and the appellant chose to mislead this court about the nature of the interest payments that were paid by the six onshore companies”.

[17] It is evident that the appellant’s witness did not make a good impression on the court *a quo* which found that the allegations made in his evidence contradicted the facility letters and the ELCC approvals which were produced in evidence. For instance, despite his insistence that Standard Chartered Bank PLC London was the lender, this allegation was contradicted in each facility letter wherein the appellant was stated to be the lender and the customer the borrower. Each agreement required interest to be paid to the appellant. In each facility letter the appellant obtained a tax indemnity from the borrower.

[18] The gist of the evidence of Mr Young and the beneficiaries of the facility letters in question was that the beneficiaries sourced offshore funds which they borrowed from Standard Chartered Bank PLC London (the offshore bank) and repaid with interest to the offshore bank, the appellant acting merely as a conduit pipe for facilitating access to the funds and for seeking Reserve Bank approval on behalf of both the borrowers and the offshore bank. However, while their evidence corroborated each other, it conflicted with the documentary evidence placed by the appellant before the court purportedly in support of its case.

[19] It seems to me that what clearly emerges from the contents of the facility letters and the ELCC approvals, read together, is that the appellant borrowed money from the offshore bank for on lending to the six onshore customers or borrowers. The six borrowers were to make payments in terms of their agreements with the appellant. In terms of these agreements all repayments were to be applied first to interest and then to capital. Nothing in the facility agreements required the borrowers to make payment to any person other than the appellant. In

the premises, Mr Young's evidence to the effect that the repayments, inclusive of interest, were made offshore to the offshore bank on the appellant's instruction, called for an explanation. The explanation given by Mr Young is that the bank was the agent of the offshore bank. But this explanation presents a further difficulty. It is this. The Master Risk Participation Agreement (MRPA) concluded between the appellant (as Grantor) and the offshore bank (as Participant) and placed by the appellant before the court as an exhibit, expressly provides to the contrary. Clause 6.4 provides in relevant part:

“6.4 Relationship: There is, and the Participant acknowledges that there is nothing in this Master Agreement or any Acceptance Agreement or any other agreement or understanding between the parties in relation to a participation which:

(a) Constitutes the Grantor an agent, fiduciary or trustee for the Participant;”

[20] Granted, the MRPA further provides that the acceptance agreement would prevail over it. However, the acceptance agreement was not produced by the appellant and it was not part of the appellant's case that the acceptance agreement contained instructions requiring the appellant to ensure that payments were made offshore. Suffice it to say that the evidence presented by the appellant established no justification for payments in respect of the loans to be made offshore. The second issue is, therefore, determined in favour of the respondent.

Whether the charges debited against the foreign *nostro* accounts of the appellant by the bank operating such accounts were liable to withholding tax in terms of s 30, as read with the 17th Schedule, of the Income Tax Act [*Chapter 23:06*].

[21] Section 30 of the Income Tax Act provides:

“30 Non-residents' tax on fees

There shall be charged, levied and collected throughout Zimbabwe for the benefit of the Consolidated Revenue Fund a non-residents' tax on fees in accordance with the

provisions of the 17th Schedule at the rate of tax fixed from time to time in the charging Act”.

The 17th Schedule to the Act provides in paragraph 1:

“(1)...

“fees” means any amount from a source within Zimbabwe payable in respect of any services of a technical, managerial, administrative or consultative nature, but does not include any such amount payable in respect of—

(2) For the purposes of this Schedule—

(a) fees shall be deemed to be from a source within Zimbabwe if the payer is a person who or partnership which is ordinarily resident in Zimbabwe;”

[22] The appellant holds *nostro* accounts with certain foreign banks. The appellant told the court that transactions in these accounts were conducted in the following manner. A customer would instruct the appellant to make payment to a third party. The appellant generated a telegraphic transfer through SWIFT (a safe international payment processing platform used by all banks to transfer money from one bank to another), to transfer the funds from its relevant *nostro* account to the third party’s designated bank account. In line with international banking practice, SWIFT automatically charged a fixed rate against the *nostro* account based on the number of clearing transactions that operated through the system. SWIFT charged the related account directly from that transaction by debiting the account without raising an invoice. The appellant’s witness Mr Young equated the *nostro* bank charges with fees paid by customers of local banks for services rendered and charges levied for maintaining an account with the local bank. The appellant was charged fees for particular transactions that went through the *nostro* accounts. He conceded that the debits to the *nostro* accounts represented money earned by the foreign bank.

[23] The respondent took the view that the *nostro* charges, whether stated as service charges or transaction related charges, are subject to non-resident tax on fees as they fall under the

definition of ‘fees’ as defined in s 30 as read with the 17th Schedule to the Act. The court *a quo* agreed.

[24] Mr *de Bourbon* submitted in his heads of argument that the *nostro* charges were not liable to non-resident tax for three reasons.

- a) There had to be a payer who made a physical payment from which the tax could be withheld. Since the appellant was not a payer the schedule did not apply.
- b) The payment had to be from a source within Zimbabwe and no payment had been made from Zimbabwe, the debits having been made by the foreign bank to the *nostro* accounts.
- c) The fees had to be in respect of services of a technical, managerial or administrative nature. In this case the fees did not fall within the above description and the section did not apply.

Reliance was placed on the judgment of CHEDA J in *Sunfresh Enterprises (Pvt) Ltd t/a Bulembi Safaris v Zimbabwe Revenue Authority*⁷ in which it was held that payment of a commission outside Zimbabwe by a foreign client to a foreign marketing agent of a local safari operator did not constitute payment of fees in terms of para 1(1) of the 17th Schedule of the Income Tax Act.

[25] On behalf of the respondent it was submitted as follows. The foreign banks earned certain fees for transactions undertaken on the *nostro* accounts held by them on behalf of the appellant. Those fees were paid by the appellant. Whichever method was employed by the appellant in making payment, money moved from the account held in the name of the appellant to that of the foreign or non-resident and the appellant is consequently regarded as having paid

⁷ 2004 (1) ZLR 506 (H)

or extinguished the debt. By virtue of section 30 of the Act, the appellant was obliged, as payer, to withhold tax on the fees and charges.

It was further submitted that in so far as the *Sunfresh* case determined that the originating cause of the fees paid to the non-resident was not Zimbabwe, that case was wrongly decided. The respondent referred this Court to the decision of the High Court in *Zimasco Ltd v Commissioner-General of the Zimbabwe Revenue Authority*⁸ which it urged us to accept as the correct exposition of the law.

[26] In the *Zimasco* case the fees were for service rendered by a foreign agent to a local safari operator. The High Court held that the originating cause of the fees was in Zimbabwe and that withholding tax was payable by the local safari operator. At page 3 of the judgment the learned Judge said the following:

“the appellant disputes that the source of the commission is from within Zimbabwe and seeks to rely for that proposition on the decision in *Sunfresh Enterprises (Pvt) Ltd t/a Bulembi Safaris v Zimra* 2004 (1)ZLR 506 (H). In that case Cheda J held inter alia that payment of a commission by a foreign client to a foreign marketing agent of a local safari operator outside the country did not under para 1(1) of the 17th Schedule of the Income Tax Act constitute payment of fees from within Zimbabwe even though the originating cause was the safari operation in Zimbabwe. In my view, however, the facts in this case are distinguishable from those in the *Sunfresh* decision. In casu, the appellant clearly qualifies as the “payer”, i.e., “any person who or partnership which pays or is responsible for the payment of fees...” and is ordinarily resident in Zimbabwe, whereas in *Sunfresh* the payment of fees or commission was ostensibly done by foreign clients to a foreign marketing agent.”

On the interpretation of ‘fees’ as set out in the 17th Schedule, the Court ruled:

“The respondent submitted that the words “any amount” above give a broad definition to the term fees and contended that money paid as commission could be regarded as “any amount” for the purposes of s 1(1) of the 17th Schedule. In my view, the respondent was correct in its interpretation of the words “any amount” to include commission. From the above definition, it is clear that the legislature intended “fees” to cover any sum of money, by whatever name called, paid for services rendered of a

⁸ HH 149-16

technical, managerial, administrative or consultative nature save for those that are expressly excluded”.

[27] I respectfully associate myself with the views quoted above. As in the *Zimasco* case, the originating cause of the fees in *casu*, is entirely in Zimbabwe. The fees and charges in issue are raised by the banks holding the *nostro* accounts in respect of transactions undertaken by them on behalf of the appellant which issues an instruction on behalf of its clients in Zimbabwe and pays on behalf of those clients using its *nostro* accounts. These transactions clearly amount to services of a managerial or administrative nature within the meaning of para 1(1) of the 17th Schedule.

Regarding the *Sunfresh* case it would appear that the facts are distinguishable from those in the present matter. However, in so far as it conflicts with the *Zimasco* decision on the issues discussed above I would consider the *Zimasco* decision to be the correct exposition of the law.

[28] Accordingly, I agree with Mr *Magwaliba* that all three requirements mentioned by Mr *de Bourbon* are satisfied. It follows that the appellant, as payer of the fees, was obliged to withhold the non-resident tax and remit such tax to the Commissioner within 30days.

Disposition

[29] The appeal falls to be dismissed on all three grounds.

On the question of costs, it was agreed by the parties that there should be no order as to costs.

It is accordingly ordered as follows:

The appeal is dismissed.

There shall be no order as to costs.

GUVAVA JA: I agree

MAVANGIRA JA: I agree

Gill Godlonton and Gerrans, appellant's legal practitioners