REPORTABLE **(69)**

ZIMBABWE PLATINUM MINES (PRIVATE) LIMITED
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, CHIWESHE JA & MUSAKWA JA
HARARE: 2 OCTOBER 2023 & 19 JULY 2024

T. Mpofu, for the appellant

S. Banda, for the respondent

MUSAKWA JA: This is an appeal against the judgment of the High Court (the court *a quo*) wherein it dismissed an application for a declaratory order sought by the appellant.

BACKGROUND

The appellant approached the court *a quo* with an application for a declaratory order to the effect that;

> "1. The applicant's interpretation of Public Notices 36 of 2021 and 57 of 2021 as read with the Finance Act and Income Tax Act is correct and that its income liability (including any estimates for purposes of provisional tax payments) in foreign currency shall be determined by deducting expenditure incurred in foreign currency from foreign currency revenue and expenditure incurred in local currency from local currency revenue.
>
> 2. As such, that the respondent's interpretation of Public Notices 36 of 2021 and 57 of 2021 read with the Finance Act and Income Tax Act and its decision on 29 June 2021 to decline the Applicant's proposed method is incorrect.

3. Any alternative/further relief as the court may grant.
4. The respondents should be ordered to pay the costs of this application."

The appellant is in the business of mining and processing platinum group metals and other associated metals (nickel, gold, copper, cobalt and silver) in the Ngezi and Selous areas in Zimbabwe. The appellant previously conducted its mining and processing operations in terms of a Special Mining Lease ('SML') which was issued on 24 August 1995 in terms of the Mines and Minerals Act [*Chapter 21:05*]. The appellant migrated from operating under an SML to a General Mining Lease on 31 May 2018. It exports the minerals it mines and is paid in United States Dollars. Besides exporting minerals, the appellant also generates revenue in local currency from scrap metal sales and local investments. The appellant's operational and capital expenditure is thus incurred in both local and foreign currency.

During the time when the appellant was a holder of an SML, its taxable income was determined through a special tax regime set out in the Twenty-Second Schedule to the Income Tax Act [*Chapter 23:06*] (the 'ITA'). The appellant was specifically required in terms of the ITA to pay taxes in United States Dollars ('USD') upon receipt of an assessment in USD. Upon migrating to the General Mining Lease, the appellant is now required to pay income tax in terms of the general provisions as set out in Part III of the ITA.

The appellant, in making the application for a *declaratur* averred that since 22 February 2019, the respondent issued four Public Notices ('PNs'), being PN 26 of 2019, 49 of 2020, 36 of 2021 and 57 of 2021 for the computation of income tax in foreign currency. The

appellant averred that the PNs have no force of law as they are merely directory in nature. The appellant further averred that the PNs have to be construed in line with enacted legislation.

The appellant averred that on 23 June 2021, it submitted an application in terms of PNs 36 and 57 of 2021 to the respondent's Commissioner for the approval of an alternative method for the computation of its tax liability in foreign currency for purposes of making its final provisional tax payment for the year 2021 assessment. On 29 June 2021 the Commissioner declined the appellant's proposed computation method and advised that deductible expenses, capital allowances and non-deductible expenses should be split between USD and Zimbabwean dollars ('ZWL') using the ratio of 60:40 based on the fact that the USD and ZWL expenses were both incurred in the production of the USD and ZWL income. The appellant was aggrieved by the Commissioner's response and hence made the application for a *declaratur*. The appellant further averred that it had a proposed alternative method of having separate returns for the same tax period based on splitting of gross income and expenses between USD and ZWL.

The respondent opposed the application and raised a preliminary point to the effect that the Commissioner General had been improperly cited. With regards to the merits, the respondent averred that the PNs it issued have force at law as they are provided for in terms of s 37 of the ITA which requires certain classes of tax payers to submit prescribed returns at prescribed times and prescribed places. The respondent further averred that the apportionment ratio it put in place was in line with the gross income ratios of the appellant and as such it was a fair apportionment of expenses incurred for the purposes of generating gross income. The respondent maintained that the appellant had no right to challenge the PNs as by submitting its

self-assessments to the respondent it had already exercised its right and that the refusal by the respondent to approve its proposal did not mean that its right was infringed.

The respondent further averred that in as much as the appellant receives almost 100% of its earnings in USD, 40% of that amount accrues by operation of law in local currency as the Reserve Bank liquidates the USD and pays it to the appellant in local currency. As such, for tax purposes the amounts are considered to be earned in local currency. The respondent further averred that s 4 A (10) of the Finance Act [*Chapter 23:04*] provides that where income is earned from both foreign currency and part of the foreign currency is liquidated to local currency tax shall be calculated that it was earned in local currency. In addition, the respondent contended that the section does not provide for any method of calculation and that by its nature the income received by the appellant in USD is converted to local currency once it is subjected to the retention scheme by operation of law.

The appellant filed an answering affidavit and conceded that it earns 100% of its income in USD and that 40% of its income is liquidated in terms of s 4 A (10) of the Finance Act. The appellant however, disputed the respondent's interpretation of the law. The appellant maintained that it had a right to claim its USD expenditure in USD against its USD income. In addition, it contended that the conversion or liquidation of 40% of its USD income to ZWL in terms of legislation after that income was received in USD in its local bank account does not change its entitlement to claim the expenditure incurred in USD in tax returns to arrive at its taxable income. The respondent further averred that in the absence of specific legislation regulating the splitting of the expenses in different currencies in order to give effect to s 4 A (10) of the Finance

Act, s 15 (2) (a) of the ITA had to be interpreted in the manner it did in order to arrive at the quantification of the amount deductible. The respondent admitted that there is no provision for the splitting of expenses based on currency and that expenditure should be deducted on the provisions of the ITA as provided for under s 15 (2) (a).

SUBMISSIONS BEFORE THE COURT *A QUO*

Before the court *a quo,* the respondent raised two preliminary objections. The objection relating to the misjoinder of the Commissioner-General of the respondent was conceded by the appellant. The remaining objection was to the effect that the appellant ought to have proceeded by way of review and not an application for a declaratory order. The court *a quo* dismissed the preliminary point and found that the appellant had fulfilled the requirements of a *declaratur* in terms of s 14 of the High Court Act [*Chapter 7:06*]. With regards to the merits of the matter, the court *a quo* held that s 4 A (10) of the Finance Act had to be read together with s 15 (2) (a) of the ITA. The court *a quo* held that a unitary reading of the two provisions established that it was the intention of the legislature to apportion foreign currency and local currency income in the same ratios as the foreign currency expenditure and local currency expenditure. The court *a quo* noted that s 4 A (7) of the Finance Act further elaborates the above point in that it provides that the ITA shall apply to the payment of tax in foreign currency in the same way it applies to the payment of tax in local currency.

The court *a quo* found that the appellant's proposed method of accepting the Reserve Bank notional ratio of 60:40 in regards to income only, and using the currency of the invoices for expenditure had no legal backing. It further noted that the appellant could not pinpoint

with precision how much USD expenditure produces how much of the income in USD and ZWL and conversely how much ZWL expenditure goes to produce how much of the income in each of the two currencies. The court *a quo* also noted that s 4 A (10) of the Finance Act caters for such uncertainties. In addition, the court *a quo* noted that the issue raised by the appellant that the issuance of the PN's by the respondent amounted to self-arrogation of legislative powers was devoid of merit as in terms of s 37 of the ITA the respondent is obliged to issue such PN's. The court *a quo* concluded that the appellant's reading and interpretation of the law was wrong and the *declaratur* it sought could not be granted. Thus, it dismissed the application with costs.

Aggrieved by this decision the appellant noted the present appeal on the following grounds of appeal:

"1. The court *a quo* erred in law by holding that s 15 (2) (a) of the Income Tax Act [*Chapter 23:06*] obliges the Applicant to match both income and expenditure before deducting such expenditure. (*sic*)

2. The court *a quo* erred in law, by holding that s 15 (2) (a) of the Income Tax Act [*Chapter 23:06]* requires expenditure to be deducted for the income that was earned from that expenditure.

3. The court *a quo* erred in law by holding that s 15 (2) (a) of the Income Tax Act [*Chapter 23:06*] as read with s 4A (10) of the Finance Act [*Chapter 23:04*] required deductible expenditure to be apportioned in the same ratio of foreign currency to local currency income.

4. The court *a quo* erred in law by holding that the appellant is not entitled in terms of s 15 (2) (a) of the Income Tax Act [*Chapter 23:06*] to deduct deductible expenditure in

full in the currency of invoice without apportioning such expenditure to another currency.

5. The court *a quo* erred in law by holding that, by requiring apportionment of expenditure based on currency, the respondent's Public Notices 26 of 2019, 49 of 2020, 36 of 2021 and 57 of 2021 did not prescribe a computation of income tax method which was ultra vires s 15 (2) of the Finance Act as read with s 4 A (10) of the Finance Act."

<u>APPELLANT'S SUBMISSIONS</u>

Mr *Mpofu*, counsel for the appellant, submitted that the ITA does not have a provision for the splitting of expenses and income based on currency. Counsel further argued that s 15 of the ITA does not provide for such splitting of expenses and income. In addition, counsel argued that the matching principle is not part of our law. It was counsel's argument that tax must be calculated in terms of the ITA and that if there is any ambiguity in the ITA, it must be resolved against the tax authority and that the tax payer must pay what is due and nothing more or less. Counsel maintained that the fixed 60/40 ratio could not apply to tax assessments as tax years differ from year to year and as such, there could not be a one size fits all approach for deduction of expenses from income as provided for in terms of s 15 of the ITA.

With regard to the matching principle, counsel argued that the decision in *Delta Beverages (Pvt) Ltd* v *Zimbabwe Revenue Authority* SC 3/22 wherein the court found that the matching principle was part of our law, was wrongly decided as it is impossible to match expenditure and income in a year. Counsel urged the court to have regard to the case of *SZ (Pvt) Ltd* v *ZIMRA* HH 142/20 wherein it was held that the matching principle is not part of our

law. Counsel also argued that the decision of the court *a quo* was erroneous as it gave regard to public notices which are not part of our law.

RESPONDENT'S SUBMISSIONS

Per contra, Mr *Banda*, counsel for the respondent submitted that the appellant failed to show how the matching principle does not apply to the present matter. Counsel argued that the judgment in *Delta Beverages (Pvt) Ltd* v *Zimbabwe Revenue Authority* SC 3/22 is binding and established the matching principle. Counsel further argued that the method for calculation of deductible tax proposed by the appellant was not in tandem with the provisions of s 4A (10) of the Finance Act in respect of the splitting of income into 60/40. Counsel maintained that for tax purposes the appellant earns its income in both foreign currency and local currency and also that it has expenses like salaries in both foreign currency and local currency. As such, counsel argued that 60% of the appellant's expenditure had to be deducted from the foreign currency income and 40% of the expenditure from the local currency income.

ISSUE FOR DETERMINATION

Whether or not the court a quo erred in finding that a reading of s 4A (10) of the Finance Act as read with s 15 (2) (a) of the Income Tax Act apportions foreign currency and local currency income in the same ratios as the foreign currency expenditure and local expenditure thereby matching income and expenditure.

APPLICATION OF THE LAW

Section 15 (2) of the ITA ought to be read together with s 4 A (10) of the Finance Act as the two statues complement each other in respect of revenue matters. Section 4 A (10) of the Finance Act provides as follows:

> "10. Where any person liable to pay tax on income from trade or investment-
>
> (a) earns any part of such income in foreign currency; and
> has any part of such income liquidated and paid in local currency upon transfer to a nostro account, pursuant to a retention scheme operated by the Reserve Bank of Zimbabwe; any tax due on such part that is liquidated shall be calculated on the basis that it was earned in local currency."

For purposes of allowable deductions in respect of taxable income, s 15 (2) (a) of the ITA provides that:

> "The deductions allowed shall be—
> (a) expenditure and losses to the extent to which they are incurred for the purposes of trade or in the production of the income except—
> (i) to the extent to which they are expenditure or losses of a capital nature; or
>
> (ii) expenditure that constitutes prepayment for goods, services or benefits that will be used up in any subsequent year of assessment (in which event the expenditure will be allowed proportionately over the years of assessment in which the goods, services or benefits are used up).
> [Paragraph substituted by Act 1 of 2018]
>
> (iii) where the taxpayer is a miner as defined in subpara (ii), the amount of any royalty paid during the year of assessment in terms of s 245 of the Mines and Minerals Act [*Chapter 21:05*]."

Section 15 (2) (a) of the ITA is clear and unambiguous. The provision allows for expenditure incurred for trade purposes, which is not of a capital nature, to be deducted in the computation of taxable income. Section 4 A (10) of the Finance Act refers to income only. The two provisions must, as reasoned by the court *a quo,* be read together when determining deductible income in order to understand the true intention of the legislature. The unitary reading of these two provisions shows that the legislature intended to apportion foreign currency expenditure and

local currency expenditure in the same ratio applicable to the liquidation of the foreign currency income into local currency. Therefore, the appellant ought to match both income and expenditure before deducting the appropriate expenditure. Income and expenditure cannot be separated as the expenses that must be deducted are those incurred in the production of the income. This has to be so because s 4 A (10) of the Finance Act refers to income only whilst s 15 (2) (a) of the ITA matches both the income and the expenditure. Therefore, the income in the respective currencies matches with expenses incurred in the respective currencies. In this regard the matching principle gives effect to s 4 A (10) of the Finance Act as read with s 15 (2) of the ITA.

However, the appellant prefers to treat s 15 (2) of the ITA as a standalone provision. In this manner the appellant singled out a particular provision and sought to interpret it in isolation from s 4 A (10) of the Finance Act which has a bearing on the issue in contention. It is an established principle of interpretation that related statutes must be read together. See *PTC* v *Retrofit (Pvt) Ltd* 1994 (2) ZLR 71 (S). The appellant is of the contention that this Court should not adopt the matching principle as enunciated in *DEB (Pvt) Ltd* v *ZIMRA* 2019 (3) ZLR 722 and later confirmed in *Delta Beverages (Pvt) Ltd* v *Zimbabwe Revenue Authority supra*. The appellant further argued that by the time this Court confirmed the matching principle in 2022, the lower court had reversed its earlier decision in *DEB (Pvt) Ltd* v *ZIMRA supra* by holding that the matching principle was not part of our law in the case of *SZ (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2020 (1) ZLR 315 (H). The nub of the appellant's argument was that this Court should depart from the *Delta Beverages (Pvt) Ltd* v *Zimbabwe Revenue Authority supra* judgment because of the retraction by the lower court of its earlier position on the matching principle. In a nutshell, the appellant urges this Court to be bound by the judgment in *SZ (Pvt) Ltd* v *ZIMRA supra.*

In the case of *Delta Beverages (Pvt) Ltd* v *Zimbabwe Revenue Authority supra* the respondent issued six amended tax assessments in respect of income tax which included penalty and interest. The appellant objected to the assessments. The respondent then issued revised assessments and furnished them to the appellant without explanation. The appellant further objected but the objection was disallowed. On appeal to the Special Court for Income Tax Appeals, that court set aside some of the assessments and directed the Commissioner of the respondent to issue further revised assessments. Both the appellant and the respondent appealed to this Court.

The appellant's contention was that it bought consumables which were not exhausted during the year of purchase and spilled over into the succeeding year. The appellant contended that deductions could only be made in the first year and that the matching principle did not apply as doing so would entail apportioning costs over two years. On the other hand, the respondent contended that the essence of the matching principle was that the purchase of consumables was for the purpose of generating income during the year of purchase. It further contended that since the purchases were in excess, they could not be deducted in the same year as the excess purchases were not consumed in the year of purchase and therefore, did not generate income.

In considering the import of s 15 (2) (a) of the ITA, this Court held that the provision relates to deduction of expenditure incurred for purposes of trade in the production of income during the tax year in issue. In respect of gross income (s 8 (1)), the court held that such income is accrued from a source which is used in generating it. Thus, income for any tax year is calculated

by deducting allowable deductions from gross income. The court upheld the High Court's finding regarding the matching principle which is an accounting as opposed to a legal concept.

Concerning the decisions of the Supreme Court in non-constitutional matters, MALABA CJ in *Lyttton Investments (Private) Limited* v *Standard Chartered Bank Zimbabwe Limited* & *Another* 2018 (2) ZLR 743 (CCZ) stated that such decisions are correct because they are final. The Chief Justice further stated that only the Supreme Court can depart from or overrule its previous decisions, rulings or opinions on a non-constitutional matter. It follows that lower courts are bound by Supreme Court decisions and not vice versa. Although the Supreme Court is not bound by its own decisions or by those of its predecessors, in practice it normally treats such decisions as binding. See *Book* v *Davidson* 1988 (1) ZLR 365 (SC).

According to Herbstein and Van Winsen in *The Civil Practice of The High Courts of South Africa* 5th ed, a superior court will depart from a previous decision under the following circumstances:

1. When it is clear that the previous decision is wrong.
2. Where it is clear that the reasoning in the previous decision was unsound.
3. Where legal principles were not concurred in by the majority of the judges.
4. Where there are two conflicting decisions, the court will follow the decision it considers to be correct.

From the above principles, the appellant did not demonstrate why this Court should depart from the decision in *Delta Beverages (Pvt) Ltd* v *Zimbabwe Revenue Authority supra* from

placing reliance on the decision of a subordinate court. The appellant did not convincingly demonstrate in what way the decision in *Delta Beverages (Pvt) Ltd* v *Zimbabwe Revenue Authority* is wrong, especially when account is taken of the provisions of the statutes in issue. We are therefore not persuaded by the appellant's submission that this Court should depart from the judgment in *Delta Beverages (Pvt) Ltd* v *Zimbabwe Revenue Authority.* This Court cannot be asked to revisit its previous decision on the basis of the decision of a lower court.

DISPOSITION

There being no basis for departing from a previous decision of this Court, the appeal should fail. As is the norm, costs will follow the cause.

Accordingly, it is ordered that:

"The appeal be and is hereby dismissed with costs."

GWAUNZA DCJ : I agree

CHIWESHE JA : I agree

Maguchu & Muchada, appellant's legal practitioners

Sinyoro & Partners, respondent's legal practitioners