REDGRAVE SERVICES T/A ALRO TRANSPORT
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 12, 15 and 19 November 2021

Urgent Chamber Application

M Tshuma and Z Ndebele, for the applicant
S Bhebhe and H Muromba, for the respondent

MUSITHU J:

BACKGROUND

The applicant carries on business of transport logistics. It is registered according to the laws of Zimbabwe. It is also a registered tax payer in terms of the Income Tax Act.[1] The respondent is the State's revenue collection agent. It derives its mandate from the Revenue Authority Act[2], as read together with other revenue legislation. The respondent carried out a tax audit on the applicant, which led to the issuing of tax assessments which the applicant disputed. The respondent invoked the statutory collection measures which resulted in the imposition of a garnishee on the applicant's bank accounts. It is that act which triggered this application in terms of which the applicant seeks the following relief:

> "**FINAL ORDER SOUGHT**
> That you show cause why an order should not be made as follows;
> 1. The provisional order be and is hereby confirmed.
> 2. The assessment issued by the respondent under reference number 20000930255 and 122137 against the applicant be and is hereby set aside.
> 3. The respondent be and is hereby interdicted from instituting any and all collection measures under reference number 20000930255 and 122137.
>
> **INTERIM RELIEF SOUGHT**
> 4. The garnishee instituted by the respondent against the applicant pursuant to assessment reference number 20000930255 and 122137 be and is hereby suspended.

[1] [*Chapter 23:06*]
[2] [*Chapter 23:11*]

SERVICE OF THE PROVISIONAL ORDER
……..”

The parties appeared before me on 12 November 2021. The respondent’s notice of opposition and heads of argument had been filed earlier, but had not found their way into the record. Both were detailed and I needed time to consider them. The parties had been discussing a payment plan for the assessed tax liability. A revised payment plan was proposed by the applicant. Chances were that the parties could agree on the payment plan pending further contestations of the assessed liability. I postponed the matter to 15 November 2021. The new payment plan was rejected and the matter had to be argued. I asked counsel to address me on the preliminary point and the merits for convenience.

Applicant’s case

According to the applicant, the respondent assessed its tax liability for the year 2019 at **US$4, 871,716.06**. Added to that amount were interest charges of **US$474,788.40**. The tax liability for 2018 was **ZWL4, 794,478.61**. The applicant disputed the computations. It objected to the assessments. The objection was disallowed in full by the commissioner through a letter of 7 September 2021. Even after the disallowance of its objection, the applicant did not relent. It continued to engage with the respondent through its representatives. It offered a payment plan pending further verification of the respondent’s tax computations. The applicant hoped that at some point, the parties would find common ground on the correct tax liability. The proposed payment plan was rejected. In no time the respondent appointed the applicant’s bankers as agents for purposes of collecting the assessed tax. **ZW$4,208,746.65** was garnished from the applicant’s bank account on 10 September 2021.

In its certificate of urgency, the applicant contends that as late as 5 November 2021, meetings were still being held between the parties. The urgency of the matter had to be understood in that context. The applicant did not sit on its laurels so to speak. It only approached the court when it became clear that the parties had failed to reach common ground and litigation was unavoidable. It further contends that the respondent had also admitted at some point that its computations had some errors. In the meantime, the applicant had no access to its bank accounts. The harm that it continued to suffer was not just commercial. It was failing to discharge its financial

obligations to employees, suppliers and creditors. The likelihood of the applicant being liquidated was not fanciful.

The applicant claimed that it had exhausted all domestic remedies in an attempt to resolve the dispute amicably. The matter craved urgent attention as the harm that it continued to suffer was irremediable.

Respondents' case

The respondent urged the court to strike off the matter for want of urgency. It reckoned that the matter was not urgent for the following reasons. Tax assessments were served on the applicant as far back as 29 June 2021. From that date, the applicant was aware that alternative recovery measures would be activated if it did not comply voluntarily. The applicant did not voluntarily comply. Alternative recovery measures were immediately set in motion. Applicant's bankers were appointed agents for purposes of collecting the assessed tax. On the day of their appointment, the money sitting in the applicant's account was garnished. That was on 10 September 2021. The applicant was aware from that date that its account had been garnished.

What followed thereafter was an attempt at ameliorating the situation by proposing a payment plan. The payment plan was rejected by the respondent. Urgency could not be triggered by the rejection of a payment plan. The respondent further averred that the certificate of urgency as read with the founding affidavit were equally revealing. The applicant waved the financial hardships card. The garnishee was going to lead it into financial ruination. The urgency was based more on a plea for mercy, and not on legal grounds.

As regards the merits, the respondent averred that the court was being asked to interdict a lawful process. It was being asked to usurp the powers of an administrative authority. The *"pay now and argue later"* principle was entrenched in our law. The respondent had the law firmly on its side. It conducted a tax audit on the applicant, and thereafter raised assessments which were served on the applicant. The applicant objected, but the objection was disallowed. The assessed tax was not paid voluntarily leading to the appointment of the applicant's bankers as agents for collection of the assessed revenue. The application clearly lacked merit and deserved to be dismissed with costs on the higher scale of attorney and client.

Submissions on the preliminary point

Lack of urgency

The parties' counsels were upfront in their preparation for the ultimate showdown. Detailed heads of argument were prepared. Mr *Bhebhe* for the respondent submitted that the need to act arose as far back as 29 June 2021 when the applicant was served with assessments. The obligation to pay the assessed tax arose from that date. Mr *Bhebhe* referred to the dictum in *ZIMRA v Packers International (Private) Limited*[3]. Alternative recovery measures were to be initiated from that date in the event of non-payment. Indeed on 10 September 2021, the applicant's accounts were garnished. The applicant did not act. The garnishee was merely an enforcement measure permitted by the law. No urgency arose from a lawful act. The court had no business suspending lawful acts.

Mr *Tshuma* for the applicant submitted that the issue of urgency must be contextualized to the lack of redress that a litigant would suffer if their matter was not heard urgently. He referred to the case of *Documents Support Centre P/L v Mapuvire*.[4] In the heads of arguments, Mr *Tshuma* cited the case of *EastRock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd & Others*[5], to advance the submission that the concept of *'irreparable harm'* in interdicts was not required to prove urgency. Instead, urgency was established by proving the lesser requirement of absence of *'substantial redress'*. That, according to counsel, was the primary consideration.

The court was urged to be slow in refusing to hear an urgent matter merely because there was a delay in its filing. In interrogating the reasonableness of the delay, the court must have regard to the circumstances of each case. Mr *Tshuma* further submitted that where an applicant took steps to protect its interests or sought to resolve the matter amicably, then the court must not refuse to hear the matter on account of the delay in filing an application. According to Mr *Tshuma*, the applicant was consistently in contact with the respondent in an attempt to resolve the matter. The latest such engagement was a meeting of 5 November 2021. At that meeting, the applicant sought

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[3] SC 28-16 where the court said:

> "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 a garnishee was a possibility. In my view no other conclusion is possible."

[4] 2006 (2) ZLR 240

[5] (2012) JOL 28244 (GSJ)

reasons why its payment plan was not approved. The applicant was therefore not careless. Proposing a payment plan was not careless conduct. The conduct of the respondent was also worth mentioning. The respondent raised an unlawful assessment, which in turn yielded an unlawful garnishee. That surely called for urgent intervention by this court.

In reply, Mr *Bhebhe* insisted that the rejection of a payment plan did not found agency. After receiving the notice of assessment, the applicant instead chose to go for a payment plan instead of approaching the court. There was always a risk that the payment plan would be rejected. This is what happened in *casu*.

Analysis

It is axiomatic that the court must relate the question of urgency to the circumstances of each case and the conduct of a party. An applicant may be sluggish in taking action. The reasons for such sluggishness maybe justifiable and the court will indeed condone such delay in approaching the court. However courts must be wary of stretching that indulgence a bit far especially where administrative fiat has a legal basis. What triggered the approach to this court was the garnishee issued pursuant to assessments that the applicant contests. The respondent's conduct was firmly grounded on the law.

The applicant's counsel drew the court's attention to the case of *JK Motors (PVT) Limited t/a Flo Petroleum v Zimbabwe Revenue Authority*.[6] In that case, ZIMRA issued tax assessments on 28 June 2021. Payment was due 30 days from the date of assessment. On 29 June 2021, ZIMRA placed a garnishee on the applicant's accounts. The taxpayer engaged ZIMRA for the upliftment of the garnishee. ZIMRA declined. The taxpayer approached the court on an urgent basis. In dismissing the preliminary point on lack of urgency, the court said:

> "In this case, immediately after the garnishee was placed the applicant engaged the respondent to uplift it. Besides disputing the amounts assessed, the applicant made it clear that the placement was in contravention of the procedural rights accorded to the applicant by the respondent. I do not accept the submission by the respondent that the need to act arose on the 4th of June when the applicant was advised to pay forthwith. By that date the applicant had not placed a garnishee on the applicant's accounts. There was no cause of action by then. It is for those reasons that the preliminary point was dismissed"

[6] HH 380/21

The *JK Motors (PVT) Limited* case is distinguishable from the present. While the court tied the cause of action to the placement of the garnishees on the applicant's accounts, it found that the taxpayer acted with dispatch. When ZIMRA refused to uplift the garnishee, the applicant immediately approached the court within the 30 day window period allowed to a taxpayer to object to an assessment after its issuing. In *casu*, the applicant's accounts were garnished on 10 September 2021. It only approached the court on 9 November 2021, almost two months after the cause of action arose. In my view, that delay was inexcusable. I say so for the following reasons.

Firstly, section 69(1) of the Income Tax Act entrenches *"the pay now and argue later principle"*. It states as follows:

> "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"

The garnishing of the applicant's accounts during the course of the parties negotiations on a payment plan attested to the respondent's stance on the collection of the assessed revenue. Secondly, as correctly submitted by Mr *Bhebhe*, negotiating a payment plan does not suspend the duty to collect revenue and the concomitant obligation to pay the assessed tax. Nothing short of a guarantee by the respondent would have assuaged the applicant's fears that alternative collection mechanisms would not be unleashed. The garnishing of applicant's accounts should have galvanized the applicant into approaching this court immediately. The words of MAFUSIRE J in *Fairdrop Trading (Private) Limited v ZIMRA*[7] are quite enlightening. He said:

> "…..I find nothing peculiar in the circumstances of the applicant to warrant a treatment that is different from the rest of the other taxpayers that may find themselves with objectionable tax assessments against which they will have appealed. The garnishees may worsen the applicant's bad situation. But regrettably, those are some of the natural consequences of the application of the law. I have found nothing outrageous or grossly unreasonable in the respondent's conduct. The applicant was offered the chance to avert the garnishees by offering an acceptable payment plan. Before it filed the urgent chamber application none had been submitted. The one submitted after the launch of the application was rejected by the respondent. The respondent made the counter offer. The applicant said the counteroffer was way beyond its means. But that does not make the conduct of the respondent grossly unreasonable in any sense."

[7] HH 68-14

I associate myself with the views of the learned judge. The refusal by the respondent to accept the applicant's payment plan does not create urgency. This is so especially after the respondent had made its intentions clear almost two months before the application was launched.

For the foregoing reasons, I find that the matter is not urgent and the application must fall on that score.

COSTS

Mr *Bhebhe* urged the court to remove the matter from the roll of urgent matters with costs on the higher scale, if the preliminary objection found favour with the court. I did not find the applicant's conduct to be grossly unreasonable as to invite an order of costs at that level.

DISPOSITION

Resultantly it is ordered that:

1. The application is not urgent and it is hereby removed from the roll of urgent matters.
2. The applicant shall pay costs of suit.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners