DELTA BEVERAGES (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 23 November 2017 and 4 July 2018

Opposed Matter

D. Tivadar, for the applicant
A. Moyo, for the respondent

MAKONI J: The background facts of this matter were clearly laid out in the applicant's heads of argument and are as follows;

a) In December 2011 the respondent contended that the applicant had underestimated its provisional tax payments for 2009 and 2010, and demanded the payment of interest on those underestimated provisions.
b) The respondent calculated the total interest to be outstanding to be US$698 864.48 and demanded payment of that sum under threat of garnishing the bank account of the applicant, and thereby removing that sum of money from the use of the applicant.
c) To avoid that action, the applicant paid the demanded interest in three instalments in September, October and November 2012.
d) The applicant challenged in the High Court the right of the respondent to the payment of such interest. In the judgment delivered in case no. HC 9715/12 on 29 January 2015, this Honourable Court held that the applicant had no obligation to pay that interest and held that the respondent was a matter of law obligated to waive payment of that interest. The respondent has not challenged the correctness of that judgment.

e) The respondent has credited the applicant with the amount of that interest, but has not paid to the applicant any interest on the unlawfully demanded and accepted payment of interest in the latter part of 2012.

The applicant has now approached the court seeking an order in the following terms;

1. It is declared that the respondent is obliged to pay interest to the applicant at the rate of 10% per annum on the sums, and for the period calculated, in Annexure J to the founding affidavit.
2. It is ordered that the respondent pay the costs of this application.

The basis for applicant approaching the court is that the amount in issue was never due to the respondent. The respondent held onto the amount for a period of about two and half years. The amount was only paid to applicant after a judgment. By refusing to pay interest on the amount, the respondent refuses to compensate the applicant for the loss of use of that money. Applicant had been objecting throughout the entire process and the money was unlawfully demanded.

The application is opposed on the basis that the payment in issue was made by operation of law which demanded that payment be made pending determination of the dispute between the parties. The respondent further averred that s 48 (3) of the Income Tax Act [*Chapter 23:06*] (The Act) applies to the circumstances of this matter.

The applicant's approach was too pronged. The first rung is the common law position, that interest starts to run whenever an amount becomes due and that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date, commonly referred to as mora interest. The purpose of mora interest is to place the creditor in the position he would have been had the debtor performed in terms of an undertaking.

It was submitted, on behalf of the applicant, that had it not been unlawfully deprived of the funds in question, it would have been able to use those funds and therefore it is entitled to be placed into the position it would have been in had it not been for the illegal conduct of the respondent. It was further contended that the respondent is in no different position to any other debtor.

It was further contended that based on the Supreme Court decision of *Commissioner of Taxes* v *F Kristiansten (Pvt) Ltd* 1994 (1) ZLR 412 at 417 (SC) under common law there is no immunity for the fiscus from the payment of mora interest. The applicant then further argued that

the respondent is not the fiscus as fiscus means the treasury on whose behalf the respondent is obliged to act. The respondent is a statutory corporation and enjoys none of the privileges of the fiscus. It only enjoys those priviledges granted to it by Parliament. Exemption for mora interest is not one of them.

The applicant concludes this point by submitting that the right to interest in the present matter arises, under common law and not out of the provisions of any legislation. The rate of interest payable would be the prescribed rate of interest of 5% from the date of payment of each of the instalment to the date of refund.

The second rung which kicks in if the court were not with applicant in the above submissions is to have regard to the legislation to determine whether or not the respondent is obligated to pay interest in the circumstances of the present matter. Regard was had to s 43 (3) of the Act and the Income Tax (Rate of Interest) Notice 2010, S.I 7 of 2010 which fixes the rate of interest at 10%.

Mr *Moyo,* on the other hand, submitted that the relationship between the taxman and the taxpayer is a *sui generis* one primarily governed by statute. Wherever claims are to be made they must be based on the enabling provisions of the relevant statue. For this submission he relied on *Bindura Nickel Corporation Ltd* v *Zimbabwe Revenue Authority* 2008 (1) ZLR p 152 at 162 A-B. Such claims are distinguishable from other common law relationships where parties are brought together by either contract or delict.

He further submitted that it is the hall mark of a tax administration that the tax payer is obliged to pay an assessed tax notwithstanding any contestation it may have. He relied on the authority of *Metcash Trading Limited* v *The Commissioner for the South African Revenue Service & anor* 2001 (1) SA 110 CC which was quoted with approval in *Mayor Logistics* v *Zimbabwe Revenue Authority* CCZ 2014 and in *Zimbabwe Revenue Authority* v *Packers International (Pvt) Ltd* SC 28/16. The respondent acted in terms of s 68 of the Act and the demand for payment was therefore lawful.

He also contended that the applicant's cause of action is "wishy-washy". On one hand they claim to be paid interest on monies paid to the respondent in circumstances where this court found that the respondent had no entitlement to require payment.

In para 14 of founding affidavit they state that their cause of action is based on s 48 (3) of the Act. They plead a claim in the alternative under the Prescribed Rate of Interest Act [*Chapter 8:11*]. In the draft order they claim interest and 10 percent which is taken from s 48 (3) of the Act as read with SI 17/00. He concluded by saying based on the above, the applicant is making a claim in terms of s 48 (3) of the Act. It cannot be a claim based on common law principles such as contract, delict or creditor / debtor relationship. Their claim must rise or fall based on whether that section or any other provision of the statute allows them to recover interest. The respondent's position is that the demand, as made in their letter to the applicant dated 15 August 2012 was lawful as it was made in terms of s 69 of the Act.

He further submitted that s 48 (3) of the Act is clear and unambiguous. It says that the respondent shall refund money within 60 days from the date of demand. The applicant made the demand on 20 February 2015 and payment was made on 14 March 2015, within the sixty days as prescribed in terms of the law.

He further contended that s 4 and 5 of the Prescribed Rate of Interest Act [*Chapter 8:11*] do not apply to the circumstances of this case.

The issue for determination is captured in the applicant's heads of argument which is whether or not, in the light of the ruling made on 29 January 2015, the respondent is obliged not only to repay the interest it had unlawfully demanded from the applicant, but whether in addition the applicant is entitled to receive interest on those unlawfully demanded amounts, whether a 10% rate set out in the Act or at the rate of 5% set out in the Prescribed Rate of Interest Act [*Chapter 8:11*].

By the time the matter was argued the respondent had repaid the interest it had demanded from the applicant in terms of the judgment of this court. What remains for determination is whether the applicant is entitled to receive interest on the amount that was refunded paid to it and the rate of interest applicable.

The applicant brings up an element of unlawfulness in the demand made by the respondent on 15 August 2012. I will deal with this later on in the judgment.

A similar issue came up for discussion in *COT* v *Kristianten* supra. In that case the tax payer sought interest in respect of over paid taxes which were refunded to it. This court granted the application on appeal. It further held that under common law there is no immunity for the fiscus

from the payment of interest and that the legislation relating to income tax in Zimbabwe imposed an obligation on a tax payer to pay interest on unpaid tax but imposed no obligation on the commissioner to pay interest on refunds. This was after the court had examined the history of the Income Tax legislation from the War Taxation Ordinance 20 of 1918 to 1994 when the matter was determined. From the above it is clear that Mr deBorbon was correct in his submission that in terms of common law, the respondent was not exempt from paying interest on refunded amounts.

In my view that is not the end of the enquiry. One has to go further and examine what the Act provides in such circumstances. What distinguishes the present matter from *COT* v *Kristianten* supra is that now there is a provision that imposes an obligation on the commissioner to pay interest.

I want to agree with Mr *Moyo* that the relationship between the applicant and the respondent, in *casu,* is a statutory relationship and is primarily governed by the statute. See *Bindura Nickel Corporation* (*supra*) at p 162 A-B. This sets apart the relationship between the parties from other relationships were parties are brought together through contract, delict or other transactions, which impute liability. In other words, the common law principles regarding contracts and such other transactions do not apply to the relationship between the taxman and the taxpayer.

I also want to agree with Mr *Moyo's* contention that the principle that the taxpayer is obliged to pay assessed tax notwithstanding any contestations is the hall mark of any tax administration. The reasons for that are obvious and were clearly set out in Metcash *supra* p 92 para 60.

The provision under which the amount in dispute was collected IS s 69 of the Act which provides:

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."

In my view the wording of the above section is very clear in terms of the powers that the respondent has. This puts paid to the applicant's contention that the respondents acted unlawfully

in demanding and holding on to the amounts thereby depriving the applicant use of the money. The respondent had the full backing of the law. As was stated in Mayor Logistics *supra* at p 13 of the cyclostyled judgment, mechanisms were put in place to ameliorate financial hardships experienced by individual taxpayers as a result of the enforcement of the pay now, argue later rule." The court stated;

> "The fact that the statutory provision give the Commissioner the discretionary power to direct that the continuing obligation to pay 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 late 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 should be within the exclusive knowledge of the taxpayer he or she must place them before the Commissioner."

In *casu,* the applicant did not formally request the Commissioner to suspend the continuing obligation to pay the charged tax pending the determination of the dispute between the parties. There was therefore no unlawfulness to talk about. Having said the above, one has to examine the provisions of the Act to see under what circumstances the Commissioner pays interest on refunded amounts.

The parties are agreed that the relevant is s 48 (3) of the Act. The section was inserted in the Act by Act 18 of 2004. It provides;

> (3) "The Commissioner shall pay interest, calculated at a rate to be fixed by the Minister by statutory instrument on any amount of tax overpaid that is not refunded by him or her within sixty days of the date when the taxpayer claimed the refund or the date of completion of the assessment, whichever is the latter date, unless the overpayment was due to an incomplete or defective return or other error on the part of the taxpayer, and not to an error on the part of the Commissioner."

It is the only section which deals with an obligation on the part of the respondent to refund any sums exacted by it under "the pay now argue later" principle with interest.

Can the applicant recover interest, on the sum in question, in the circumstances of this matter. The judgment of this court was handed down on 28 January 2015. The judgment did not sound in money but made two declaration one of them being that the taxpayer had no liability to pay the sum $698 864.48 as demanded by the respondent. The applicant then wrote a letter, dated 19 February 2015, demanding a refund of the amount in issue.

On 14 March 2015 the respondent refunded the amount. On 6 May 2013 the applicant made a demand for the payment of interest in the sum of 10% *per* annum on the refunded amount.

Section 48 (3) is couched is clear and unambiguous terms as to when interest is due by the Commissioner. I did not hear argument suggesting otherwise. It provides that the Commissioner shall refund the money within 60 days, from the date of demand.

For purposes of this matter, the demand was made on 19 February 2015 and payment was made on 14 March 2015 which was within the 60 days as stipulated in terms of the law.

If the Commissioner fails to pay the refund within 60 days from the date the demand is made then the Commissioner shall pay interest as calculated in terms of S.I. 7/00 on the refunded amount. Section 48 (3) talks of prospective interest rather than retrospective interest. The Commissioner will be in mora after the expiry of the 60 days and would be obligated to pay interest. This is not the position *in casu*.

I also agree with Mr *Moyo* that the Prescribed Rate Of Interest Act [*Chapter 8:11*] does not apply. The applicant had made reference to s 4 and 5. Section 4 does not apply as it provides that the prescribed rate of interest will apply, if there is no other law governing the transaction. In *casu* the law governing the transition is s 48 (3) of the Act as read with S.I. 7/00 which provides for the rate of 10% *per* annum.

Section 5 provides for the prescribed rate of interest for every judgment debt which would not otherwise bear any interest after the date of judgment from the date on which such judgment debt is payable. As I have already pointed out, the judgment relied on by the applicant did not sound money. That is why the applicant had to resort to making a formal demand for the refund. Otherwise it would have issued on a writ. Section 5 does not therefore apply in this case.

In view of the above findings, the applicant has failed to establish a case for the grant of the order sought.

In the result I will made the following order

1. The application is dismissed.
2. The applicant to pay the respondents costs.

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