

Judgment No. HB 26/2003  
Case No. HC 215-6/2003  
HC 217-8/2003  
HC 219-20/2003  
HC 121-22/2003

- (1) **KERRIGAN INVESTMENTS (PVT) LTD**  
**T/a RIFA WILDLIFE SAFARIS**
- (2) **MATUPULA HUNTERS**
- (3) **DHUMUKWA SAFARIS**
- (4) **WESTERN SAFARIS (PVT) LTD**

**Versus**

**ZIMBABWE REVENUE AUTHORITY**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 14 & 27 FEBRUARY 2003

*Ms N. Ncube* for the applicants  
*A. B. C. Chinake* for the respondent

Urgent Application

**CHEDA J:** Applicants filed urgent applications seeking an interim order interdicting respondent from freezing, garnishing or interfering with their bank accounts held by several banks in Bulawayo.

As all applicants present the same issue and were being represented by the same legal practitioner and equally so, respondent, I decided to deal with them together. Applicants are registered safari operators in terms of the laws of Zimbabwe. Respondent is a parastatal empowered to collect revenue for and on behalf of the Government of Zimbabwe. They do so under various Acts of Parliament and the appropriate one in this case being the Income Tax Act [chapter 23:06]. It is under this Act that respondent is authorised to audit, investigate and also freeze any person or

business concern's account should they, during their investigations form an opinion that there have been some irregularities, which may financially prejudice their fiscal collection procedure.

It is common cause that during audit inspections being carried out by respondent such irregularities were found which led to the freezing of applicants' accounts.

It is pertinent to mention that applicants have, also filed separate applications asking this court to declare that respondent's actions in freezing the said accounts acted *ultra vires* its powers in terms of section 30 as read with schedule 17 of the Income Tax Act [chapter 23:06], in ruling that, the withholding tax is due and collectable by applicant for commission paid by non-resident clients to non-resident independent operators. They further seek an order that in terms of section 30 as read with schedule 17 of the Income Tax Act there is no statutory obligation on the part of applicant to collect withholding tax on commission paid directly to a non-resident operator by a non-resident hunter. These issues are yet to be determined by this court.

*Ms Ncube* for the applicants argued that respondent has no legal basis for freezing the said accounts because the commission on which the withholding tax is founded does not originate from Zimbabwe. Her further argument, is that, if respondent is allowed to continue freezing applicants' account, applicant will be rendered bankrupt as they cannot economically operate their businesses without these accounts.

*Mr Chinake* for respondent has vigorously opposed this application as he argued that respondent is empowered to withhold tax in terms of section 30 of the

Income Tax Act which reads:

**“Section 30 - Non-residents’ tax on fees**

There shall be charged, levied and collected through out Zimbabwe for the benefit of the Consolidated Revenue Fund on non-residents’ tax on fees in accordance with the provisions of the seventeenth schedule at the rate of tax fixed from time to time in the changing Act.” (my emphasis)

The question which should be determined is whether the word “commission” as used in the present context falls within the scope of section 30 of the Income Tax Act.

It is basically on that basis that respondent is of the view that it is entitled to freeze these accounts. It is clear that there is a need for the determination by this court as to whether there is any legal basis for respondent to have acted in the manner they did .

Applicants also argued that it is essential that they be allowed to utilise their accounts pending the final determination of the other court application referred to above. Their fears are that in the event that the court holds in their favour respondent will not be able to reimburse them. In fact, *Ms Ncube* argued that not only does respondent have problems in securing foreign currency but local currency as well. In reply *Mr Chinake* pointed out that this in fact is not correct as in the current year respondent has successfully collected Z\$258 billion and has this year budgeted to collect Z\$728 billion in revenue. While it is correct to say that respondent has problems with foreign currency, it cannot be correctly said so of the local currency. This therefore stands to reason that respondent is in a position to reimburse applicants should applicants succeed in their other applications.

This argument by *Ms Ncube* although sound however, it seems to overlook one real possible route which applicants can take in the event that they are allowed to utilise their accounts pending determination of their other applications by this court that is of winding up their companies. She buttressed her argument by pointing out that the economy of the country in general is not favourable for business and that the tourism industry in particular has taken a slump. While these observations are indeed correct, I find that there is reason enough for any business person to close shop or diversify into other businesses. It is possible therefore for applicants in those circumstances to declare themselves insolvent after they have been allowed to utilise their accounts. Should this happen, then respondent will suffer irreparable harm as they will not be able to recover tax in the event that, the court's determination is in their favour. The situation will be however, entirely different if the courts determine in applicants' favour as their money will still be held in the bank.

In an application of this nature applicant must show a *prima facie* case in order to succeed. In the present case it is clear that, there is a dispute as to the interpretation of the relevant provisions of the Act under discussion.

As pointed out above their fears are without justification in view of what they might do after they have been allowed to freely utilise their accounts, this argument is therefore rejected as it is devoid of any merit. In addition they have failed to make a *prima facie* case against respondent. The reason for this is that, they have not been truthful with the court in arguing that respondent will not be able to pay them in the event of their success. I am persuaded to agree with *Mr Chinake's* argument that in

the case of Western Safaris P/L, the account held is \$1.8m, which represents, possibly one asset of e.g. a motor vehicle. To say that a business will be bankrupt as a result of a freeze on an asset of \$1.8m or so in a business which has been receiving such large sums of foreign currency is not entirely correct. It also emerged that the collection percentage of the said commission is not uniform as it varies from one safari operator to the other. One wonders why this is so and applicants were unable to explain this irregularity. This on its own is reason enough to justify the freezing of the accounts. This goes to demonstrate their lack of *bona fides*.

Having listened to both arguments and perused various documents before me I am of the view that there is a need for the courts to determine the main application, more particularly in view of the fact that the commission referred to in the National Parks Declaration forms lacks uniformity as far as the calculation of the commission is concerned. With all due respect, the fact that the calculation of commission is left at the whims of applicants, is an indication that proper determination should be made by this court.

It is for the above reasons that respondent should be allowed to freeze accounts in the meantime, which it reasonably believes, there have been irregularities in the declaration of foreign currency.

The court will therefore be failing in its duty, if it is seen to be hindering respondent in its quest to correct what is *prima facie* an irregularity. The balance of convenience favours the freeze.

There is no irreparable harm which will be suffered by the applicant if their accounts are frozen and I accordingly dismiss this application with costs.

*Messrs Lazarus & Sarif* applicants' legal practitioners  
*Kenntor & Immerman* respondent's legal practitioners