THE ZIMBABWE STOCK EXCHANGE
versus
THE ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 14 September and 8 November 2006

OPPOSED APPLICATION

Mr T Biti, for the applicant.
Mr M Sinyoro with *Mr G Matsikidze* for the respondent.

MAKARAU JP: This is an application for a declarator to the effect that stockbrokers are exempt from paying Value Added Tax in terms of section 11(a) of the Value Added Tax Act [*Chapter 23:12*] for the services they render in the normal course of their business.

Section 3 of the Zimbabwe Stock Exchange Act establishes as a corporate body, the Stock Exchange for Zimbabwe wherein securities and shares in listed companies are freely traded. To run the affairs of the Exchange is a Committee set up in terms of the Act. The application before me was founded on an affidavit deposed to by the Chairperson of this committee, on behalf of the applicant.

BACKGROUND

In May 2006, a misunderstanding arose within applicant as to the liability of stockbrokers to pay VAT. As a result of this misunderstanding, stockbrokers folded their arms and trading on the bourse came to a complete halt. Trading only resumed on 30 May 2006 when an agreement was reached between the stockbrokers and the government that the accrued tax would not be collected pending determination of the matter by a court. This truce holds.

THE ISSUES

The main issue that falls for determination in this application is easy to formulate. It is whether the law exempts stockbrokers from paying VAT. However, attendant upon this simple issue are three procedural issues. These are

a) whether the application before me is opposed;
b) Whether the applicant has *locus standi* to bring the application; and
c) Whether this matter is *lis pendens* before another tribunal of competent jurisdiction, namely, the fiscal court.

In my view, the second issue, *viz*, whether the applicant has *locus standi* to bring this application overshadows the other two. It presents itself clearly to me that a deliberation on the other two issues can only ensue once I am satisfied that the applicant is properly before me. On the basis of the forgoing, I shall therefore deal with the issue of *locus standi* first.

THE LOCUS STANDI OF THE APPLICANT

It is common cause that the applicant itself is not a stockbroker and is not liable to the respondent for VAT. The applicant brings this application on behalf of stockbrokers. From a reading of the applicant's papers, it is quite apparent that the applicant greatly sympathises with the stockbrokers' case and has adopted their stance as if it was its own. It firmly believes that stockbrokers are exempt from paying VAT and has argued so in its application. Noticeably, in its draft order, it does not pray for an order compelling the parties to the dispute to speedily resolve the issue that has disrupted trading on the bourse, but, specifically prays that the dispute be resolved in favour of the stockbrokers. The applicant has thus taken it upon itself to be the voice

of the stockbrokers in the application before me and the issue that arises is whether it has the legal standing to do so.

The applicant has sought to argue that it has the legal standing to bring this application in terms of both the Stock Exchange Act and at common law.

To dispose of one argument quickly, it is quite clear that the Stock Exchange Act does not provide that the applicant can bring an action of behalf of stockbrokers. To be fair to him, I did not understand *Mr Biti* to be arguing that it does.

I would therefore dismiss the notion that the applicant has any *locus standi* in terms of the Stock Exchange Act to bring this application.

It would appear to me that the net effect of applicant's argument is that since the applicant is set up to manage a fair and efficient manner of dealing in listed securities, it has an interest in the impasse between the respondent and the stockbrokers, the brief details of which I have given above. Thus, I understood the applicant to be arguing that it has a standing in terms of the common law on the basis that it has a direct and substantial interest in the impasse.

A review of some of the decisions that have come before this and the Supreme Court on the issue of *locus standi* in public and private interest litigation, though not imperative, may be useful.

Deary NO v Acting President and Others 1979 ZLR 200 appears to have been the first decision in this jurisdiction dealing with the issue. In that matter the *locus standi* in issue was that of a public body that had brought an application on behalf of the citizens of the then Rhodesia against the government of the day. Although the applicant or petitioner is cited as Deary, the application was brought by the Catholic Commission for Justice and Peace a public authority, seeking to protect the rights of the citizenry. The *locus standi* of the applicant was objected to and initially it was contended that the application had been brought

for purely political reasons and was vexatious. In holding that the applicant was properly before the court, Beck J had this to say at page 203A-B:

> "It must be said from the outset that the Court will be slow indeed to deny *locus standi* to an applicant who seriously allege that a state of affairs exists within the court's area of jurisdiction, whereunder people have been or about to be, and will continue to be unlawfully killed. No more pressing need for the protection of the mandatory interdict *de libero homine exhibendo*, or a prohibitory interdict restraining such alleged oppression can possibly be imagined. (See *Wood and others v Ondangwa Tribal Authority and Another,* 1975 (2) SA 294 (AD). The non-frivolous allegation of a systematic disregard for so precious a right as the right to life is an allegation of an abuse so intolerable that the court will not fetter itself by pedantically circumscribing the class of persons who may request the relief of these interdicts." (The underlying is mine).

It is worth noting that the decision in *Deary* was made in 1979 prior to the enactment of the Constitution of Zimbabwe and section 24 in particular, which grants certain but limited *locus standi* to public bodies to bring applications such as the one brought in the *Deary* case.

In my view, it is instructive to note that even in the Deary case, some qualification appear to have been attached to the standing of the CCJP to bring the application and its *locus standi* was not assumed nor was it had for the asking. The right at stake was regarded as precious and compelling the court to act and not to fetter itself by pedantically subscribing the class of applicants who could request it to protect such a precious right. One can almost discern the birth of section 24 of the Zimbabwean Constitution in these remarks.

The Supreme Court has had occasion in several cases to determine the scope of the right of applicants to bring applications on behalf of others. (See *Law Society of Zimbabwe v Minister of Justice, Legal & parliamentary affairs and Another* 16/06, *Law Society and Others v Minister of Finance* 1999 (2) ZLR 231 (S), *In re Wood and Anor* 1994 (2) ZLR 155 (S); *Ruwodo v Minister of Home Affairs and Others*

1995 (1) ZLR 227 (S) and *Capital Radio (Private) Limited v Broadcasting Authority of Zimbabwe and Others* SC 128/02).

In my view, a distinction has to be made between the *locus standi* of applicants to bring applications under section 24 of the Constitution alleging a breach of the Declaration of Rights in respect of another and the *locus standi* of a public body to bring a public interest suit on behalf of another or members of the public or to seek to protect the interest of its members. As observed by CHIDYAUSIKU CJ in *Law Society Zimbabwe v Minister of Justice, Legal & Parliamentary & Anor* (supra) at page 15 of the cyclostyled judgment, the locus *standi* of a public body to make a direct application to the Supreme Court in terms of s24 of the Constitution is much narrower than at common law.

What then is the test for *locus standi* of a public body to bring a suit on behalf of another at common law?

In *Zimbabwe Teachers Association & Others v Minister of Education* 1990 (2) ZLR 48, EBRAHIM J reviewed earlier decisions where the issue had been determined. Before holding that the applicant before him had the requisite *locus standi*, he summarized the legal position at page 57B:

as follows

> "From these authorities it is apparent what the legal approach to the issue of *locus standi* should be. The petitioners must show that they have a direct and substantial interest in the subject matter and what is required is a legal interest in the subject matter of the action".

In coming up wit this formulation, the learned judge appears to have relied heavily on the remarks of CORBETT J (as he then was) in *United Watch and Diamond Co (Pvt) Ltd & Others v Disa Hotels Ltd & Ano*r 1972 (4) SA 409 (C), wherein the same formulation was set out. (See page 57G-H of EBRAHIM J's judgment). The remarks in *United Watch and Diamond* however came with the qualification that the

petitioner must show that its legal interest in the matter will be prejudicially affected by the decision of the court.

It then appears to me in summary that a public authority or body will have *locus standi* in a suit where it shows that it has a legal interest in the subject matter of the suit and such interest may be prejudicially affected by the decision of the court. This is what constitutes a direct and substantial interest to found *locus standi* at common law.

In the Zimbabwe Teachers Association case, EBRAHIM J appears, with respect, to have dropped the requirement that the applicant must show that its legal interest in the matter will be prejudicially affected by the court's decision. The drop of this further qualification by EBRAHIM J appears to me to have been deliberate, as the learned judge did not use it to test the direct and substantial interest of the teachers' association that was appearing before him. In coming to the conclusion that the association had *locus standi*, the learned judge held that the association membership was about 42% of the total number of teachers in the country and in the circumstances, it would be fallacious to conclude that the applicant had no real and substantial interest in the litigation to redress the unlawful dismissal of three teachers.

I make the point at this stage that the facts of the application before me are distinguishable from the facts of the application that was before EBRAHIM J and that on the reasoning of the learned judge, the applicant before me would not have *locus*. It is common cause that the applicant is not an association of stockbrokers fighting for the cause of its membership.

It further appears to me that yet another distinction must be made between purely public interest litigation, where a suit is brought in the public interest and to protect a public right and private interest litigation for the settling of private disputes. The *Deary* case may be one instance in which the interest at stake involved a large number of victims such as

to constitute a public interest. The parties to the dispute and the nature of the dispute are such as to place the litigation in the public domain. Litigation to protect the environment is another example that comes to mind in public interest litigation. On the other hand, private interest litigation is where the right or interest sought to be protected is essentially a private interest. The private law of litigation is primarily interested in the settling of private disputes. In my view, the test for *locus standi* in public interest litigation and private interest litigation ought to be separate and different. While a wider approach may be arguable for public interest litigation, it does not appear to me that a similar wide approach is desirable in private interest litigation. From a reading of the authorities on private interest litigation, it is a settled position that the applicant must show that he or she has a legal interest in the suit that will be affected by the court's judgment. Whether it is a requirement in public interest litigation is a question I shall leave open for discussion in a suitable case.

In my view, the impasse between the respondent and stockbrokers is essentially a private dispute. The applicant has an interest in how the issue will be resolved. That interest is not direct and substantial in the sense that there is no recognizable right at law of the applicant that is at stake. It has no legal interest that is at risk in the dispute between the stockbrokers and the respondent.

As indicated above, it cannot rely on the question of membership that seems to have influenced the courts in the ZIMTA case and in the *Law Society and others v Minister of Finance* case. Stockbrokers are not its members as lawyers are the members of the Law Society or as some teachers are members of ZIMTA. The applicant was not joined in the application by any one of the affected stockbrokers nor was such joinder sought at any stage.

BROAD VIEW OF LOCUS STANDI

I make the further observation at this point that in cases where the Supreme Court took a "broad view" of *locus standi*, the court took into account additional considerations in the applications before it. In *Retrofit (Pvt) Ltd v PTC and Another 1995 (2) ZLR 199* (S), the court held that the applicant has *locus standi* to bring the suit to protect a "commercial self-interest and advantage" that was being threatened by the respondent. In *Law Society and others v Minister of Finance (supra)*, McNALLY J A, in his usual clarity, remarked that the Supreme Court was disposed to take the broad view of locus standi generally as the Class Action Act was not yet in force and he was not disposed to make an order that would hinder the development of class actions. His words at page 243B-C:

> "In this jurisdiction, there has not yet been a great deal of development in the field of class actions or representative actions. The Class Action Act 10 of 1999 is yet in force. But it would not be right for this court to make any ruling which would hinder the development of such actions. Therefore, we are disposed to take a broad view of *locus standi* in matters of this nature, as indicated by the Chief Justice in *Catholic commission for Justice and Peace in Zimbabwe v Attorney –General & Others* 1993 9(1) ZLR 242 (S) at 205A-E."

DISPOSITION

No additional considerations presented themselves to me in this matter. I was not referred to any. While generally inclined to widen rather that constrict access to justice by all, it is my view that in so doing, one should not distort the time-tested test that has been used to establish what constitutes a direct and substantial interest for the purposes of private interest litigation.

In the above two matters where a broad view of locus was taken, the affected parties were joined in the applications before the court thereby making the issue of *locus standi* a non- issue in both instances at the end of the day.

On the basis of the foregoing, it is my finding that the applicant has no *locus standi* in this matter.

In view of the finding I make on the issue of *locus standi*, it appears to me unnecessary that I deal with the other two points raised in *limine*.

In the result, I make the following order:

1. The application is dismissed.
2. The applicant shall bear the respondent's cost.

Honey & Blankernberg, applicant's legal practitioners.
Sinyoro & Company, respondent's legal practitioners.