TRIPLE C PIGS (Partnership)
and
COLCOM FOODS LIMITED
versus
THE COMMISSIONER-GENERAL
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 27 November 2006 and 18 January 2007

Urgent Chamber Application

Advocate S.C. Anderson, for the applicants
Messers Sinyoro & Matsikidze, for the respondent

GOWORA J: On 18 January 2007 I issued an order dismissing this application and ordering costs against both applicants jointly and severally. I have been requested to give my reasons and these are they.

The two applicants entered into a contract of supply the exact nature of which is now a subject of an appeal before the Fiscal Appeal Court. Arising from of the contract between the parties, the respondent made a decision on the nature of the goods being supplied in terms of the contract and in consequence thereof made an assessment on Value Added Tax to be paid, a penalty of 40% and levied interest on the amounts so assessed. An appeal to the same was noted by the applicants on 8 November 2006. Upon receipt of the Notice of Appeal, the respondent addressed a letter to the applicants' legal practitioners advising that unless payment of the penalties and interest levied on the principal amount was made by 21 November 2006, collection measures would be effected against the applicants. This then necessitated the application before me.

Before I can delve into the merits of the dispute before me, it is necessary to dispose of two preliminary issues raised by the respondent. In the first, the respondent challenges the urgency of this matter. The respondent takes the point that the applicants have not advanced any cogent reasons on the papers as to why the matter should be regarded as urgent.

The legal practitioner for the applicants has filed, as is the norm in urgent chamber applications, a Certificate of Urgency. It is the practice of these courts as provided for in our rules of court to afford relief to those litigants who seek such relief on an urgent basis. Whether the matter should be treated as urgent and set down for hearing is entirely within the discretion of the judge upon being satisfied on the papers that the matter is indeed urgent. In terms of Order 22 Rule 244, where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge who shall consider the papers forthwith. The certificate attached to these papers is phrased thus:

2. That I consider that the matter should be heard urgently because, on the face of it, the Respondent should have issued a directive to Applicants that pending the appeal to the Fiscal Appeal Court, payment of the disputed amount should not be effected and that her decision refusing to do so is likely to be set aside on review.

Respondent has however, advised that if payment is not made by Tuesday of next week, collection procedures will be put in place. In practice, this means that 2nd Applicant's banking account will be effectively garnisheed and the disputed amount, paid over to the Zimbabwe Revenue Authority. This is a type of enforced execution without any order of Court, which would not have occurred had the Respondent made the directive which she should have made.

The basis on which the respondent should have made the directive is not given in the certificate nor is an attempt made to convince the court why the alleged failure on the part of the respondent to issue such directive would necessitate the matter being heard on an urgent basis. There is no averment on the part of the legal practitioner to amplify on the statement that collection procedures would be put in place by the respondent. There is

no allegation that this action would constitute an illegality on the part of the respondent, or that the respondent was not empowered in terms of the Value Added Tax Act [*Chapter 23:12*] (hereinafter referred to as the Act)to put such measure into effect. At issue in the main dispute is the applicants' alleged or assessed indebtedness to the Zimbabwe Revenue Authority for unpaid value added tax in terms of the Act. In terms of section 36 thereof, the obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under the Act shall not be suspended pending an appeal unless the Commissioner so directs. The Commissioner has not issued such a directive, but that refusal standing alone and in the circumstances of this case and in the absence of other factors cannot constitute urgency. The consequences of such failure or refusal on the applicant have not been indicated leaving the court in the dark as to how urgency would arise therefrom. Sight should not be lost that the court relies on the certificate of urgency in order to hear the matter outside the normal periods set in the rules. The rules require that the certificate provide reasons for urgency. The court therefore expects that the view expressed in the certificate that the matter be viewed as urgent is well grounded and premised on sound reasons. Those reasons do not appear in the certificate.

In his oral submissions Mr *Anderson* argued that the garnishee would put the taxpayer out of business as it, the garnishee, would deprive the applicants of working capital. It is assumed and indeed expected that if the Commissioners decision to effect collection measures is to have this effect on the applicants' working capital the deponent of the founding affidavit would himself have been alive to the impending disaster and would have brought it to the court's attention. That would after all be the reason for approaching the court on an urgent basis. The founding affidavit is silent on this, and more importantly, the certificate, of urgency, which should contain the reasons for the urgency is silent on this factor as well.

The statement in the affidavit that garnishee procedures would, be in effect a form of enforced collection without a court order, in my view

requires a comment from the court. Mr *Anderson* did not address it and naturally in the circumstances, *Messrs Sinyoro* and *Matsikidze* also did not address the point. I am therefore very loath and hesitant in the absence of full argument from counsel on the same, to make pronouncements which may touch on the interpretation of the Commissioners powers in terms of the Act. I hasten to add however that these are powers bestowed on the Commissioner by the Act.

Mr *Sinyoro* suggested in argument that in order to succeed in having the matter considered as urgent the applicants would have to show imminent danger to existing rights and more importantly the possibility of irreparable harm. He cited no authority.

It is obvious that in so far as the applicants are concerned the day of reckoning had arrived. They were being called upon to pay what was required by the Zimbabwe Revenue Authority or dire consequences would ensue. Clearly from their perspective, the matter was urgent in that they were being put on terms to pay what the respondent claimed to be legally due by them. They are clearly intent on stopping all efforts to make them pay the sums thus demanded until the appeal lodged with the Fiscal Appeal Court is determined. That in itself does not is not sufficient to justify granting the applicants the privilege of jumping the queue and having their matter heard ahead of a host of other litigants. When a court is considering whether or not a matter is urgent, each case is judged according to the circumstances surrounding the matter. The test for urgency, is however not subjective. See *Document Support Centre P/L v T. F. Mapuvire*[1]. MAKARAU JP stated therein that the test for urgency is not subject but objective.

Naturally, every litigant appearing before these courts wishes to have their matter heard on an urgent basis, because the longer it takes to obtain relief the more it seems that justice is being delayed and thus denied. Equally courts, in order to ensure delivery of justice would endeavour to hear matters as soon as is reasonably practicable. This is not always possible however and in order to then give effect to the intention of the

[1] HH 117/2006

courts to dispense justice fairly a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest if not redressed immediately would not be the cause of harm to the litigant which any relief in the future would render a *brutum fulmen*.

I would however, in closing, wish to quote respectfully the remarks of GILLESPIE J in *General Transport & Engineering P/L & Ors v Zimbank Corporation P/L*[2], quoting from his own remarks in *Dilwin Investments P/L t/a Formscaff v Jopa Engineering Company Ltd*[3] the learned judge stated:

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it."

In my view this is the irreparable harm that Mr *Sinyoro* argued should be established by the applicants in order to justify that the matter be treated as urgent. Good cause would have been shown by the applicants establishing that the Commissioner had, by her actions threatened or interfered with some lawful right in a manner likely to result in irreparable harm and that the absence of immediate relief from this court would ultimately render any subsequent relief 'hollow'. That is not the case made out by the applicants for urgency, and I conclude therefore that the application should fail on that basis.

In his argument Mr *Sinyoro* submitted that for this court to direct the Commissioner to suspend payment of the recovery of payments due under section 36 would be tantamount to the court substituting the Commissioner's discretion for its own. This in his view is not what is

[2] 1998 (2) ZLR 301 (H) at 302
[3] HH 116/98

contemplated by the legislation, and he submitted that unless there was on the papers before it malice, bias, or some other preconceived prejudice on the part of the Commissioner against an applicant, this court would have no jurisdiction to usurp the discretion of the Commissioner. Mr *Sinyoro* did not provide any authorities for his submission and I requested that he furnish them to me after the hearing, with the applicants being afforded an opportunity to file authorities in support of their case on the same issue. The applicants have not done so although their legal practitioners filed heads of argument. The purpose of the heads of argument from their tenor was to enjoin the court not consider any submissions by the respondent which were not concerned with the lack of jurisdiction of the court to interfere with the discretion of the Commissioner. I am in agreement with their views thereon.

The authorities cited by Mr Sinyoro are all concerned with the powers of a court to review administrative decisions. It is pertinent for me to remark that although the relief sought, were I to grant it, would result in the Commissioner's decision being suspended pending the determination of a review to have it set aside, this notwithstanding that at the present there is no order setting aside such decision. It is the case of the applicants that the Commissioner has refused to make a direction in terms of section 36 of the Act. If I were then to accede to their request and grant an order that the applicants not pay the disputed amount, such an order would have the effect of reversing the decision of the Commissioner. Yet I have not been requested to review the decision of the Commissioner. I am mindful of the fact that the respondent has not taken issue with this aspect of the application. It occurs to me that the legal practitioners from both sides failed to exercise their minds and consider the nature of the application placed before me by the applicants. If it is not a review, how then can this court be asked to give an order which has the effect of setting aside the decision of the Commissioner without such decision having been brought under the scrutiny of the court.

Turning now to the nature of the relief sought in the provisional order annexed to the applicants' papers, I am required to interdict the respondent from instituting proceedings for the recovery of the disputed value added tax. Apart from the submission from applicants' counsel from the bar that the recovery would affect the cash flow of the applicants no case is made out that there would be prejudice to the interests of the applicants if the relief were not granted. The right on which the applicants seek the temporary interdict is not adverted to in the affidavit. There is a statement to the effect that the applicants' Constitutional rights would be infringed if they were obliged to pay the capital amount, penalty and interest before the appeal is heard. There is no averment as to which constitutional rights are being infringed by such action. No section of the Constitution is referred to and the court can only speculate as to what these rights may be. As the Act provides for the collection of these amounts even in the event of a pending appeal, can this court grant an interdict against an administrative act being exercised properly in accordance with a statutory provision which has not been struck down? The court would in essence be giving sanction to an infringement of the law. It is a court's duty to uphold the law not. In the absence of an order setting aside the decision of the respondent to levy and collect the amounts in dispute I cannot as a court grant an order interdicting her from carrying out her lawful duties.

This application in my view is without any foundation or basis. The application is therefore dismissed with costs which costs shall be borne by the applicants jointly and severally, the one paying the other to be absolved.

Wintertons, applicant's legal practitioners
Sinyoro & Company, respondent's legal practitioners