BINDURA NICKEL CORPORATION LTD

versus

The ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE 12 October 2006 & 20 February 2008

Opposed matter

Advocate Mazonde, for the applicant,

Mr Matsikitse, for the respondent,

CHATUKUTA J: The applicant sought an order in the following terms:

> "1. That the Respondent be and is hereby directed to refund Applicant within seven days of the date of this order the sum recovered from the Applicant's Value Added Tax refund on the 20th December 2005 (*sic*) of $5 450 939 769.71.
> 2. The Respondent shall pay interest to the Applicant on the sum recovered from the Value Added Refund (*sic*) on the 20th December 2005 (*sic*) in the sum of $5 450 939 769.71 at the prescribed rate of interest from 20 December 2005 to the date of payment in full.
> 3. The Respondent shall pay costs of this Application."

The background to the matter is that, in the exercise of its statutory duty, the respondent reviewed the tax affairs of Trojan Nickel Mine and Bindura Smelting Corporation for the period 2003 and 2005. Both companies are subsidiaries of the applicant. At the conclusion of the review exercise, the two companies were assessed to pay additional corporate and withholding tax amounts due as according to the annual payment dates. The respondent imposed a penalty and interest on the due amounts in terms of sections 46 and 71(2) of the Income Tax Act [*Chapter 23:06*] respectively. The respondent objected to the payment of interest beyond the capital debt. On 6 July 2003, the applicant instructed respondent to hold back an amount of $8 000 000 000 from its Value Added Tax refunds account with the respondent, as a deposit pending the

finalisation of the investigations on the two subsidiaries' corporate tax. The interest due in relation to the applicant's two subsidiaries was deducted from this amount. The applicant was of the opinion that the amount deducted and withheld by the respondent in the sum of $5 450 939 769 was interest in exces of the *in duplum* rule. The applicant then filed this application to recover that amount.

The respondent raised a point *in limine* that the applicant did not have the *locus standi* to institute these proceedings. It was submitted, for the respondent, that the additional corporate and withholding tax was due, not from the applicant, but from Trojan Nickel Mine and Bindura Smelting Corporation. Although the two companies were applicant's subsidiaries, they were separate legal personalities. The companies should have brought the action in their individual names as they were not incapacitated in any manner.

The applicant submitted that it had a direct pecuniary interest in the affairs of its subsidiaries and therefore had *locus standi*. The respondent had throughout the review of the affairs of the two subsidiaries communicated with the applicant. The court was referred to various communications between the applicant and the respondent in connection with the matter at hand. In particular, the applicant referred the court to the letter dated 6th July 2005. That letter authorised the respondent to hold back as deposit an amount of $8.8 billion being VAT returns submitted to ZIMRA. ZIMRA held back that amount and deducted the interest due by the two subsidiaries from that amount.

It is trite that for a party to be able to sue it must have an interest in the subject-matter of the suit and that such interest must be a direct one. There is a plethora of authority in this regard[1]. The Supreme Court in *Law Society of Zimbabwe & Ors v Minister of Finance (Attorney-General Intervening)*(supra) cited with approval the meaning ascribed to "direct and substantial interest" in *Zimbabwe Teachers Association & Ors v Ministry of Education* (supra) by EBRAHIM J (as he then was). At 52E it was observed that a party needs to show that it has an interest in the right which is the subject-

[1] see *Hotel Association of Southern Rhodesia and Another v Southern Rhodesian Liquor Licensing Board and Another* 1958 (1) SA 426 (SR) *Law Society of Zimbabwe & Ors v Minister of Finance (Attorney-General Intervening)* 1999 (2) ZLR 231 (SC) at p234H-G and *Zimbabwe Teachers Association & Ors v Ministry of Education* 1990 (2) ZLR 48 (H)

matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.

It is my view that the applicant's financial interest in the current matter is not indirect as in the other cases cited above. In this case, the interest is direct by the very nature of the relationship of the applicant *vis a vis* the two companies whose financial affairs were reviewed. It is not in issue that the applicant wholly owns the subsidiary companies. The applicant's position is reinforced by the fact that the respondent did engage the applicant in its review of the affairs of the subsidiaries. It accepted the applicant's authority to hold back as deposit an amount of $8.8 billion being VAT returns due to the applicant in order to off-set what was due from the subsidiaries. The respondent did not object to this direct communication between the holding company and itself. In fact, it is the balance of this amount that the applicant sought to be refunded. Although the respondent submitted that all the correspondence emanating from its office was directed at the two subsidiaries, it is conceded in the heads of argument that it had held a number of meetings with the applicant over the two subsidiaries. One such meeting was held on 17 January 2006. It concedes that it is the applicant who instructed the holding over of its VAT Refund, to settle the two subsidiaries' indebtedness to the respondent. It is further conceded that the applicant and the respondent held a meeting on 17th of January 2006. It is my view that after all this engagement with the applicant in connection with the tax affairs of the subsidiaries, the respondent cannot turn round at this late hour and dispute the applicant's direct interest in the matter and therefore its *locus standi*.

Coming back to the merits of the application, it appears to me that there are two issues for determination. The first issue as identified by the applicants was whether the Commissioner is entitled to charge interest on unpaid withholding taxes from the dates from which they should have been paid or from the date of notification. The applicant submitted that interest is payable in terms of section 71(2) only after the taxable capital amount has been determined by the respondent and the applicant has been notified of the amount. Interest will then become due on to the remaining capital unpaid by the taxpayer. In this regard, the applicant relied on *Air Zimbabwe Corporation and Ors v*

The Zimbabwe Revenue Authority[2]. It was the respondent's contention that interest accrued at the time when the taxes became due and the interest continued to accrue on the outstanding debt.

Section 71(2) provides:

> **"If tax is not paid on or before such days and at such places as are fixed or prescribed by or under this Act or, where no such time or place is so fixed or prescribed, as are notified by the Commissioner** in terms of subsection (1), interest, calculated at a rate to be fixed by the Minister, by statutory instrument, shall be payable on so much of the tax or an instalment of the tax, as the case may be, as from time to time remains unpaid by the taxpayer during the period beginning on the date specified by the Commissioner in the notification as the date on which the tax or the instalment of the tax shall be paid and ending on the date the tax or the instalment of the tax is paid in full:
>
> Provided that in special circumstances the Commissioner may extend the time for payment of the tax without charging interest." (own emphasis).

It appears to me that the applicant's reliance on *Air Zimbabwe Corporation and Ors v The Zimbabwe Revenue Authority* is misplaced. The applicant relied on a section that had been amended. *Air Zimbabwe Corporation and Ors v The Zimbabwe Revenue Authority* was decided on section 71(2) before it was amended by the Finance Act 2003, Act 10 of 2003. Prior to the amendment, the provision did not refer to time fixed or prescribed by the Act. It is therefore my view that section 71(2) is now clear that interest is not payable from the date of notification but from the date when the tax was due in terms of the Act.

The second issue for determination is whether or not the *in duplum* rule applies to the fiscus. The rule states that interest runs only until the sum of the interest unpaid is equal to the sum of the capital. The applicant submitted that the rule was intended to protect borrowers from the exploitation of lenders and it was entitled to the protection afforded by the rule. In this regard, the applicant relied on a number of cases[3]. The applicant further submitted that at the time when interest was charged, the common law rule applied to the fiscus. This has however changed with the amendment of the General Laws Amendment Act [*Chapter 8:07*] by the Finance Act (No. 2), Act 8 of 2005. The

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[2] HC 96/03

[3] *CBZ Ltd v MM Builders & Supplies (Pvt) Ltd & Ors* 1996 (2) ZLR 420, *Georgias & Anor v Standard Chartered Finance* 1998 (2) ZLR 488, *Ehlers v Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (HC) and *Conforce (Pvt) Ltd v City of Harare* 2000 (1) ZLR 445

General Laws Amendment Act was amended by the insertion of section 11A which provides that the rule does not apply to the fiscus. It was submitted that the amendment however did not have any retrospective effect and was therefore not applicable to the applicant.

The respondent submitted that the applicant and respondent's relationship was not that of a borrower and a lender. It was submitted that the *in duplum* rule applies to the real world of commerce and not to public fiscus matters. The applicant relied on *South African Revenue Services v Woulidge* and *Verulam Medicentre Pty v Ethekwin Municipality*[4].

Indeed, the purpose of the *in duplum* rule is the protection of the borrower from the lender and forms part of our law. This is clearly presented in the cited cases. The question is whether or not the rule applies to the fiscus. The question is better answered from an examination of section 11A of the General Laws Amendment Act. Section 11A provides-

> **"11A Exclusion of *in duplum* rule in certain cases**
> (1) ……..
> (2) For the avoidance of doubt it is declared that the rule of the common law known as the *in duplum* rule that prohibits the payment of outstanding interest in excess of the amount representing the capital or principal sum of a debt does not apply to fiscal debts, that is, to debts by way of outstanding taxes or duties or penalties in respect of the non-payment thereof that are owed to the Authority by a person liable to pay such taxes, duties or penalties under the Scheduled Acts."

It appears to me that the import of that section is that under common law, the *in duplum* rule does not and has never applied to debts due to the state. The applicant contented that prior to the introduction of the section in our legislation, the *in duplum* rule applied to the fiscus as it did to any other entity. The respondent submitted that section 11A was a restatement of the common law position.

It is my view that the wording of section 71(2) of the Income Tax Act is clear that the in duplum rule does not apply to the fiscus. Section 11A of the General Laws Amendment Act would therefore be a restatement of the common law position on the rule. A strict approach is adopted in the interpretation of fiscal legislation[5]. Where the

[4] 2002 (1) SA 68 (SCA) and 2005 (2) SA 45
[5] See Richard Jooste on **Revenue Law**, 1995 at 124; A. S. Silke on **South African Income Tax**, 8th Edition 1975 at 898

statute is expressed in clear, precise and unambiguous words, the court can only expound those words in their ordinary and natural sense and nothing more.[6]

The relevant part of section 71(2) provides that –

> **"…….** interest, calculated at a rate to be fixed by the Minister, by statutory instrument, shall be payable on so much of the tax or an instalment of the tax, as the case may be, **as from time to time remains unpaid** by the taxpayer during the period beginning on the date specified by the Commissioner in the notification as the date on which the tax or the instalment of the tax shall be paid and **ending on the date the tax or the instalment of the tax is paid in full."**(own emphasis).

It is my view that where tax due remains unpaid, interest is chargeable at the rate fixed by the relevant Minister. Interest ceases to be charged on the date the tax or any instalment thereof is paid in full. Therefore whether or not interest exceeds the capital the Commissioner is entitled to charge interest on any tax that remains unpaid. It is my view that the provision is not ambigious and therefore need not be interpreted in favour of the applicant.

It is my view that the confusion has arisen as a result of section 11A of the General Laws Amendment Act, where it begins with:

> "For the avoidance of doubt it is declared that the rule of the common law known as the *in duplum* rule……"

The impression created is that there may have been an ambiguity in the legislation as to whether or not the *in duplum rule* applied to the fiscus. However, I cannot find any clearer language used by the legislature as in this provision. It does not raise any ambiguity. I am of the view, therefore that there is no need to interpret it in favour of the applicant.

Assuming that I am wrong in my interpretation of section 71(2), it is my view that the cases cited by the applicant do not in fact support its contention that before the introduction of section 11A, the common law rule applied to the fiscus. In *CBZ Ltd v*

[6] *Commissioner of Taxes v C.W* 1989 (3) ZLR 361 (SC) at 372C-D; *C.W v Commissioner of Taxes* 1988 (2) ZLR 27 at 35, *Loewenstein v Commissioner of Taxes* 1956 (4) SA 766 (FC) at 772A-F

MM Builders & Supplies (Pvt) Ltd & Ors[7], GILLESPIE J states, after an investigation into the history of the rule, that-

> "In conclusion, the result of this investigation is such as to persuade me that it is a principle firmly entrenched in our law that interest, whether it accrues as simple or as compound interest, ceases to accumulate upon any amount of capital owing, **whether the debt arises as a result of a financial loan or out of any contract whereby a capital sum is payable together with interest thereon at a determined rate,** once the accrued interest attains the amount of capital outstanding. Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which cause action was instituted." (own emphasis).

Citing the decision in *Union Government v Jordaan's Executor*[8] with approval GILLESPIE J stated at 433C-D

> "The decision in *Union Government v Jordaan's Executor* is of great persuasive authority, bearing in mind the identity of the Bench from which it comes. **It is also one of interest, not only as an example of the application of the rule to debts other than loans (recovery of survey fees due and unpaid)**, but more importantly because it affirms the proposition that the duplum rule does not simply render interest irrecoverable but operates so as to prevent it from accruing at all." (own emphasis)

The nature of transactions to which the rule is applied is again referred to in *Commissioner for SA Revenue Service v Woulidge*[9]. DAVIES J at 611E-G, states:

> "The effect of the *in duplum* rule is that interest stops running when the unpaid interest equals the outstanding capital. When the debtor repays a part of the interest the quantum of the outstanding interest reduces below the amount of outstanding capital. Interest again runs until it equals the capital amount. **The rule applies not only to money-lending transactions but to any transaction which involves the payment of interest on an amount due in terms of the transaction**." (Own emphasis).

It is my view that, by necessary implication, *in duplum* rule does not apply to any other relationship which is not that of a borrower or lender, or which is not that of a commercial nature. The relationship between the applicant and the respondent is a statutory relationship where the interest charged is intended to be compensatory for failure to pay tax on the due date. It appears to me that the relationship is in fact more

[7] 1996 (2) ZLR 420 at 441D-F
[8] 1916 (1) TPD 412
[9] 2000 (1) SA 600 (C)

than that. It is a relationship between the state and a subject, where it is in the domain of the state to tax its subjects. It surely cannot be said to be a contractual relationship where the *in duplum* rule would apply. It is my view therefore that the relationship is not a transaction envisaged in *CBZ Ltd v MM Builders & Supplies (Pvt) Ltd & Ors* and the cases cited therein and further the other cases that have been decided on the rule. As stated earlier, in *CBZ Ltd v MM Builders & Supplies (Pvt) Ltd & Ors* the court cited with approval the decision in *Union Government v Jordaan's Executor* (supra) where it was held that the *in duplum rule* applied to the fiscus. In that case the Union Government had paid survey fees of the farm belonging to the plaintiff. The amount so paid out carried interest at a fixed rate. When the plaintiff sought transfer of the property, he realized that he had not paid the capital amount and the interest. The interest claimed by the Union Government included interest beyond that permitted under the *in duplum* rule. DE VILLIERS J.P. ruled in that case that no interest runs after the amount is equivalent to the capital sum.

It appears to me that case is distinguishable from the present. In *Union Government v Jordaan's Executor*, the relationship between the plaintiff and the Government was a relationship where the state had expended money in paying surveyor fees on behalf of Jordaan's Executor. The relationship created was therefore that of a debtor and a creditor, even though the creditor was now the state. It is my view that the Union Government had placed itself under the common law rule. Secondly, the amount expended in the payment of the surveyor fees started earning interest with effect from the time it was expended. In the case of tax, interest is not charged on tax during the period of the tax review. Tax is only charged when the amount becomes due and has not been paid.

It is my view that what is alos important is the basis of the rule. The rule is based on public policy intended to protect debtors from exploitation by creditors by forcing them to pay unregulated charges, and enforce sound fiscal discipline on creditors[10]. The rationale for the rule is broadened in *Conforce (Pvt) Ltd v City of Harare*[11] where CHINHENGO J observed as follows[12]

[10] (See *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* (supra) at 495D)
[11] 2000 (1) ZLR 445 (HC)
[12] at 457G-458A-D

> "The rationale for the in duplum rule and its origins are fully examined by GILLESPIE J in *M M Builders'* case supra. I am much persuaded by his Lordship's reasoning and understanding of the rationale and origins of the rule. I do not need to traverse the same ground. If I understand the reasoning of GILLESPIE J correctly, then I venture to say that the public interest served by the in duplum rule is not to be identified with sympathy for the debtor, so as to say that the rule is design to protect him. I view the public interest involved as encompassing a wider spectrum of interests, from the protection of the debtor, to securing fiscal discipline on the part of lenders, to considerations of justification for charging interest in the first place i.e. to compensate the creditor for deprivation of use of the money due until payment (*Mawere v Mukuna* 1997 (2) ZLR 360 (H) at 364G) and to the interests of commerce generally and to perhaps many more interests. Thus the public interest cannot be restricted to one or two considerations i.e. the protection of the debtor and the dictates of modern commerce. But even if it were to be so restricted, I cannot see anything incompatible with the rule serving those interests if it were to be applied in the manner advocated for in *M M Builders'* case. The creditor's claim for interest would be limited to an amount that does not exceed the capital."

The issue that arises from the rationale for the rule is best stated in *Verulam Medicentre Pty v Ethekhin Municipality*[13] where GALGUT AJP says-

> "It would appear from this that where on a proper construction the interest at issue serves a purpose other than the ordinary function that interest fulfils, the in duplum rule will not apply.
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> It may well be that the test is not as strict as that, however, because Blieden J went on to refer (at 655E - F) to single capital annuities and similar investments, and pointed out that concerns doing business of those kinds do not require protection and that public policy would not require that the investors concerned be limited by the rule, and in *Commissioner, South African Revenue Service v Woulidge* 2002 (1) SA 68 (SCA), which admittedly turned on entirely different facts, Froneman AJA said (at 75B - C) that the in duplum rule can be applied only where it serves considerations of public policy in the protection of borrowers against exploitation by lenders.
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> It appears therefore that the test might simply be whether in the particular case public policy requires the debtor to be protected against exploitation by the creditor."

The import of the above observations by GALGUT AJP is firstly whether public policy dictates that the rule should apply to tax debts and secondly, whether the applicant required protection. It has been accepted in our jurisdiction that the rule is not limited to money lending transactions but applies to all contracts or transactions under which a debt is subject to interest at a fixed rate. As alluded to earlier, it is my view that the relationship between the applicant and the respondent is a statutory one and does not fall

[13] supra at 454I-455B

under the contracts or transactions as perceived in the decided cases. The whole purpose of the relationship between the applicant and the respondent is to enable the respondent to raise, by way of tax, public revenue. As stated in **Revenue Law-Principles and Practice**[14], tax is a compulsory levy imposed by the government or local authority. The money so raised is intended for public purpose i.e. for government expenditure. Would it be in the public interest that the *in duplum* rule should apply to a person who has a statutory obligation to pay tax when it is due but fails to meet the obligations? What would be the consequences of the application of the rule?

I do not believe that public policy would dictate that a taxpayer, who has defaulted in paying tax and interest thereon can benefit from the *in duplum* rule. The tax is raised for the good of the public. Judicial note is taken of the fact that tax payable in any given year forms part of the national budget. It is inconceivable to imagine what would happen to the fiscus if taxpayers were to be given the comfort that they can hold onto their money until interest due on overdue tax is equal to the capital amount and they can proceed holding onto their money thereafter until the Commissioner sues for what is due. In *Commissioner of Taxes v First Merchant Bank Ltd*[15], GUBBAY CJ (as he then was) discussed the common law on the raising of set-off against taxes due to the fiscus. He observed that[16]:

> "At common law, set-off or compensation is a method by which mutual debts, being liquidated and due, may be extinguished. It takes place *ipso jure*. If the debts are equal, both are extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced. There are, however, two important exceptions to the operation of the rule. A debt owed by one department of the State cannot be set off against a debt owed to another department. And set-off cannot be raised against taxes due to the fiscus or where goods are sold for the benefit of the State. See *Schierhout v Union Government* 1926 AD 286 at 291; *Pentecost & Co v Cape Meat Supply Co* 1933 CPD 472 at 479; *Voet* Commentarius ad Pandectus 16.2.16 (Gane's translation, Vol 3 at 166); van Leeuwen Censura Forensis 1.4.36.11 and 13 (Barber and Macfayden's translation); Wessels **The Law of Contract in South Africa** 2 ed vol II at paras 2567 and 2568; Wille's **Principles of South African Law** 8 ed at 483. Both these exceptions are grounded in public policy and utility. The first is designed to avoid confusion in State accounts; the second to ensure the uninterrupted flow of tax revenues to the Treasury in the interests of good governance. In each instance, it is for the State to decide whether or not set-off should apply even though the debts co-exist."

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[14] C. Whitehouse and Elizabeth Stuart-Buttle, at p2-4
[15] 1997 (1) ZLR 350 (SC)
[16] at 353B-E

The above rationale against set-off would surely apply to the non application of the *in duplum* rule to tax debts. The non-remittance of tax and the application of the rule to tax debts would interrupt the flow of revenue to the fiscus with adverse impact on good governance. The purpose of the common law, on set-off *vis a vis* tax debt, is the preservation of the fiscus for the good of the nation. Under such circumstances, it is my view that the applicant cannot be said to require any protection against the respondent.

It appears to me that the very nature of the relationship of the parties also has a bearing on the purpose of the interest charged by the respondent. In the cases of a borrower and a lender, interest starts accruing on the capital amount from the date the amount is advanced. In the present case, interest is payable from the date fixed under the Income Tax Act or date as notified by the Commissioner. The tax is not computed through out the tax year. It is my view therefore that the underlining purpose of the interest charged by the respondent is clearly different from interest charged in a commercial transaction.

In the result, I find that the *in duplum* rule does not apply to tax debts. I have found it not necessary, because of my conclusion above, to deal with the question raised by the applicant that it was entitled to interest on the refund that it sought.

Accordingly, I make the following order:

The application is dismissed with costs.