MUROWA DIAMONDS
versus
COMMISSIONER GENERAL OF THE ZIMBABWE
REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 25 October 2010 and 12 January 2011

Urgent Chamber Application

E W Morris SC, for the applicant
A B Chinake, for the respondent

GOWORA J: This matter was argued before me on 25 October 2010. Counsel for both the applicant and the respondent undertook to furnish me with authorities for the arguments advanced on behalf of both litigants. Unhappily counsel did not act on their undertaking with the result that the authorities filed by counsel for the respondent was only availed on 11 November 2010. To date I have not received any from the applicant's counsel and as a result this judgment will be prepared without the benefit of those authorities.

The applicant has filed a founding affidavit in which the facts surrounding the application are alleged to be the following. The applicant carries on business as a diamond miner at Murowa, with its registered office being in Harare. In June or July 2009 officials of the Zimbabwe Revenue Authority (commonly referred to as ZIMRA) of which the respondent is, in terms of the Revenue Authority Act [*Cap 23:11*] responsible for the supervision, management of staff and activities, funds and property, carried out an audit of the applicant. Arising from that audit was a determination that the applicant had overpaid an amount of $215 878-54 in respect of withholding tax between January 2007 and October 2008. It was then agreed between the applicant and the officials of respondent's office that the overpayment could be offset against payments due in the future. On 8 July 2009 the applicant addressed a letter to the respondent seeking confirmation that the overpayments would be used to offset outstanding taxes. In a letter dated 24 July 2009 the applicant sought confirmation of the amount of the overpayment and further, information as to when a refund would be made,

alternatively, whether there would be an offset against other taxes due by the applicant to the respondent. This letter was received and signed for on the same day by an official of ZIMRA.

The applicant avers that the overpayments were amounts which had been paid to the Reserve Bank in foreign currency which were credited to an account held in the name of the ZIMRA. The applicant avers that because of the policy of the Reserve Bank at the time the foreign currency was itself taken by the Reserve Bank and an equivalent value in Zimbabwe dollars was credited to ZIMRA's account.

The applicant avers that on 25 January 2010 the respondent addressed a letter to the applicant stating that there was only a possible overpayment and that no payments had been made. A follow up letter dated 29 September 2010 was addressed to the applicant's legal practitioners stating that the withholding tax had not been paid in foreign currency and therefore no payments had been made. It was also suggested that the Reserve Bank was not authorized to accept payments on behalf of ZIMRA and that ZIMRA's foreign currency (FCA) account was held at CBZ Bank and not at the Reserve Bank.

It is averred by the applicant that the alleged overpayments took place during January 2007 and September 2008 and that during that period there was no obligation to pay withholding tax in foreign currency. The obligation was only introduced by s 4A(1) (f) of the Finance Act which was brought into force through s 3 of the Finance Act of 2009, which was promulgated sometime in 2009. The applicant therefore contends that in as much as the respondent was not entitled to receive foreign currency for withholding tax, the amount which was received by the Reserve Bank was converted by the bank to Zimbabwe dollars and posted to the ZIMRA account. The applicant contends that the respondent is obliged to recognize the payments and give full credit for them as it derived benefit from the funds between January 2007 and September 2009. An amount of $178 961-07 was set off and $37 208-07 was paid to ZIMRA as cash. However, despite receiving payments mentioned above, the respondent has threatened to institute recovery proceedings against the applicant. If this action were allowed to be executed the applicant would be crippled in the conduct of its business activity. The respondent has no basis to fear that the applicant would be unable to pay any amount that is legally due to it as the applicant has considerable assets.

The respondent is opposed to the granting of the relief being sought. The opposing affidavit has been deposed by Grasia Garuso who is an Investigating Officer within ZIMRA. A

point in *limine* has been raised in the affidavit to the effect that the matter is not urgent. The deponent avers that indeed the respondent has made demand of certain amounts due to ZIMRA but is of the opinion that even if the respondent were to garnishee the amount from the applicant's accounts this would not result in the applicant suffering irreparable harm.

As to the merits the respondent avers as follows. It is admitted that the respondent is demanding payment of US $215 878-54 which amount represents withholding tax for the tax years 2009 and 2010. The respondent emphasizes that these amounts are due and payable. The respondent denies however that there was overpayment and denies further that the audit revealed such overpayment for withholding tax in respect of the period January 2007 to October 2008. It is the position of the respondent that the issue of overpayment was raised by an employee of the applicant after the audit was finalized. The respondent states further that it was then agreed that if there was an overpayment, then such overpayment could be offset against payments in future if the original payment was paid to the respondent in foreign currency. The applicant had assured the respondent that it had paid in foreign currency but the respondent had only received Zimbabwe dollars.

The respondent admitted that it had received a letter from the applicant but denies that there was an overpayment of US$215 878-54 for the period January 2007 to October 2008. The respondent confirmed that all payments made by the applicant for the period in question were in Zimbabwe dollars into a Zimbabwe dollar account. The respondent's view is that a payment to the Reserve Bank in foreign currency was not payment to ZIMRA for withholding tax. The respondent further states that the applicant had been advised by letter dated 25 January 2010 that the respondent had verified that there had been no overpayment towards withholding tax in United States dollars for the period January 2007 to October 2008. A further letter dated 29 September 2010 addressed to the applicant's legal practitioners had confirmed that there was no overpayment and that the applicant was being put on terms to pay the amounts due by it. The respondent contends that prior to the amendment of s 4 of the Finance Act [*Cap 23*:*04*] and the introduction of s 4A which came into force on 23 April 2009 there was no obligation on a taxpayer to pay withholding tax in foreign currency and that any payment by the applicant to the Reserve Bank of any amount prior to the promulgation of the new section was not in terms of a legal obligation. The respondent accepts that the applicant has paid withholding tax for January 2007 to October 2008 but contends that the payment was

in Zimbabwe dollars and not foreign currency. What the respondent denies is that the applicant made an overpayment of withholding taxes in foreign currency.

The applicant has annexed to its papers a letter from the Reserve Bank of Zimbabwe dated 9 September 2009 confirming that the applicant had on certain specified dates made payments to the Reserve Bank and that the amounts paid on the said dates had been credited into the Federal Reserve Bank account of the Reserve Bank of Zimbabwe held in New York. The letter in the final paragraph states that the funds received by the Reserve Bank were converted to Zimbabwe dollars and posted to account number 20-11109 in accordance with instructions on the credit confirmation. The respondent's position is that the applicant owes withholding tax for January 2009 to 2010 and although the applicant admits that withholding tax for the period is due, it, the applicant, has not proved that it has paid such withholding tax. Instead the applicant is alleging a set-off.

The respondent disputes that he has appointed anyone to recover monies due to it by the applicant. The respondent further states that the applicant was advised on 25 January to pay the withholding tax and that this constitutes a reasonable period. Some of the tax was due since 2009 and nothing has been paid. The respondent prays for the dismissal of the application and a corresponding award for costs on the higher scale.

In argument Mr *Morris* contended that in so far as urgency was concerned there was a sword of Damocles hanging over the applicant, given the peremptory powers that the respondent enjoys under the Act. These powers include the power to appoint a bank as agent for purposes of collecting money on behalf of ZIMRA. The existence of a dispute between the applicant and the respondent pointed to a strong possibility that the respondent would exercise one of his peremptory powers under the Act.

As regards the issue of urgency, it was contended on behalf of the respondent that this matter has been conducted by the parties in a professional manner through the exchange of correspondence since March 2010.

The first letter on record from the office of the Commissioner General indicating that withholding taxes for 2009 were outstanding is actually dated 25 January 2010. This was responded to by the applicant's legal practitioners on 4 March 2010. The record reflects that a further letter was written by the legal practitioners, on 24 August 2010 which the Commissioner General responded to on 29 September 2010. It is in penultimate paragraph of

this letter where the applicant is put on terms to pay the outstanding taxes by 5 October 2010 failing which recovery measures would be instituted against the applicant. This application was filed on 19 October 2010 and by that date there had been no recovery measures put in place by the Commissioner General.

In order to decide whether or not this matter can be considered urgent, it is necessary to scrutinize the relief being sought. The applicant seeks a provisional order which is framed as follows:

TERMS OF FINAL ORDER SOUGHT

That the respondent show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the respondent be and is hereby prohibited from appointing agents in terms of s 48 of [*Cap 23*:*12*] until such time as the applicant's indebtedness, if any, to the respondent has been determined in accordance with the procedure relating to the Declaratory Order to be instituted by the applicant against the respondent.
2. The cost of this application will be borne by the respondent on the scale of costs as recommended by the Law Society as between legal practitioner and own client

TEMPORARY RELIEF GRANTED

The applicant is granted the following relief:

1. That the respondent be and is hereby prohibited from appointing agents in terms of s 48 of [*Cap 23*:*12*] pending the return date of this order
2. A copy of this application will be served on the respondent by the applicant's legal practitioners

The applicant has not denied that the withholding tax is due and owing. As far back as July 2009 the applicant had concluded that it had overpaid the respondent by US$215 878-54. It sought to engage the respondent in dialogue to have the issue resolved. By January 2010, the respondent had put his position clearly to the applicant that there had been no overpayment. Given the attitude of the respondent, in the event that the applicant felt strongly, as it seems to do, that there had been overpayment, it would have been prudent for the applicant to then have instituted proceedings for the dispute to be settled. It has not done so.

The respondent has the power under s 58 of the Income Tax Act [*Cap 23*:*06*] to appoint an agent for the collection of tax due by a person. The applicant accepts that this power has been bestowed on the respondent by the legislature to enable the respondent to comply with his obligations under the Act.

It cannot be argued by the applicant that the exercise by the respondent of his powers under the empowering legislation is improper where monies are admitted to be due and owing. It seems to me that this court can only be enjoined by a litigant to bar the respondent from exercising those powers on the basis that the respondent is acting improperly or that there exists some irregularity in the manner in which the powers are being exercised, or that the sums sought to be collected from the exercise are not in fact owed to the *fiscus.* In *casu,* there is no allegation that the respondent is improperly seeking to appoint an agent. There is also no suggestion that withholding tax is not due. What the applicant seeks to rely on is a payment made to a party, not then appointed as agent for the respondent, and which payment did not sound in United States dollars when it was apparently credited to an account of ZIMRA. The United States dollar payment remained in the account of the Reserve Bank of Zimbabwe.

The applicant's case is premised on a set-off which is disputed by the respondent. In terms of s 58 of the Act, the respondent is empowered to appoint any person, including a bank as his agent for the purpose of collecting withholding tax. The payment by the applicant in 2007 to 2008 of the foreign currency now the reason of this dispute was made to the Reserve Bank of Zimbabwe which only made payment to the respondent in local currency. The respondent did not have a foreign currency account with the Reserve Bank. In seeking to deny receipt of the monies in question during the relevant period the respondent has stated that the Reserve Bank was not its agent in terms of the Act for the due collection of tax. The applicant does not dispute this. Rather, the position taken by the applicant is that as both the Reserve Bank and ZIMRA fall under the umbrella of the *fiscus* and that the payment made by the applicant should be recognized as having been received by the State. The argument advanced by the applicant is that as long as it can be shown that the government benefited from the payment, then the set-off should be implemented in favour of the applicant.

In 2007 the tax due from the applicant was in local currency, this much is admitted. The applicant however chose, in a transaction agreed between itself and the Reserve Bank to pay an amount to the latter in foreign currency and the ZIMRA was then credited with an

amount in local currency. The applicant has not taken this court into its confidence as to the circumstances under which the payment to the Reserve Bank was made. It cannot however state that it was paying its tax under the arrangement with RBZ.

This state of affairs between the applicant and the respondent has been existing for the better part of 2009 and 2010, and one would assume that the applicant, in order to seek a resolution to the impasse would have approached the court for a *declaratur*. Even when it became obvious that the respondent might act to recover the disputed tax, the applicant has not brought the dispute to court for clarity on whether or not the monies it paid to RBZ can be set-off against what it now owes the respondent. In my view the applicant has to establish that in the circumstances of this case, it would be entitled to claim a right of set-off against the respondent.

Set-off is a process whereby debts which are mutually owed between the same parties are extinguished. In order that one debt be set-off for another, it is a prerequisite that both debts be liquid. In addition, the debts must clearly be between the same parties. Mr Chinake referred me to *CoT v First Merchant Bank* 1997 (1) ZLR 350 (S) in which the Supreme Court made it clear that where debts are due by government departments, a debt owed by one department cannot be off-set against one owed by a different department. At p353C-F GUBBAY CJ stated:

"At common law, set-off or compensatio 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 is 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."

In *casu*, the entities in respect of which set-off is being claimed are not *strictu sensu* government departments. They exist in terms of enabling statutes and are completely separate personae in their own right. They each have boards of directors which boards are responsible for the management of each. In addition set-off is being claimed in respect of taxes owed to the *fiscus*. In my view the exceptions which operate against the right of set-off as they relate to debts owed and owing by government departments are pertinent to this dispute. The applicant is clearly not in a position to legally claim set-off in the circumstances and it is therefore my view that the applicant has not established a prima facie right for the grant of an interim interdict.

It was contended that if the relief sought was not granted the applicant would suffer loss. What that loss constitutes has not been stated. Indeed, it would be contradictory for the applicant to seek to establish irreparable harm. In para 17 of the founding affidavit, it is stated that the applicant is a company with considerable assets and that the respondent would not be at risk in failing to recover any amount that is found to be properly due. How then can a company with considerable assets be at risk if its account were to be deprived of the sums sought by the respondent as withholding tax? The least the applicant could have done was to present to the court a financial statement that would confirm its allegation that the exercise by the respondent of his power under the Act concerned would leave the applicant with a cash deficit. This it has not done. Indeed, it was submitted on its behalf that the Commissioner would not know how the applicant's business is run and how a shortfall of US$250 000-00 would affect that business. The applicant would expect this court to accept its mere say so that an appropriation by the respondent of an amount of US$250 000-00 which is admittedly owing would leave it impecunious. The court does not know how the applicant runs its business and would therefore require evidence of the effect of the deprivation of these funds, especially when one takes into account the fact that these sums are admittedly owed to the *fiscus.*

The applicant has said that it will suffer damage that cannot be compensated in any other way than the grant of an interdict. It does not specify what specific harm it will suffer

and in the circumstances I am unable to find that any action on the part of the respondent would cause harm to the applicant.

As for the balance of equities, in my view this favours ZIMRA which is owed money by the applicant and which money, in terms of the Act the respondent is obliged to collect. I am unable to agree with the submission that the State benefited from the foreign currency paid to the RBZ in 2007 because the circumstances surrounding such payment have not been explained by the applicant.

In the premises it is my view that the application is devoid of merit and it is hereby dismissed with costs.

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