

TIME SECURITY (PRIVATE) LIMITED
(Under liquidation, represented herein by
CECIL MADONDO the appointed liquidator)
versus
THE COMMISSIONER OF TAXES
(Otherwise known as ZIMBABWE REVENUE AUTHORITY)
and
GOVERNMENT OF THE UNITED KINGDOM
and
LOBELS (PRIVATE) LIMITED
and
CAIRNS HOLDINGS LIMITED
and
ME CHARHONS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 17 May 2018 and 29 May 2018

Opposed Application

T. Mpofu, for the applicant
T Magwaliba, for the 1st respondent
No appearance for the 2nd -5th respondents

MUZENDA J: This is an application for a declaratory relief where the applicant seeks the following:

“IT IS DECLARED THAT:

1. First respondent is required by law to lodge and prove its claim against applicant just like any other creditor and to that end to make its claims through the process set out in terms of both the Companies Act and the Insolvency Act.
2. Section 58 (1) of the Income Tax Act does not place first respondent in any privileged position in respect of payments which are to be made post the grant of an order for liquidation.

IT IS CONSEQUENTLY ORDERED THAT

3. The moneys due to the applicant from second to fourth respondents shall be paid to the liquidator of the applicant who shall deal with them in terms of the law.
4. First respondent shall bear the costs of this application.”

The second to fifth respondents do not oppose the application, the real battle is purely between the applicant and the Zimbabwe Revenue Authority, the first respondent.

Right from onset I want to greatly appreciate both senior counsel representing the applicant and the first respondent for submitting well researched heads of arguments for it is usually said that the penultimate quality of a judgment depends upon the nature and standard of lawyers who argued the matter.

The following aspects are not in dispute. The first respondent (the British Embassy) holds US\$28 580-00 which was due to Time Security (Private) Limited before liquidation. The third respondent, Lobels (Private) Limited, owed Time Security (Private) Limited USD 29 024-50, fifth respondent, ME Charhons (Private) Limited, USD 55 675-00 and the fourth respondent, Cairns (Private) Limited and Time Security USD44121-95. The total coming to USD 157 401-45. Time Security (Private) Limited does not also dispute that in the period between 2009 to 2012, it owed first respondent USD150 873 in respect of Pay As You Earn and USD599 902-75 in respect of Value Added Tax.

On 18 June 2012, the British Embassy was declared an agent in terms of s 58 of the Income Tax Act [*Chapter 23:06*] and s 48 of the Valued Added Tax Act [*Chapter 23:12*], sometime in February 2012 the same declaration was made for ME Charhons, Cairns and Lobels, this appointment was for the purposes of the agents to collect what was due to the first respondent from the applicant before it was liquidated. On 1 October 2012 Mr Cecil Madondo of Tudor House Consultants (Private) Limited was appointed the liquidator of the insolvent Time Security (Pvt) Limited company.

It is also not in dispute that the applicant was placed under liquidation in July 2012 before the appointed agents had collected the amounts. The liquidator had since held a meeting with all other creditors but could not get co-operation from the first respondent and the first respondent's attitude to the applicant is that it must get all the funds from the agents. In response the liquidator is worried that if all the money from the agents, second to fifth respondents is remitted to the first respondent, then according to the applicant nothing will remain payable to the creditors. In other words the applicant states that the first respondent is just like any other creditors and must join the *concursum creditorium* (coming together of creditors) where the interests of creditors as a group enjoy preference over the interests of individual creditors.

(See the matter of *Richter N.O v Riverside Estates (Pty) Limited* 1946 209 @ 223).

On the other hand the first respondent differs with the applicant; first respondent argues that it occupied a privileged position which entitles it even to require foreign state to collect revenues done to it. The tax obligation arose before the applicant went into liquidation; the appointment of the second to fifth respondents in terms of s 58 of the Income Tax Act s 48 of the Value Added Tax Act was done prior to the liquidation of the applicant. According to the respondent the process of the liquidation does not in any way impinge upon its right to have the funds held on behalf of the applicant remitted to it, in terms of the agency appointment. The first respondent avers that there is nothing wrong or unlawful about appointing the second respondent (the Embassy) as an agent for the purposes of enforcing the revenue laws of Zimbabwe.

There are two questions pertinent for determination in this application.

- “(a) whether the declaration of the British Embassy as an agent by first respondent is unlawful for the purposes of collecting revenue?
- (b) whether first respondent must join the *concursum creditorum*?

It is important to look at the provisions of the statutes applicable to this enquiry.

“Value Added Tax Act [Chapter 23:12]

Section 48 Power to appoint agent

(1) For the purposes of subsection (2) –

“person” includes –

- (a) a bank, building society or savings bank, and
- (b) a partnership; and
- (c) any officer in the Public service and
- (d) any prescribed person in relation to a prescribed service.

(2) The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person and the person so declared an agent shall be the agent of such other person for the purposes of this Act, and, notwithstanding anything to the contrary contained in any other law, may be required to pay any amount of tax, additional tax penalty, or interest due from any money, in any current account, deposit, fixed deposit account, or savings account or any other moneys. –

- (a) including pensions, salary, wages or any other remuneration which may be held by him for, or due by him to, the person whose agent he has been declared to bear.
- (b) that the person so declared an agent receives as an intermediary from the other person.”

Section 58 of the Income Tax Act, [Chapter 23:06] provides:

- “1. Commissioner may, if he thinks it necessary declare any person to be the agent of any other person, and the person so declared an agent of such other person for the purposes of this Act notwithstanding anything contrary contained in any other law may be required to pay any tax due from any moneys, in any current account, deposit account, or savings account, or from any other money including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent has been declared to be.” (my emphasis)

In s 2 of the Income Tax Act, a “person” includes a company, body of persons, corporate or un-incorporate (not being a partnership), a local or like authority, deceased or insolvent estate and in relation to income the subject of a trust to which no beneficiary is entitled, the trust.

Mr *T Mpofu* vehemently submitted that the word “person” defined in both statutes should not include an embassy”, because the latter is not a legal persona. An Embassy cannot sue or be sued in a court of law, he cited the matter of *CT Bolts (Private) Ltd v Workers Committee* SC 16-12. He further urged the court to critically look at the word “includes” used in the statutes and cited the matter of *Jones v Commissioner of Inland Revenue 24 SATC* 7 at p 10 where the court stated the following:

“but the word used in defining “company” was not “means” but “includes” Now “includes” as a general rule was not a term of exhaustive definition, sometimes it was so employed out as a general rule, it was a term of extension, and when s 100 of Act 41 of 1917 was considered it would be found that the legislature had been particularly careful when it wished to give a term of exhaustive definition, to use the word “means” but when it wished to refer to extension or enlargement to use the word “includes” and it carried out the system not only in the English but also in the Dutch version where “Omvat” was used for “includes” and “*betekent*” when the English had “means”.

He also cited the matter of *Amberley Estates (Pvt) Ltd v Connler of Customs And Excise* 1986 (3) ZLR 269 (SC) at p 270 C where it was held per GUBBAY JA:

“that the use of the word “includes” in the definition of the word manufacture shows an intention to extend the normal meaning of the word to embrace the specific activities mentioned thereafter, namely”.

Mr *T Mpofu* went on to cite *R v Debele* 1956 (4) SA 570 where the appellate Division had this to say:

“It seems to be clear that “includes” in the definition of “*peace offcer*” is equivalent to “means”.

Mr *Mpofu* also referred this court to the matters of *Customs & Excise Commissioners v Savoy Hotel* (1966) 2 All ER 299.

Dilworth v Stamps Commissioners (1899) AC 99 (PC) *Torfis Estate v Minister of Finance* 1948 (2) SA 283 at 290. *Reuck v Director of Public Prosecutions Witwatersand Local Division and Ors* 2004 (1) SA 406 (CC) and *S v Kombayi* 1983 (1) ZLR 44 @ p47 where FIELDSEND CJ noted that:

“Nevertheless in view of the equivocal nature of the word, it is probably safer to rely on what may be said to be its ordinary meaning but to examine the use of it in relation to the particular context in which it appears.”

Mr *T Mpofu* urges this court to interpret the word “includes” in a restrictive way and submitted that the institutions listed under s 58, clearly excluding an embassy/mission, are all legal personae. In this regard he cited the case of *Matanzima v Minister of Welfare and Pensions and Ors* 1990 (4) SA I (TKA) where it was stated:

“The provisions extended to any officer in the Public Service, banks, Building Societies and Savings Banks which hold funds on behalf of tax payers, the funds out of which tax and interest may be recovered therefore includes bank accounts, deposit accounts, fixed deposits and savings accounts.”

Mr *T Magwaliba*, for the first respondent in reply on that point of the definition of “person” for the purposes of the legislation submitted that the word “person” can in deed include a diplomatic mission. He argued that the paramount focus on the word “person” is for one to conclude that that person or entity has to hold money for some other person owing Zimbabwe Revenue Authority. Diplomatic mission employs staff and need services and the embassy pays pay as you earn and services in accordance with revenue laws of the host country, he submitted. Hence Mr *Magwaliba*, contended on behalf of the second respondent, there is nothing out of the ordinary in first respondent appointing the embassy. The legislature’s intention was that the “person” would refer to anyone who held money for other person owing Zimra; to say otherwise is clear attempt to distort the true intention of the legislature.

Mr *Mpofu*’s submissions are quite attractive but I am not persuaded. I am more persuaded by the interpretation of the statutory provisions of both ss 48 of the VAT Act and s 58 of the Income Tax Act, by the first respondent. Sections 48 of the Value Added Tax Act and s 58 of the Income Tax Act use the word “declare”, that the Commissioner using his discretion and where it is necessary “declare” any person to be an agent. The word “declare” means “affirm, announce, decree, express belief or state.” In other words the commissioner mandates, call upon or promulgate or signals such a person to collect money in that person’s custody or control and pay to the revenue authority. The use of the word “includes” in my

view is not restrictive but leaves room for the interpreter of the subject legislation under consideration to look and determine whether the person who is sought to be included, in the class of persons can be included. I am not convinced by the applicant's contention that the word "person" in the statutes under consideration excludes the embassy if it was the intention of the legislation to exclude such then the statute must so declare in unclear and unequivocal language.

In the case of *COT v First Merchant Bank Ltd* 1997 (1) ZLR 350 (s) at p 353 GUBBAY JA (as he then was) stated:

"It is a seminal presumption in Statutory construction indeed, the most fundamental of all presumptions often referred to as "a sound rule" – that the legislature does not intend to alter or modify the existing law more than necessary, Thus any intention to do so must be declared un clear and unequivocal language, or the inference must be such that the inevitable conclusion is that the legislature did have such an intention."

On p 353 H to 354 E the learned Judge of Appeal went on:

"The interpretation of a provision of a statute should always be in contextual harm any with both the letter and spirit of the whole body of the law statutory and common. Regard must be had therefore not only to the pervasive presumption referred to but to the Act as a whole to its preamble general framework and antecedents for it is very rare indeed that the true meaning of a particular provision can be ascertained simply by looking at the language used and nothing else....."

'it is the duty of the court to read the section of the Act which requires interpretation sensibly. i.e with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contractual scene, which involves consideration of the language of the rest of the statute as well as the matter of the statute, its apparent scope and purpose and, within limits, its background.'

In the ultimate result the court strikes a proper balance between these various considerations and thereby ascertains the will of the legislature and state the legal effect with reference to the facts of the particular case which is before it."

Sections 48 of the VAT Act and s 58 of the Income Tax Act were promulgated to maximise collection of revenue for the fiscus as well as the recovery of moneys due to the State and ensure the interrupted flow of tax revenue to the Treasury in the interests of good governance. The legislature would not have intended to exclude diplomatic missions who employ the locals and also utilise services from the host country. In *Chihara And Anor v Mapfumo And Anor* CC 06/15 it was held that some interpretations had the possibility of introducing absurdity and possible chaos" thus if one interprets the word "person". So for one

to exclude an entity declared by first respondent as an agent for the purposes of collecting revenue, such can lead to chaotic collection of revenue by the first respondent.

In *Packers International (Private) Limited v Zimbabwe Revenue Authority* HH 328/14, the court held:

“My reading of section 48 of the VAT Act is that the commissioner of Taxes has a discretion to declare any person to be respondent’s agent, and once such a declaration is made the proposed agent has no choice but to pay any amount of money held on behalf of the applicant to the respondent, as long as it is required for purposes of fulfilling tax obligations, and must even pay to respondent money that will be held in an account of wages.

This obligation on the part of the appointed agent is not subject to any other law except section 48 overrides anything that is contrary to it which may be set out in any other law.”

The same interpretation is given to s 58 of the Income Tax Act.

The first respondent declared second respondent an agent in 2012 and the embassy accepted the appointment, I do not see any illegality in that appointment. The applicant argued that the court should envisage a situation where the embassy would not collect and remit tax to the first respondent and in such a situation, can the embassy be subject of criminal prosecution? It is the view of this court that such comparison is not relevant at this stage. The second respondent is holding money on behalf of the applicant and in its capacity as the first respondent’s agent it must remit the money to the first respondent. I therefore conclude that the second respondent was legally declared an agent of first respondent in terms of ss 48 of the VAT and s 58 of the Income Tax Acts and second respondent has the statutory obligation to pay that money to the revenue authority.

The second issue to determine is whether the first respondent should join the other creditors to the insolvent estate.

Mr T. *Mpofu* argued on this aspect that whether the designation of second to fifth respondents was made before liquidation is immaterial. What is of importance he argues is the position post the designation. He went on to cite the South African case of *Roering And Ors N.O v Nedbank Ltd* 2013 (3) SA 160 (GS) N 2013 (a) SA p 160 in that case the applicants had accrued a right of cancellation before the liquidation of a company. They sought to enforce that right post liquidation. The court rejected their argument and pointed out that they ought to join the line of creditors. This court was urged to have a similar approach to the case at hand. Mr *Mpofu* further submitted that the first respondent must also approach the queue of the other creditors and prove its claim and made reference to ss 23, 55, 65 and 104 of the Insolvency Act, to support his arguments.

Mr T. *Magwaliba* submitted that the appointment of second to fifth respondents was done before liquidation and the first respondent had a right to “leap frog” claims of other creditors in a corporate liquidation and secure payment of a tax debt ahead of all other creditors. He cited the decision of the Federal Court in the matter of *Commissioner of Taxation v Buton Holdings Pty Limited* (in liquidation) 2008 FUAPC 184.

In the matter of *Shurrie v Sheriff of the Supreme Court, Hynberg* 1995 (4) SA 709 the court held that the purchaser was entitled to such delivery where the hammer had fallen on the sale of property at an auction after the application had been lodged but before the liquidation order had been granted.

As already pointed out in this judgment the designation of second to fifth respondents as agents was done well before liquidation, what was left to the second to fifth respondents was the remittance or payment of the money to the revenue authority. The wording of the two ss 48 of Vat and s 58 of the Income Tax Act and more particularly the following words:

“and notwithstanding anything to the contrary contained in any other law may be required to pay any amount of tax additional tax, penalty, or interest due, from any moneys”.

overrides any other law in their application, thus the liquidation cannot override this provision especially when it is considered that the designation of agents was done prior to the liquidation of the applicant and also in the fundamental objective of the legislation to ensure uninterrupted flow of tax revenue to the Treasury in the interests of good governance.

(See *COT v First Merchant Bank Ltd supra* at p 353E).

The designation of agents in terms of s 48 and s 58 meant that the amounts held by the second to fifth respondents never became assets in the insolvent estate and there is no basis upon which the liquidation (the applicant could claim it from the second to fifth respondents or to justify the first respondents to join other creditors.

(See the matter of *Warricker N.O And Anor v Seneka ZAGPHC* 134 2006).

Designation therefore meant that from the date of designation they belonged to the principal, the first respondent hence first respondent is not like any other creditor wanting to have what is due to her verified and approved. The first respondent is not claiming preferential treatment but in this court’s view the first respondent is rightfully claiming what is due to it in terms of the law.

Disposition

The application is dismissed with costs.

Henning Lock, applicant's legal practitioners