PROSPEROUS DAYS INVESTMENTS
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 5 November, 2020 & 27 January, 2021

Opposed application

T. Tshuma for the Applicant
S. Bhebhe core appearing with *H Muromba* for the Respondent

MANGOTA J: The Biblical saying which reads "Render to Caesar what belongs to Caesar and to God what belongs to God" aptly captures the circumstances of the parties to this application. The applicant, a legal entity which is into the manufacturing and distribution of performance mining chemicals, mining plant and equipment in the African mining market is owed an accumulated Value Added Tax ("VAT") refund of ZWL 502 289.23 by the respondent which is the tax collector for Government. It, in turn, owes the respondent a total VAT liability of USD 49157.62. The accumulated tax refund and the tax liability are respectively referred to as input tax and output tax. The total sum of output tax of USD 49 157.62 is split into the following two sums namely, USD 22 581. 39 which is output tax for May 2019 and USD 26576.23 which is output tax for June, 2019.

On 26 July, 2019 the applicant wrote to the respondent. It requested it (the respondent) to set off its output tax of USD 49 157.62 against its input tax refund of ZWL 502 289.65. Its request did not meet with favour from the respondent which turned down the same.

In turning down the request, the respondent maintained the view that the accumulated tax refund which is denominated in the local currency could not be off set against the applicant's foreign currency output tax liability of USD 49 157. 62. It insisted that relevant provisions of the Value Added Tax Act [Chapter 23.12] did not allow it to move along the lines which the applicant was suggesting.

The decision of the respondent did not go down well with the applicant. It filed this application for a declaratur. It moved me to declare that the respondent's refusal to offset

output tax in foreign currency with input tax in Zimbabwe dollars is unlawful and *ultra vires* the value Added Tax Act.

The applicant has two hurdles which it must traverse for it to succeed. The first is that its application should be *in sync* with s 14 of the High Court Act in terms of which it was filed. The second is that its interpretation of provisions of the Value Added Tax Act which are relevant to its application must be correct. Where it construes the applicable law correctly, its application will succeed and where it misconstrues it, the application will fail.

The application, it is noted, is filed under s 14 of the High Court Act. The section deals with declaratory orders. It confers a discretion upon me to inquire into and determine any existing, future or contingent right or obligation. It exhorts me to exercise my discretion judiciously at the instance of any interested person.

A condition precedent to the granting of a declaratur was aptly enunciated in *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (5) at 338. The condition is that the applicant in a declaratur must be an interested person. He must have a direct and substantial interest in the subject-matter of the suit, which could be prejudicially affected by the judgment of the court. The interest must refer to an existing, future or contingent right or obligation.

Placing the *Munn v ZBC dictum* into the context of this application, therefore, the applicant, it is evident, has a clear and unqualified right to its accumulated tax refund of ZWL 502 289. 23. That stated matter is neither abstract, academic nor hypothetical. It is real.

It follows, from the foregoing, that if the application was premised on the applicant’s right to its tax refund, it would most certainly have received my nod with little, if any, difficulty. The declaration would have been a matter of course given that the parties are *ad idem* on the applicant’s entitlement to the tax refund.

The case of the applicant is not, however, anchored on the right to its tax refund. It is premised on its claim to a set off. It insists that there should be a set-off of its local currency tax refund against its foreign currency tax liability to the respondent.

The applicant does not state that it has a right to the set off which forms the foundation of its application. It does not allege, let alone prove, the existence of the right of set off. It does not state, in so many words, that it has the right. It proceeds by way of deductive, as opposed to inductive, reasoning. It places reliance on the letter, Annexure PD4, which its tax consultants addressed to the respondent on 16 October, 2019.

The respondent does not mince its words. Its states, in an emphatic manner, that the applicant does not have the right which it claims in the application. The right of set off is not open to the applicant, according to it. The right, it insists, is open to it and not to the applicant. It moves me to dismiss the application on the basis that the most essential element of a declaratur – ie, the right to a set off- is not available to the applicant.

The applicant, it is noted, does not challenge the assertion of the respondent. It does not, for instance, state that it has the right to a set off. It, in fact, circumvents real issues which the respondent raises in its notice of opposition. It does not refer to those issues at all in its answering affidavit.

It is trite that what is not denied in affidavits is taken as having been admitted: *Fawcett Security Operations v Director of Customs of Excise*, 1993 (2) ZLR121 (S), DD. *Transport (Pvt) Ltd v Abbot,* 1988 (2) ZLR 92.

The applicant's insistence on the allegation that the respondent misconstrued relevant provisions of the Value Added Tax Act does not cure the defect which its application is suffering from. The misconstruction, or otherwise, of the Value Added Tax Act by the respondent does not confer any right of set off upon it. The right, it is trite, must appear *ex facie* the pleadings of the applicant. It is not sustained by argument as the applicant is doing *in casu.*

On the strength of the fact that the applicant does not have any right to the remedy of a set off which it is moving me to consider herein, its application cannot stand. It is *devoid* of merit. Its consideration falls into the realms of conjecture.

The *Munn v ZBC* case which I referred to in the foregoing part of this judgment does not allow me, in the exercise of my discretion, to entertain matters which are of an abstract, academic or hypothetical nature in an application for a declaratur. That case and others which I have not cited herein encourage me to deal with an existing, future or contingent right or obligation. They do not permit me to consider an application for a declaratur of a non-existent right as is the case with the current application.

So much for the first hurdle which the applicant has failed to cross. The second hurdle is more pronounced both in form and in substance than the first one. It centres on the construction which must be placed on provisions of the Value Added Tax Act which are relevant to this application. These, in the main, comprise s 15 (3) and s 38 (4) of the Value Added Tax Act, [Chapter 23:12] ["the Act"].

Before I delve into the meaning and import of the mentioned sections, however, it is pertinent for me to discuss, in brief, the law which relates to principles of interpretation of statutes. The cardinal rule of the law is that words which appear in a statute, or in any document, should be given their ordinary grammatical meaning. They should bear the meaning by which they are popularly known. They take the meaning in terms of which they are understood to mean in everyday life. The ordinary meaning of the words should not, in other words, be departed from except where the same results in some inconsistency or absurdity which renders the statute or document, read as a whole, meaningless: *Zimbabwe Revenue Authority and another v Murowa Diamonds (Pvt) Ltd*, 2009 (2) ZLR 213 (S) 217G; *Registrar General of Elections v Tsvangirai*, 2002 (1) ZLR 204 (S), 213 E-H.

Section 15 of the Act requires no interpretation at all. Its text is clear and straight forward. It provides a formula for calculating tax. It does so in subsection (3) of the same wherein it provides for the deduction of input tax from output tax.

The applicant hinges its application on the above section. Its argument, which is well captured in the respondent's Heads, is that, since s 15 of the Act provides for the deduction of input tax from output tax in the calculation of tax without discrimination on the currency used, the respondent should not refuse to set off United States dollars output tax against Zimbabwe dollars input tax. It insists that where, as *in casu*, there is input tax in Zimbabwe dollars and output tax in United States dollars, the deduction should still be done in terms of s 15 of the Act.

The challenges which the applicant's approach presents onto the issue at hand are not only real. They are also formidable. The respondent enumerated them in a clear and unambiguous manner. It stated, correctly in my view ,that:

(i) s 15 does not state what would happen where, as *in casu*, the input tax and the output tax are in different currencies;

(ii) the Act does provide for conversion of one currency to the other prior to the proposed deduction - and

(iii) the Act does not state the rate which should be used in the conversion exercise, if such is to be embarked upon.

The applicant's syllogism does not hold. It is not suggesting that the above-observed gaps which exist in the law upon which its application is premised do not exist. It cannot persuade me to gloss over the gaps which the respondent pointed out for its benefit as well as

mine. It is not requesting me to read into the relevant law which is clear and undiluted what is not part of it.

The applicant and the respondent are *ad idem* in their interpretation of s 38(4) of the Act. They both agree that the provision is not only mandatory but that it does not allow them to implement it in a manner which is different from the clear intention of the legislature.

The meaning, import and implications of s 38(4) should be appreciated by the applicant and the respondent. I recite those hereunder for purposes of bringing out to the fore the legislature's intention. It reads:

> "(4) …. where a registered operator –
> (a) receives payment of any amount of tax in foreign currency in respect of the supply of goods or services, that operator <u>shall pay that amount</u> to the commissioner <u>in foreign currency</u>;
> (b) imports or is deemed in terms of section 12(1) to have imported goods into Zimbabwe, the operator <u>shall pay any tax</u> thereon to the commissioner in foreign currency." (emphasis added).

It is clear from a reading of the above-cited paragraphs of subs (4) of s 38 of the Act that a registered operator, such as the applicant, who receives payment of tax in foreign currency for whatever he sells should pay that tax in no other currency except in the currency by means of which he was paid. Paragraph (b) of the subsection brings out the intention of the legislature more clearly than does paragraph (a) of the same. I say so for the reasons which I state hereunder.

A registered operator who imports goods into Zimbabwe imports such goods from outside Zimbabwe. He requires foreign currency for him to import the goods which he requires for his business/operations. Because he uses foreign currency to import the goods into Zimbabwe, the law obliges him to pay any tax for the imported goods in foreign currency.

It follows from the above – analysed matters that, where any output value added tax is received in foreign currency, the same should be paid in foreign currency. The law which relates to the subject matter of this application is clear and unambiguous. It requires no interpretation at all. Its ordinary grammatical meaning suffices.

It is for the mentioned reason, if for no other, that the court had to, and did actually, re-state that issue it in *T(Pvt) Ltd* v *Zimra* wherein it remarked that:

> "Section 38(4) prescribes how VAT for income denominated in foreign currency is to be paid. It does not grant the respondent or the Reserve Bank of Zimbabwe or the Association of

> Zimbabwe Travel Agents or the court or anyone else for that matter the power to order payment for value added tax in any currency other than in foreign currency."

Paragraphs 11 and 12 of the founding affidavit bring the case of the applicant to the fore. They resonate well with para (b) of subs (4) of s 38 of the Act. They appear at p 11 of the record. They read:

> "11. All of the applicant's products <u>are acquired from markets outside the country</u>, including from China, Belgium, France, South Africa and Zambia.
>
> 12. As a result of limited availability of foreign currency on the interbank market the applicant has been granted authorisation by the Reserve Bank <u>to charge for its goods in foreign currency."</u> (emphasis added)

It is evident that the applicant's situation is completely *in sync* with s 38(4)(a) and (b)of the Act. It imports raw materials for its operations from outside Zimbabwe. It requires foreign currency for the importation of the raw materials. It sells its products in foreign currency. It, in fact, has the authority of the Reserve Bank of Zimbabwe to sell its goods in that currency.

The applicant is a registered vat operator. It sells its goods in foreign currency. It cannot, therefore, pay its tax liability to the respondent in the local currency. Section 38(4) of the Act prohibits it from doing so. The section confers no power on any authority including me to violate it as the applicant is persuading me to do.

The applicant cannot talk of its accumulated tax refund of ZWL 502 289.65 which is due to it from the respondent without, at the same time, talking of its accumulated tax liability of USD 49 157.62 which it should pay to the respondent. The two sums of money have their history in s 15 as read with s 38(4) of the Act. Each has a way in which it came about. One sum cannot, therefore, be set off against the other.

Each is a stand-alone sum which must go to the party to whom it is due. The respondent states, in my view correctly, that set off does not apply to tax duty. The case of *Commissioner of Taxes* v *First Merchant Bank Limited* 1997(1) ZLR 350(S) to which it drew my attention fortifies the view which I hold of the matter. The relevant portion of the case reads:

> "… A debt owed by one department of the State cannot be set off against a debt owed to another department. And a set off cannot be raised against taxes due to the fiscus …."

I invited the applicant to profer comments on the above *dictum* during submissions.

The applicant missed the point. It only related to set off of debts which one department of the State owes to the other. It insisted that the stated circumstance was/is the context in which the case was to be understood.

The applicant missed the bigger picture of the case. The bigger picture was that a set off cannot be raised against taxes which are due to the Treasury or to the Ministry of Finance. The court gave two pertinent reasons for prohibiting a set off against taxes which are due to the fiscus. It stated that the first set-off of a debt due to one department of the state by another – was designed to avoid confusion in state accounts. The second, it stressed, was to ensure uninterrupted flow of tax revenue into the Treasury in the interests of good governance. The court left the discretion to the State to decide whether or not set off should apply in any given case.

The position which the court took in *Commissioner of Taxes* v *First Merchant Bank* resonates well with s 44(6) of the Act. It is in the same that the respondent is conferred with the discretion to do a set off. The respondent was, therefore, correct when it asserted, as it did, that it is only it, and not the applicant, which has the discretion to do a set off.

This application provided me with a very good exercise of the mind. It was more academic than it was real. Its aim and object were to critiquing the decision of the respondent especially its correctly designed VAT 7 form.

The respondent states in para 7 of its Heads what should happen to the parties' accumulated sums. It repeats, in my view, the biblical statement which I cited at the introductory part of this judgment. It insists, and I agree, that the applicant should request for its accumulated local currency denominated tax refund to be paid to it and it should pay to it the foreign currency denominated tax liability for May and June, 2019.

Nothing prevents the parties from resolving the issue which the applicant created in the manner which the respondent suggests. That, if anything, is the parties' way forward. It is not resolved by moving me to violate clear provisions of the Act. It is resolved by rendering to Caesar what belongs to Caesar and to God what belongs to God.

The applicant failed to prove his case on a balance of probabilities. The application is, in the result, dismissed with costs.

Gill, Godlonton & Gerrans Legal Practitioners, applicant's legal practitioners

Kantor and Immerman, respondent's legal practitioners