

TRIANGLE LIMITED

And

HIPPO VALLEY ESTATES

Versus

ZIMBABWE REVENUE AUTHORITY

And

ZIMBABWE SUGAR CANE DEVELOPMENT ASSOCIATION

And

ZIMBABWE CANE FARMERS ASSOCIATION

And

MKWASINE SUGARCANE FARMERS TRUST

And

COMMERCIAL SUGARCANE FARMERS ASSOCIATION OF ZIMBABWE

And

HIPPOVALLEY PRODUCTIVE FARMERS ASSOCIATION

And

ZIMBABWE SUGARCANE DEVELOPMENT ASSOCIATION ROYAL TRUST

And

CHIPIWA MPAPA MILL GROUP

And

CHIREZI PRODUCTIVE CANE GROWERS ASSOCIATION

And

FARAI DUMO AUGUSTINE MUSIKAVANHU

And

ROY BHILA

HIGH COURT OF ZIMBABWE

ZISENGWE J

Masvingo, 28 May & 24 June 2020

Opposed Application

Mr E. T Moyo, for the applicants

Mr. Chipangura, for the 1st respondent

Mr W. Muzenda for the 2nd 8th & 10th respondents
Mr C Ndlovu, for the 5th respondent
Mr R Chavi, for the 7th respondent

ZISENGWE J: The parties in this application are embroiled in a bitter dispute over the implications of their failure to specifically include Value added tax (abbreviated herein as “VAT”) matters in agreements for the milling of sugarcane.

The applicants are both companies duly incorporated in terms of the laws of Zimbabwe whose names over the years have become synonymous with sugar and sugarcane production in Zimbabwe. They grow, source and mill sugarcane and market its products. They carry on this agro-based business in and around the Lowveld towns of Triangle and Chiredzi.

The first respondent is The Zimbabwe Revenue Authority (ZIMRA): a statutory body whose chief mandate is to assess, collect, and enforce the payment of all revenues on behalf of the state. It is established in terms of the Revenue Authority Act, [Chapter 23:11]

Save for the 10th and 11th, the rest of the respondents are organisations representing the interests of sugarcane farmers in the Lowveld.

The 10th and 11th respondents are individual sugarcane farmers. They were probably singled out on account of the positions they hold as members of parliament for the Chiredzi South and Chiredzi North constituencies respectively over and above their roles as sugarcane farmers. They also occupy and serve in specialised parliamentary capacities.

BACKGROUND

Solely for purposes of convenience and brevity, the 2nd to 11th respondents will be referred to simply as “the farmers” and the 1st respondent as “ZIMRA”. It is common cause that pursuant to the terms of either of two types of written agreements between them, the farmers supply the sugar cane that they produce to the applicants. These contracts are generally referred to by the parties as the “Cane milling agreement” and the “Cane purchase agreement”. Under the former, the basic idea (as is implicit in the name) is that the applicants merely provide a milling service to the farmers. In addition the applicants also proceed to market on behalf of the farmers, the sugar and molasses thereby produced as well as other by-

products and thereafter remit to the farmers the proceeds thereof after deducting the expenses associated with the milling of the sugarcane and marketing of the sugar and the other by-products.

It is further common cause that under the cane milling arrangement, there is an existing agreement that the charge for the milling is calculated according to a pre-determined ratio referred to as the "Division of Proceeds" (DoP) ratio. This ratio currently stands at 23% of the proceeds which the applicants retain in the wake of the marketing of the products of the milling process. The farmer gets the remainder.

The cane purchase agreement operates differently. According to the parties this agreement involves a direct and complete sale of the sugarcane by the farmers to the applicants with risk and benefits passing to the latter upon the delivery of the cane. During oral submissions in court, counsel for the applicants referred to a rather convoluted method by which the purchase price of the cane is computed under this arrangement, suffice it to say that there is no convergence as among the parties as to whether the supplies of cane that gave rise to the current dispute constitute a cane milling agreement or a cane purchase agreement.

Be that as it may, it is common cause that in a decision (which has since been appealed against to the Fiscal Appeals Court), the 1st respondent determined that the set-up which currently obtains chiefly characterised by the distribution of proceeds arrangement constitutes one which attracts VAT. Therein lies the genesis of the dispute. This is because the simple question to be answered is whether the 23% retained by the applicants post the milling and marketing incorporates VAT (as contended by the farmers) or it does not (as maintained by the applicants).

It is further common cause that ZIMRA having made the decision that the aforementioned arrangement was one that attracts VAT in terms of the law, and that the applicants were therefore legally obligated to have all along charged and collected from the consumers (i.e. the farmers) and remitted the amounts so collected to it directed that the said amounts be paid to it. In compliance with that decision the applicants aver that they have since calculated the outstanding amounts in this regard and remitted the same to the 1st respondent.

Through the current application the applicants seek a declaratory order to the effect that they are legally entitled to recover from the farmers the VAT which they have since paid

to 1st respondent and secondly that they are legally entitled to continue charging and collecting VAT from the farmers over and above the 23% milling charge.

The applicants also take exception to the fact that the 1st respondent (through some of its officials) took it upon itself to render certain advice to the farmers which advice they contend amounts to an unwarranted interference in matters that are purely contractual. Part of that advice related to the 1st respondent's interpretation of the tax implications of the failure to include VAT matters in the cane supply agreements.

The terms of the declaratur sought by the applicants are captured in the draft order annexed to the application which reads:

Wherefore after reading papers filed of record and hearing counsel,

IT IS ORDERED THAT:

1. The application succeeds with costs
2. It be and is hereby declared that
 - a) The conduct by the 1st respondent to give advice to the applicants and the 2nd to 11th respondents on what are purely contractual matters is ultra vires its functions and responsibilities as an administrative authority and therefore unlawful.
 - b) To the extent that they are liable to pay VAT for milling costs, the applicants are entitled to charge, levy and collect such VAT in accordance with the VAT Act on and in addition to the value for the milling charge.
3. The 1st respondent be and is hereby ordered and directed to refrain from gratuitously interfering in pricing and contractual issues between the applicants and the 2nd to 11th respondents.
4. The respondents shall jointly and severally the one paying the others to be absolved, pay the applicants costs of suit on an attorney –client scale.

The applicants raised a number of arguments in support of their contention that they should be permitted to recover that which they have since paid to ZIMRA in the wake of the latter's aforementioned determination.

The main thrust of their argument, as I see it, however, is that the very fact that the Act makes it clear that the burden to pay the tax in question rests on the consumers who in this case are the farmers yet it was them (applicants) who were compelled to pay it necessarily implies that they can recover the same from the farmers. Reliance was placed inter alia on the

elucidation by GOWORA JA, of the tripartite relationship in the VAT equation. This was in the case of **ZIMRA v Packers International (Private) Limited** SC 28-16 where the following exposition was made:

“The system of collection of VAT, as embodied in the VAT Act, involves the imposition of tax at each step along the chain of manufacture of goods or the provision of services subject to VAT” And further that “... tax under the VAT Act consists of monies that have been taxed on goods and services paid by consumers for onward transmission to the Commissioner. All that is required of an operator is to calculate the amount so paid, submit a return and make payment”

Flowing from this basic premise, according to the applicants, are two applicable precepts that emanate therefrom, namely unjust enrichment and equity. The latter though not specifically pleaded in their papers was nevertheless amply canvassed during the oral submissions in court.

Regarding unjust enrichment it was averred that should the court not find in the applicants’ favour an injustice will ensue in that the respondents will have been unjustly enriched at their expense. For the requirements and application of the principle of unjust enrichment the following cases were cited as authority; **Industrial Equity v Walker** 1996(1) ZLR 269 (H), **Chioza A.M v Siziba** S.W. SC 04-15, and **Trojan Nickel Mine LTD v Reserve Bank of Zimbabwe** HH 169-13

It was contended that the facts of this case point to the fact that all the prerequisites for a finding for the applicant on the basis of unjust enrichment have been met.

The nub of the equity argument is that justice and fairness simply demand that the applicants be allowed to recoup from the farmers that which they paid to ZIMRA in compliance with the latter’s determination. It is clear that this is merely an extension or adjunct of the unjust enrichment contention.

The applicants further referred to various sections of the Act which in their view fortify their position. Reliance was placed in this regard to section 9(2) which provides as follows:

‘The value placed on any supply of goods or services shall, save as is otherwise provided in this section, be the value of the consideration for such supply, as determined in accordance with subsection 3, less so much of such value as represents tax:

Provided that-

- a) ...,
- b) Where the portion of the value of the said consideration which represents tax is not accounted for separately by the registered operator, the said portion shall be deemed to be an amount equal to the tax fraction of that consideration.

Similarly reliance was placed on s9 (5) of the Act which provides:

“Where goods or services are deemed to be supplied by a registered operator in terms of subsection (2) or (8) of section 7, the supply shall be deemed to be made for a consideration in money equal to the lesser of-

- a) The cost to the registered operator of the acquisition, manufacture, assembly, construction or production of goods or services, including-
 - i) Any tax charged in respect of the supply to the registered operator of such goods or services or any of any components, materials or services utilised by him in such manufacture, assembly, construction or production;
 - ii) Where such goods or any right referred to in subsection (2) of section seven, when held by the registered operator, constituted trading stock as defined in section 2 of the Taxes Act, any further costs, including tax, incurred by him in respect of such goods or right;
 - iii) Any costs, including tax, incurred by the registered operator in respect of the transportation or delivery of such goods or the provision of such services in connection with the transfer of such goods or the provision of such services as contemplated in subsection (8) of section seven; and
 - iv) Where such goods or services were acquired under a supply in respect of which the consideration in money was in terms of subsection (4) of this section deemed to be the open market value of the supply or would in terms of that provision have been deemed to be the open market value of the supply were it not for the fact that the recipient would have been entitled under subsection (3) of section fifteen to make a deduction of the full amount of tax in respect of that supply, such open market value to the extent that it exceeds the consideration in money for that supply: or
- b) The open market value of such supply.

THE POSITION OF THE RESPONDENTS

The 3rd and 4th respondents did not ultimately participate in the proceedings on account of the fact that the former did not file any opposing papers and the latter filed its heads of argument outside the prescribed time and was therefore barred. In a similar vein there was no appearance by or on behalf of the 6th, 9th and 11th respondents on the day of the hearing. Effectively, therefore, only the positions of the 1st, 2nd, 5th, 7th, 8th, and 10th respondents were before the court.

ZIMRA'S POSITION

Regarding the implications of the failure by the applicants and the farmers to specifically incorporate VAT matters in their DoP arrangements, ZIMRA articulated two distinct positions: namely that which relates to past supplies of cane and that which attends to present and future supplies of cane.

In respect of past supplies of sugarcane ZIMRA averred that a proper construction of s69 of the Act shows that in the absence of the express mention of VAT component in any price for goods or services, then the price will be deemed to contain the said tax.

As far as the alleged impropriety of the advice it rendered to the farmers, it contended that whatever advice it gave to the farmers was not only within its legal powers to give but also that it did so at the behest of the applicants. It further averred that it has a duty to provide education to taxpayers not only to impart knowledge of the same but also to inculcate and engender a spirit of compliance.

1st respondent's position on VAT implications for present and future supplies of cane

In its papers opposing this application, ZIMRA does not commit itself on what the tax implications in respect of present and future supplies are. It opted instead to confine itself to the question past supplies. However, it soon became apparent that its position is that the applicants are not only at liberty to charge, levy and collect from the farmers the said tax, but that they are in fact obligated to do so. It suffices, however, to note that this does not address the issue of whether this will be over and above the 23% being charged for the milling of the cane.

THE FARMERS' POSITION

As earlier stated, only the positions of the 2nd, 5th, 7th, 8th and 10th respondents were effectively before court.

Save for a few instances of divergence (which will be highlighted below) the farmers were united not only in their resistance to the application but also on the grounds thereof. The rallying point in their opposition to the quest by the applicants to recover the tax for past supplies was section 69 of the Act. Their position essentially mirrors that of ZIMRA.

Over and above the import of s69, however, a few additional arguments were presented to buttress their position and these are:

1. The very fact that ZIMRA has determined that the 23% milling charge includes VAT as far as the 2nd, 8th and 10th respondents are concerned, is dispositive of the whole dispute. They go as far as contending that the decision of ZIMRA is binding. They further assert that in their view the applicants have merely abdicated from their responsibility to remit the VAT so collected to ZIMRA and the consequences attendant thereto cannot be visited on them.
2. That the endeavour on the part of the applicants to recover the VAT they paid from them amounts to an attempt to vary the implied terms of their contract.
3. That as far as the 5th respondent is concerned its cane supply arrangement with the applicants is governed by neither a cane milling agreement nor a cane purchase agreement but rather by what it terms a “memorandum of understanding” A copy of which was attached.
4. A further point raised by the 5th respondent was that the very fact that invoices relating to disbursements of the individual farmer’s share of proceeds is silent on the collection of VAT necessarily implies that VAT was included in the 23% milling charge.
5. During oral addresses in court yet another argument was presented namely that the DoP ratio was decided upon by the minister responsible for the superintendence of the sugar sector, namely the minister of Industry and Commerce. It was averred in this regard that during the negotiations leading up those figures (of 23% and 77%) it was in the contemplation of the parties that VAT was incorporated in the 23% milling charge.

In apparent departure from the positions held by the other respondents, the 7th respondent maintained that s69 of the Act applies to all supplies of cane; past present and future.

THE ISSUES

In my view there are two broad issues up for determination in this dispute and from each two sub questions arise. The two broad questions are:

- 1.) Whether the 23% cane milling charge includes or excludes VAT, and
- 2.) Whether there has been an unjustifiable interference by the 1st respondent in purely contractual matters between the applicants and the farmers.

The sub-questions in respect of 1) above are:

- a) Whether or not the applicants are entitled to recover from the farmers VAT which they (i.e. applicants) paid to ZIMRA for past supplies; and
- b) Whether or not the applicants are entitled to charge, levy and collect from the farmers VAT over and above the 23% milling charge

The sub-questions from 2) above are:

- a) Whether the applicants have satisfied the requirements for the declaratur sought in paragraph 2 (a) of the draft order; and
- b) Whether the applicants have satisfied the requirements for the interdict sought in paragraph 3 of the draft order.

WHETHER THE 23% CANE MILLING CHARGE INCLUDES OR EXCLUDES VAT

This is arguably the most significant question as it lies at the very heart of the dispute.

As indicated above the applicants used various arguments in support of their contention that the 23% milling charge must be taken as excluding VAT. They relied inter alia on subsections 2 and 5 of section 9 of the Act. I however fail to see how s 9(2) (b) assists the applicants. Section 9 in general is aimed at the determination of the value of supply of goods or services. Paragraph 2 (b) in particular is a proviso to the general provision that the value to be placed on any supply of goods or services is the value of the consideration. This proviso however addresses a situation where the registered operator neglects to separately account for the value of the consideration which represents tax in which case it will be deemed to be the tax fraction of the consideration. Implicit in this proviso is that the tax fraction is to be calculated from that consideration: not in addition to that to the consideration. A fraction of something is piece, part, portion or component of something. Put

in context, therefore, the tax fraction is incorporated in not excluded from or to be added to the 23% milling charge which is consideration.

Subsection (5) of Section 9 of the Act equally does not avail the applicants. It is simply a method aimed at assisting in the computation of the consideration of the supply of the goods or services in question in instances of “deemed supply”. The basic idea being that this involves a calculation of all the expenses incurred in or attendant to the acquisition of the goods or services (or any lesser amount) or simply the open market value of such supply. Needless to say that this provision does not even come close to unlocking the current legal logjam, let alone assist the applicants.

UNJUST ENRICHMENT

The applicants averred that if they are not permitted to recoup that which they have since paid to ZIMRA by way of VAT emanating from past supplies of cane, then the farmers would have been unjustly enriched at their (applicants’) expense. This is because the ultimate responsibility to pay VAT rests on the farmers who are the consumers of the milling service.

All things being equal, this argument would perhaps have carried the day for applicants had it been established one way or the other that the 23% milling charge does not include VAT. What has to be established first is whether or not it does. It is only after that determination that one can legitimately argue that placing the burden on the applicants to foot this tax when the milling charge did not include tax as amounting to unjustly enriching the farmers at the applicants’ expense or conversely that permitting the applicants to recoup from the farmers what they (applicants) have since paid to ZIMRA when it is established that the 23% actually incorporated the tax can one argue the applicants as having been unjustly enriched at the expense of the farmers.

EQUITY

Counsel for the applicants made an impassioned plea for the court in the name of equity to find that the applicants are entitled to recoup the VAT in question which they have already paid. In *Sanudi Masudi v David Jera* HH67/2007 MAKARAU JP (as she then was) made short shrift of an argument based entirely on equity (a position I adopt in casu) she had this to say:

“That argument would have won the day were we a court of equity. We are but a court of law and as correctly advanced by both counsel, we are to be restricted by the pleadings filed by

the parties to establish the cause of action that was before the trial court and the defense that was raised to meet that cause of action”

Although the circumstances of that case were admittedly different from the present one, the fact remains that the court is confined to an application of the letter of the law to the facts and not necessarily the parties’ subjective views of what is right or wrong.

Proceeding now to address some of the arguments raised by the farmers. In furtherance of their argument that the court should find that the milling charge included VAT, there was what may be termed a half-hearted suggestion that the impasse should be resolved on the basis of some ministerial directive which preceded or was contemporaneous with the agreement on the DoP ratio. That argument cannot find traction for two basic reasons. Firstly, a copy of the supposed ministerial directive does not constitute part of the court papers in these proceedings. If the directive was oral then a supporting affidavit from the minister in question should have been annexed.

Secondly, the parol evidence rule finds application in this regard. This rule has been described in the following terms:

“When a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove the terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.”

See ***Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*** 1941 AD 43 at 47, ***Purchase De Huizemark Alberton (Pty) Ltd t/a Bob Percival Estates*** 1994 (1) SA 281 (W) at 283 I-J

The parol evidence rule is closely linked to the integration rule. Schwikkard and Van Der Merwe in Principles of evidence (4th edition) on page 40 refer to Wigmore’s famous passage (Wigmore on Evidence 3rd edition Vol 9 at para 2425) explaining the integration rule:

“[The] process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, i.e. its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purposes of determining what are the terms of their act.”

In the context of this case, therefore, neither party can purport to supplement what is contained in their sugarcane supply agreement by reference to extrinsic evidence. See also

Macey's Stores Ltd v Tanganda Tea Co Ltd S.C 122/83. Should the minister have indeed brokered an agreement (or directed) that VAT be incorporated in (or excluded from) the 23% milling charge that should appear ex-facie the written memorandum.

Equally untenable is the argument advanced on behalf of the 2nd, 8th and 10th respondents that the very fact that ZIMRA has deemed that the 23% milling charge as being inclusive of VAT is determinative of the issue. ZIMRA as with any other individual or entity is bound by the provisions of the law (in this case the VAT Act). Its interpretation of its provisions is also subject to judicial review. The court is still enjoined to determine the correctness or otherwise of that interpretation.

The 5th and 7th respondents implored the court to first make a determination of the species of the agreement between the farmers and the applicants before deciding on the tax implications thereof. The 8th respondent further averred that its arrangement with the applicants was governed neither by the cane purchase agreement nor the cane milling agreement but rather by a special memorandum of understanding.

This entire argument leads nowhere: it is not the name ascribed to the agreement but the terms (or absence thereof) as they relate to VAT and the legal consequences flowing therefrom. A perusal of the agreements by whatever name they were called reveals that there was no express mention of VAT. In any event it is instructive to note two important things; firstly, this issue not being the basis of these current proceedings was not properly argued by the parties, reference to it was merely peripheral and incidental. Secondly, that issue is currently before the Fiscal appeals Court.

The real issue as I see it, lies in the interpretation of sections 69 and 72 of the Act and their application to the facts of this matter.

REGARDING PAST SUPPLIES OF CANE

As indicated earlier, in this regard ZIMRA relied almost exclusively on the provisions of S69 of the Act (and the farmers adopt a similar stance) which provides as follows:

“69 Prices deemed to include tax

- 1) Any price charged by the registered operator in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax

payable in terms of paragraph (a) of subsection (1) of section six in respect of such supply, whether or not the registered operator has included tax in such price.

According to ZIMRA the significance of this section is that where the price/charge (which in this case the milling price which is pegged at 23% of the value of the proceeds from the cane) is silent on the VAT component thereof, it is deemed, *ex lege* that VAT is included in that price. Put in perspective, therefore, according to the 1st respondent, it is deemed that the consumer of the goods or service (in this case the farmer) has already paid VAT in that price and by logical extension, all the registered operator (in this case the applicants) needs to do is to remit it to ZIMRA. Any purported attempt to recover the same from the consumer is untenable because that would not only amount to taxing the consumer twice but also runs contrary to the tenor and spirit of that section.

ZIMRA further contended that doing so would inevitably lead to a fresh computation of the VAT payable because the one calculated and subsequently paid by the applicants was on the basis of section 69. In a nutshell accepting the position adopted by the applicants would yield higher figures for the VAT payable.

The applicants took a contrary view and argued firstly that there is no need to resort to the deeming provision of any legislation when in fact the issue in question is adequately provided for elsewhere in that Act. This is because, so the argument goes, it should only be resorted to in instances of omission on the part of a party with the duty to comply with a statutory obligation. Secondly, they contended that the Section 69 only serves to remove as a potential defence in situations such as the present when ZIMRA demands from it the VAT component of any price where same is not expressly stated therein. However, according to them, it offers no sanctuary to a consumer when the registered operator now seeks to recover from him (i.e. consumer) that which they paid pursuant to ZIMRA's decision.

In my view the position adopted by the applicants cannot be sustained. Firstly s9 (2) and s 9 (5) which they relied on have already been found to be of no application to the current dispute. Secondly, the plain and literal meaning of the section suggests that it is irrelevant whether or not the registered operator has in fact charged the tax in question, where the price does not reflect the tax component thereof it is presumed that the tax is incorporated in that price. In other words the phrase "whether or not the registered operator has included tax in such price" operates a twin blow to the registered operator: it serves to estop him from denying that the price in reality did not include tax in a bid to avoid accounting for the tax to

the commissioner. At the same time it precludes him from purporting to claim from the consumer the tax that he may or may not have collected from the consumer.

The question of who bears the obligation under the Act to pay the tax (who is obviously the consumer) which the applicants expended so much effort on is hardly the issue. To contend that s69 should be construed so as to permit the registered operator to pursue the consumer for the recovery of the tax they paid to ZIMRA would in my view run contrary to the clear intention of the legislature.

The legislature must obviously have been alive to the fact that in most day to day supply of goods and services the customer disappears without trace soon after the transaction. How then would the registered operator be able to recoup the tax that he claims he did not in fact charge and collect? Even if the customer could be traced, there would be an unnecessary proliferation of disputes between him and the registered operator as to whether the price included VAT or not. It would create unnecessary uncertainty and confusion in the market place where the consumer will never know whether or not the price charged includes VAT and where he always runs the risk of being informed ex post facto that the price he paid actually did not include tax.

If the applicants are permitted to recover the tax in question from the farmers then the deeming provision will be rendered nugatory. It would mean the price cannot then be deemed to include tax: it is as simple as that.

Further, related to the above; the deeming provision cannot be interpreted to mean two different things to two different people. The interpretation that the applicants want to foist on s69 will result in a mathematical or accounting incongruence and an absurdity in logic. ZIMRA in its papers vividly illustrate the mathematical inconsistency that will arise when they juxtapose the outcomes of the two contrasting positions using the hypothetical figure of \$1000 as proceeds for the sale of sugar thus:

(a) Where section 69 is invoked

- Proceeds from sale of sugar = \$1000
- Price for milling services at 23% of the proceeds = $(\$1000 \times 23\%) = \230
- VAT due after deeming that that price includes VAT = $(\$230 \times 15/115) = \30

(b) Where the applicants recover the section 69 (\$30) VAT from the farmers

- Proceeds from sale of sugar = \$1000

- Price for milling services at 23% of the proceeds = $(\$1000 \times 23\%) = \230
- VAT due after deeming that that price includes VAT = $(\$230 \times 15/115) = \30
- VAT due after the applicants recover the \$30 VAT from the farmers = $15\% (\$230 - 30 + 30) = \34.50

What the applicants are moving the court to accept will also yield a further absurd result in the following context: where from the standpoint of the 1st respondent vis a vis the applicants, VAT is deemed to be included in the price, yet from the standpoint of the applicants vis-à-vis the farmer, the price is deemed not to include the tax. It could never have been the intention of the legislature to produce such an absurd or anomalous situation. The net result of the interpretation should be uniform, consistent and certain not only to the parties but also to other persons similarly situated.

Section 69 effectively places the registered operator on guard on the consequences of his failure to specifically include in his price the VAT component thereof. Viewed differently, it is the responsibility of the registered operator to ensure that VAT matters are addressed in his dealings with the consumer. It is not a responsibility that the registered operator jointly shares with the consumer because the duty to account to the Commissioner ultimately rests with him (i.e. Registered Operator). There can never be a conflation of the roles, duties and responsibilities among the various parties: the burden to pay the tax lies with the consumer (the farmer), the duty to charge, collect and remit the tax lies with the registered operator (the applicants)

In the context of this case, whether occasioned by inadvertence, oversight or a misinterpretation of the nature of the contract, the consequences of the failure to specifically include the VAT are that VAT is deemed included in the milling price.

During the proceedings resort was made by the applicants to s72 (1) of the Act which provides as follows:

“72 Contract price or consideration may be varied according to rate of value-added tax

(1) Whenever the value-added tax is imposed or increased in respect of any supply of goods or services in relation to which any agreement was entered into by the acceptance of an offer made before the tax was imposed or increased, as the case may be, the registered operator may, unless agreed to the contrary in any agreement in writing and notwithstanding anything to the contrary contained in any law, recover from the recipient, as an addition to the amounts payable by the recipient to the registered operator, a sum equal to any amount payable by the registered operator by way of the said tax or increase, as the case may be, and any amount so recoverable by the registered

operator shall, whether it is recovered or not, be accounted for by the registered operator under this Act as part of the consideration in respect of the said supply.”

In my view this provision is meant to address the adjustments that may have to be made in contractual situations wherein at the time the offer was made there was no VAT imposed on that contract or it stood at a certain level, however by the time the acceptance is made, that type of contract by operation of the law, now attracts VAT or had been increased. The imposition of or the increase in the VAT was not in the contemplation of the parties thereby necessitating an adjustment in the price. This provision is clearly not applicable to the current dispute. There was no imposition of a “new” tax which hitherto did not exist, nor was there an increase of the VAT chargeable and payable. The parties merely failed to take into account a tax which was already in existence.

PRESENT AND FUTURE SUPPLIES OF CANE

Therefore, against the backdrop of a finding that the parties (whether through inadvertence, oversight or misapprehension) failed to address VAT matters in their contracts, one cannot legitimately vouch for the perpetuation of the status quo. It behoves the parties to renegotiate or clarify the terms of their contract to plug that lacuna. It suffices to state that failure to do so may very well result in s69 being continuously invoked.

I did not get the impression from the concession made on behalf of the 2nd, 8th and 10th respondent that they are necessarily agreeable to the charging of VAT by the applicants over and above the 23% milling charge. What I gathered was a concession merely that the applicants can charge, levy and collect VAT from the farmers in compliance with the requirements of the Act.

THE DECLARATUR AND INDERDICT SOUGHT IN PARAS (2a) AND 3 OF THE DRAFT ORDER RESPECTIVELY

The relief sought in each of the above emanates from the same alleged culpable conduct. In both instances the applicants complain that the 1st respondent has in the past overstepped its mandate (i.e. it acted ultra vires its functions and responsibilities) and has unjustifiably (and gratuitously) interfered in matters that are purely contractual as between themselves and the farmers.

The Declaratur

In *MDC v The President of the Republic of Zimbabwe & Ors* HH 28/2007, MAKARAU JP (as she then was) on the strength of the approach by VAN DIJKHORST J in *Family Benefit Friendly Society v Commissioner for Inland Revenue and Anor* 1995 (4) SA 120 summarises the factors to be considered in an application for a declaratur. She stated that the applicant or plaintiff must show that:

1. It is an interested person;
2. There is a right or obligation which becomes the object of the inquiry;
3. It is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter;
4. There must be interested parties upon which the declaration will be binding;
5. Considerations of public policy favour the issuance of the declaratory.

As far as the first requirement is concerned it can hardly be disputed that the applicants are interested persons. To the extent that they stand to be affected by any opinion or advice rendered by the 1st respondent to the contracting parties in the sugarcane supply agreements, the applicants do have an interest thereto.

The second requirement however poses a stern challenge to the applicants. In *the MDC v The President of the Republic of Zimbabwe* case (supra) the court reviewed a number of decisions on the import of this requirement (among them *Electrical Contractors' Association (South Africa) and Another v Building Industries Federation (South Africa) (2)* 1980 (2) SA 516 (T), *Durban City Council v Association of Building Societies* 1942 AD 27, and *Caluza v Independent Electoral Commission and Another* 2004 (1) SA 631 (Tk) and concluded as follows:

"It appears to me from a reading of the above authorities that what is required to be contended is a legal right and not a factual basis upon which a right may then be founded.

In casu, all the declaratory orders do not relate to a right. Nowhere has the applicant, as a political party with the majority of opposition seats in parliament, contended that its rights are in issue and what those rights are.

I would therefore hold that the declarators sought in this application are incompetent as they relate to a factual situation and not to any rights, existing or future, that the applicant has or may have. As has been stated in the authorities, the applicant must set forth its contention as to what the alleged right is. This, the applicant has failed to do. It is not for me to speculate as to what that right is or may be."

In my respectful view, the applicants in the present case find themselves in a similar situation. Apart from alleging a certain factual situation as obtaining (namely the giving of

advice by the 1st respondent) they have not asserted precisely what right they purport to have. For that reason the application for the declaratur in paragraph 2 (a) must fail.

The Interdict

The parties sparred on the precise nature of the relief sought in paragraph 3 of the applicant's draft order. It was submitted on behalf of the applicants that what they seek is in fact an interdict although they did not characterise it as such in their papers.

The requirements for an interdict are well known; they may be summarised as:

1. A clear right on the part of the applicant
2. Actual or reasonably apprehended injury; and
3. Absence of any other remedy by which the applicant can be protected with the same results.

See *Flame Lily Investments Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378; *Setlogelo v Setlogelo* 1914 AD 221)

As far as the first requirement is concerned, the current application is blighted by several shortcomings. Firstly the imprecision of the term "gratuitous interference" renders the relief sought virtually unenforceable. When does interference cross the line from "normal" (hence acceptable) to "gratuitous" (and therefore merits censure)?

Secondly, there is no evidence that the 1st respondent has interfered in the *pricing* issues between the applicants and the farmers. The evidence placed during this application shows that the advice which 1st respondent gave relates to VAT matters. The paragraph of the letter by the 1st respondent which the applicants find offensive reads:

"Having gone through the report by Ernst and Young Consultants on the review of Division of Proceeds (D.o.P.) and the cane purchase agreement, I noted that the two documents are silent on tax issues. In that regard the legislation provides that VAT is included in the 23% milling charge."

It is clear that the advice given only related to 1st respondent on VAT matters in view of the circumstances which the parties to the contract found themselves in. That advice can neither be termed gratuitous nor unjustified interference. It does not in the least relate to

pricing. In any event, tax issues in the context of this case can hardly be referred to as pricing (or contractual) matters: they are matters of statutory interpretation.

Thirdly, there is an email from one Bigboy Shava acting on behalf of the 2nd respondent which email is dated 12 June 2019 directed to the 1st respondent among, other issues, urging the latter to essentially register and educate the farmers on the implications of its (i.e. 1st respondent's) tax directive (which the applicants were and still are challenging). It was then that meetings were held on 28 August and 6 September 2019. These meetings were followed up with the letter dated 9 September 2019. Therefore the applicants having requested the 1st respondents to address the farmers on the tax implications of their agreement cannot turn around and cry foul and allege gratuitous interference.

In the circumstances there can be no justification in granting the interdict sought.

The 3rd, 4th, 6th, 9th and 11th respondents fell by the wayside for the various reasons outlined earlier in this judgment. Counsel for the applicants sought for default judgment to be entered against them. Ordinarily that would be course of action that would ensue when a party is barred or is in default. However, in view of the findings of the court above, that would create an untenable inherent contradiction. The court cannot in one breath grant the order sought (albeit by default) against those respondents yet in the next breath rule that the application is unmeritorious. For that reason the court will not grant the said default judgment.

COSTS

The general rule is that the successful party is entitled to his costs. In determining who the successful party is the court looks to the substance and not the form of the judgment. In the present case the respondents who participated in this application (i.e. the 1st, 2nd, 5th, 7th, 8th and 10th respondents have been substantially successful. There is no justification in denying them of their costs.

In the final analysis, therefore, the following order is hereby given:

1. The application for a declaratur as sought in paragraph 2(a) of the draft order be and is hereby dismissed.

2. The application for a declaratur as sought in paragraph 2(b) of the draft order as it relates to past supplies of sugar cane be and is hereby dismissed.
3. In respect of present and future supplies of sugar cane it is hereby ordered that the applicants and the 2nd-11th respondents are at liberty to renegotiate and/or clarify the terms of their contracts to specifically incorporate VAT issues and proceed on that basis.
4. The application for an interdict as sought in paragraph 3 of the draft order be and is hereby dismissed.
5. The applicants are hereby ordered to meet the costs of the 1st, 2nd, 5th, 7th, 8th, and 10th respondents 'costs

Scanlen and Holderness; Applicants' Legal Practitioners.

Chuma, Gurajena and Partners; 1st Respondent's Legal Practitioners

Muzenda and Chitsama Attorneys; 2nd, 8th & 10th Respondents' Legal Practitioners

Ndlovu and Hwacha; 5th Respondent's Legal Practitioners

Ross Chavi Law Office; 7th Respondent's Legal Practitioners