MUROWA DIAMONDS (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY
and
MINISTER OF FINANCE & ECONOMIC DEVELOPMENT N.O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 20 January 2020

Date of written judgment: 12 February 2020

Opposed application

Mr *T. Mafukidze*, for the applicant
Mr *A. Moyo*, with him Mr *S. Bhebhe*, for the first respondent
Mr *K. Chimiti*, for the second respondent

MAFUSIRE J

[1] The applicant is a diamond mining company. In terms of s 244 and s 245 of the Mines and Minerals Act, *Cap 21:05*, it must pay an annual royalty to Government on diamonds sold by it. As a registered tax payer, the applicant must also pay income tax in terms of the Income Tax Act, *Cap 23:06*. The first respondent is a creature of the Revenue Authority Act, *Cap 23:11*. It collects revenue for Government, through various tax regimes. The second respondent is the Government representative. Among other things, he oversees and administers the revenue collection regime.

[2] There is a dispute between the applicant and the first respondent. It is whether the royalty that the applicant pays to Government as aforesaid is tax-deductible in terms of the Income Tax Act. The applicant says it is. The respondents say it is not. To resolve the dispute, the royalty must necessarily be categorised. It is either capital expenditure, in which case it is not tax deductible, or revenue expenditure, in which case it is. The applicant says it is revenue expenditure and therefore tax-deductible. The respondents say it is capital expenditure and therefore not tax deductible. Both parties support their viewpoints by reference to relevant statutes and case law. However, the parties advise that this dispute is not before me. It is before

the Special Court for Income Tax Appeals ("***the Special Court***"). Therefore, I do not have to resolve it.

[3] The applicant says the dispute before me is a constitutional one. Broadly, the applicant challenges the constitutional validity of the statutory tax regime that empowers the first respondent to unilaterally incept tax collection mechanisms to recover outstanding tax even if that tax be genuinely in dispute. Specifically, the applicant moves me to declare s 58 of the Income Tax Act to be in conflict with s 56(1) and s 68(1) of the Constitution of Zimbabwe. Section 58 of the Income Tax Act is the provision that empowers the first respondent to invoke coercive recovery measures to collect any tax as may be outstanding, due and payable, and as assessed by itself. Invariably, the first respondent does this by a process of garnishment of a tax payer's bank accounts, or levying attachments on any such amounts as may be held by third parties on behalf of the defaulting tax-payer.

[4] The foundational legal basis for the applicant's claim is that s 58 of the Income Tax Act permits the first respondent to resort to extra-judicial self-help in the recovery of *bona fide* disputed liabilities and is therefore in conflict with the Declaration of the Bill of Rights in the Constitution that guarantees to all persons the right to equal protection of the law, non-discrimination and the right to administrative justice. The section reads:

> "**58 Power to appoint agent**
>
> (1) 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 tax due from any moneys in any current account, deposit account, fixed deposit account or savings account or from any other moneys, 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 be.
>
> (2) For the purpose of subsection (1)—
> "person" includes—
>
> (*a*) a bank, building society or savings bank; and
>
> (*b*) a partnership; and
>
> (*c*) any officer in the Public Service;

"tax" includes—

(*a*) interest payable by virtue of subsection (2) of section *seventy-one*, subsection (6) of section *seventy-two* or subsection (3) of section *seventy-three*; and

(*b*) provisional tax referred to in section *seventy-two*; and

(*c*) employees tax referred to in section *seventy-three*; and

(*d*) any additional tax or other penalty payable under this Act;

(*e*) any levy or sum payable in terms of the charging Act."

[5] On the other hand, s 56(1) and s 68(1) of the Constitution read:

"(1) **56 Equality and non-discrimination**
(1) All persons are equal before the law and have the right to equal protection and benefit of the law."

"68 Right to administrative justice
(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

[6] As a preliminary point, the first respondent objects to the dispute before me being dealt with as a constitutional point. It argues that in accordance with the constitutional doctrine of ripeness and avoidance, the real dispute between the parties is the correctness of the assessments done by the first respondent in respect of the applicant's taxable income for the years 2010 to 2015 in which the first respondent categorised the royalty aforesaid as capital expenditure and therefore not tax deductible. The first respondent maintains that that dispute can easily be resolved without resort to constitutionalism by merely applying domestic legislation and relevant principles. The first respondent concludes its objection by saying that this is what is pending in the Special Court and that if the applicant gets its relief in that court then that will finally resolve the only real dispute between the parties.

[7] On the merits, both respondents argue that the tax recovery powers reposed in the first respondent by s 58 of the Income Tax Act are not unconstitutional; that they are reasonable and necessary for an efficient revenue collection system in a constitutional democracy and that they are exercised by virtually all the jurisdictions around the world.

[8] The foundational factual basis for both the dispute before the Special Court and the alleged constitutional dispute before me is largely common cause or uncontroverted. It is this. In 2017 the first respondent did an audit of the income tax paid by the applicant for the years 2010 to 2015. It detected an anomaly. It said the applicant was wrong to treat the mining royalty as a tax-deductible expense. The first respondent reversed the deductions and re-assessed the applicant's taxable income for those years. The result was an alleged tax shortfall of a phenomenal $2 588 692-50, plus a 100% penalty, both due and payable by the applicant to the first respondent.

[9] The applicant objected. It disagreed with the way the first respondent had treated the mining royalty as a non-deductible tax expense. It disagreed with the amount alleged to be due. Meetings were held between the parties in an effort to find common ground. Correspondence was exchanged. There was no progress. There was an impasse. Matters came to a head. On 28 November 2017 the first respondent's case manager dealing with the applicant's file dispatched a letter to the applicant. He complained of the applicant's prevarication on its previous undertaking to pay off in certain instalments the re-assessed tax liability. The sting was in the last paragraph. It read:

> "In light of the foregoing position, you are required to make your payments as agreed in the meeting of 24 November 2017. Kindly take note that the recovery measures will be instituted accordingly against the company in the event of failure to comply with this request."

[10] The applicant perceived the letter to be the first respondent's intention to invoke its powers in terms of s 58 of the Income Tax Act to garnish the applicant's bank accounts. As such, the applicant feared that such a development would so severely cripple its financial standing as to ground its operations and threaten its going concern status. Therefore, in order to avoid such Armageddon, the applicant made payment arrangements on a without prejudice basis. But it also filed a formal appeal to the Special Court and, at the same time, mounted this constitutional challenge.

[11] So, I have to decide two issues. The one is whether the alleged constitutional challenge is in conflict with the constitutional doctrine of ripeness and avoidance. If I find that the alleged

constitutional challenge violates the constitutional doctrine of ripeness and avoidance, then the whole case before me collapses and I may not have to consider the constitutional validity of s 58 of the Income Tax Act. But if I find that the constitutional challenge is well founded, then I have to determine whether s 58 of the Income Tax Act is in conflict with s 56(1) and s 68(1) of the Constitution of Zimbabwe.

[12] First the determination whether or not the alleged constitutional challenge violates the doctrine of ripeness and avoidance. Simply put, this doctrine says where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. There is a glut of cases on the point, both from this jurisdiction and elsewhere: e.g. *S v Mhlungu & Ors* 1995 (3) SA 867, at p 895E. In this jurisdiction, **Ebrahim JA** put it this way in *Sports and Recreation Commission v Sagittarius Wrestling Club & Anor* 2001 (2) ZLR 501 (S), at p 505F - H:

> "Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights."

[13] In the *Sports and Recreation Commission* case above, the constitutional challenge failed partly on the basis of the ripeness and avoidance doctrine when the Supreme Court found that the applicants were not challenging any law, but merely an administrative decision against which they could have appealed to the Administrative Court, or taken on review.

[14] I consider that the doctrine of ripeness and avoidance is a necessary restriction in any legal system. All legislation is valid until set aside. In *Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority* 2014 (2) ZLR 78 (C), **Malaba DCJ**, as he then was, held that any court faced with an application challenging the constitutionality of a statutory provision is required to proceed on the assumption that the legislation is constitutionally valid until the contrary is clearly established.

[15] The applicant argues that now, or in these proceedings, is the time to decide the constitutional validity of s 58 of the Income Tax Act and that the doctrine of ripeness and

avoidance should not be invoked to block a determination of that issue because the nature of the specific remedy that it seeks solely depends on the declaration of constitutional invalidity of that section.

[16] I consider that the first respondent has somewhat misconstrued the constitutional doctrine of ripeness and avoidance as it applies to the applicant's case herein. The applicant's case herein, and probably the foundational or primary dispute between the parties, is that the first respondent has wrongly re-assessed its tax liability for the years 2010 to 2015 resulting in a staggering shortfall of over $2 ½ million being said to be due by it. That dispute then splinters into several facets. One such facet is whether the first respondent is correct to treat the mining royalty as a non-tax-deductible expense. From that comes other nodes as well, such as whether the royalty is a capital expense or a revenue expense, and what effect, if any, has been the apparent indecision by the Legislature on this levy as demonstrated by its continuous amendment, back and forth, of s 15(2) of the Income Tax Act.

[17] I should not want to be bogged down with any detailed analysis of the dispute between the parties that is pending in the Special Court. But regarding the continuous amendment of s 15(2) of the Income Tax Act as aforesaid, the position is that s 15 of the Income Tax Act has always provided for the deductions allowable in the determination of taxable income. These deductions are for expenditure and losses incurred for the purposes of trade, or in the production of income except, *inter alia*, expenditure or losses of a capital nature. Then in 2003 Parliament amended sec 15 by, among other things, creating s 15(2)(f)(iii)[1]. This new provision stated that the royalties paid by a miner in terms of s 245 of the Mines and Minerals Act would be deductible from the miner's gross income in the calculation of his taxable income. The amendment would come into effect from 1 January 2004. But it lasted only until 1 January 2014 when, by the Finance Act, 2014 (No 1 of 2014), it was repealed[2]. But by yet another amendment in 2019[3] the provision has been brought back again, although to take effect from 1 January 2020, thus well after the dispute between the parties had emerged and after the application had been filed.

[1] S 9 of the Finance Act, No 10 of 2003
[2] By s 7(a)
[3] S 10 of the Finance Act (No 2) 7 of 2019

[18] As one of the facets to the main dispute before the Special Court, the parties are arguing on the import of these amendments. The applicant is saying the amendments are of no consequence as the miner's right to deduct royalties from taxable income has never been tampered with, in spite of these amendments. On the other hand, the first respondent is arguing that s 15(2)(f)(iii) was the only avenue by which such deductions could properly be made and that, with that avenue closed in 2014, so went away the right.

[19] The first respondent submits that if the applicant succeeds before the Special Court then its woes in regard to the re-assessment for the years 2010 to 2015 will come to an end. The first respondent further submits that the legal system provides a mechanism for the competent resolution of the applicant's dispute without resorting to striking down legislation that is deemed lawful. The applicant has indeed utilised that mechanism. Only if the remedy sought by the applicant was solely dependent upon the striking down of the legislation should I be moved to consider its constitutional validity.

[20] I consider that the remedy being sought by the applicant before the Special Court is manifestly different from the remedy that it seeks before this court. Admittedly, only until the applicant succeeds in the Special Court will its primary woes be put to rest. But the remedy that it seeks before this court is in relation to the period between the objection by a taxpayer to an assessment by the first respondent and the determination of that objection, firstly by the first respondent itself and then by the Special Court on any possible appeal to it. By the powers vested in the first respondent by s 58 of the Income Tax Act, the applicant is at risk of its monies held by third parties, such as its bankers, being hived off and appropriated to the fiscus by the first respondent. In terms of s 69 of the Income Tax Act, neither does an objection against a tax assessment nor an appeal to the Special Court suspend the taxpayer's obligation to pay. This is known the world over as the '**pay-now-and-argue-later**' concept of revenue collection by the revenue collector of government.

[21] Built into this pay-now-and-argue-later principle is the power reposed in the collector of revenue, to enforce payment without first resorting to litigation. That is the power given by

s 58 of the Income Tax Act. In practice, the first respondent issues orders akin to garnishments against third parties who may be owing monies to the defaulting taxpayer. To do this the first respondent does not need a court order. It is not obliged to precede the garnishment with any notice to the defaulting taxpayer. Its power to do so is not suspended by the fact that the taxpayer may be disputing the liability or that he may have lodged an objection or appealed the assessment.

[22] *In casu,* the applicant is not challenging the pay-now-argue-later principle even though in its heads of argument there seems to be some gratuitous or stray argument suggesting that the constitutional challenge is against both s 58 and s 69 of the Income Tax Act. The draft order clearly impugns s 58 only.

[23] I hold that the constitutional doctrine of ripeness and avoidance does not apply in this case because the first respondent has already advised of its intention to invoke garnishment procedures. At any time, it may pounce. There is no way the applicant may legitimately stop it. No other person, not even a court of law, can stop it because it has the power and the force of the law behind it, unless of course, if it has strayed outside the four corners of its mandate: see *Fairdrop Trading (Private) Limited v Zimbabwe Revenue Authority* HH 68-14; *Mayor Logistics (Pvt) Ltd*, *supra* and *Zimbabwe Revenue Authority v P (Pvt) Ltd* 2016 (2) ZLR 84 (S). Only until that law is declared unconstitutional can the applicant get any reprieve. That is its whole case before me. The applicant's remedy depends entirely on the constitutional point. My decision on the constitutional point does not render the proceedings pending in the Special Court nugatory. It will have no bearing on the primary dispute. That dispute will still need to be resolved.

[24] In the premises I decide the preliminary point in favour of the applicant. I then proceed to determine the constitutional point.

[25] Objections to tax assessments are common place. Constitutional challenges of the first respondent's wide-ranging and draconian powers are legion. It is a weather-beaten path. Original or innovative arguments are infrequent. In these proceedings, I wondered at first brush

what novel or fresh argument the applicant was bringing. Mr *Mafukidze*, for the applicant, argues that most of the cases where the pay-now-argue-later concept has come under scrutiny, have been in relation, not to income tax, but to value added tax under the value added tax legislation, the provisions of which, in relation to that concept, are analogous to those under the income tax legislation.

[26] A detailed analysis of the value added tax was made by the Constitutional Court of South Africa in the case of *Metcash Trading Ltd v Commissioner, South African Revenue Service & Anor* 2001 (1) 1109. The court noted that value added tax is a sophisticated multi-stage tax. It is added on value along the chain of manufacture and distribution of goods and services. It is calculated on the value at each step of the chain. It arises continuously. Traders forming such chain are called vendors. A great deal of book-keeping is required.

[27] Mr *Mafukidze* relies on the court's observation in *Metcash* that, unlike income tax, with value added tax, no liability arises immediately once an assessment has been made. The court said that income tax assessments can elicit genuine differences of opinion about accounting practice or legal interpretation, unlike value added tax. With value added tax differences are usually narrowed down to the credibility of the self-assessments done by the taxpayer himself which are based on his own records. An objector challenging a tax assessment under the value added tax system has a greater onus than the objector under the income tax system.

[28] Mr *Mafukidze* also finds support in *Capstone 556 (Pty) Lt v Commissioner, South African Revenue Services & Anor: Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Services & Anor* [2011] 74 SATC 20, two cases that were decided under one judgment. Noting the same differences between the two types of taxes as the Constitutional Court had done in *Metcash*, **Binns-Ward J**, sitting in the High Court of South Africa, said[4]:

> "There are material differences distinguishing the position of self-regulating vendors under the value-added tax system and the taxpayers under the entirely revenue authority-regulated income tax dispensation. Thus the considerations which persuaded the Constitutional Court to reject the attack on the … provisions of the of the VAT Act in *Metcash* might not apply

[4] Para 9

> altogether equally in any scrutiny of the constitutionality of the equivalent provisions in the IT (Income Tax) Act." (*emphasis by counsel*)

[29] Mr *Mafukidze* concludes this part of his argument by pointing out that in this jurisdiction, our Supreme Court has also acknowledged the special nature of value added tax, as distinct from income tax: see *Zimbabwe Revenue Authority v P (Pvt) Ltd* 2016 (2) ZLR 84 (S). His point is that case authorities that have upheld the pay-now-and argue later concept are distinguishable. They dealt with value added tax, not income tax. There are material differences between these two tax regimes. Accordingly, different considerations apply.

[30] The applicant's whole case is that its grievance against the first respondent is genuine. Its objection is far from being frivolous. It arises from a *bona fide* difference in interpretation of income tax legislation. Its objection is pending before the Special Court. Yet before determination, the first respondent is bent on invoking its self-help powers to collect the disputed tax. Such self-help powers are draconian. They are executed outside the purview of any judicial supervision. The first respondent is the prosecutor, judge and executioner in its own cause. A law that permits one party to a dispute to resort to such unilateral powers is repressive and repugnant. It is discriminatory. It is contrary to s 56(1) of the Constitution. It also violates s 68(1) of the Constitution in that it impedes one's right to administrative justice from an impartial court or tribunal.

[31] The applicant further argues that the remedies provided by the tax legislation are woefully inadequate. Among other things, by the time an objector gets reprieve, he will probably have gone bankrupt. For example, the amounts sought by the first respondent in this case are staggering. And in practice, the first respondent never gets to pay back if its assessments are set aside. It merely passes on a credit. A law that permits such kind of inequality and unfairness is disproportionate to any right sought to be protected. It is unreasonable, unfair, unnecessary and unjustifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

[32] The Administrative Justice Act, *Cap 10:28*, is the Act of Parliament contemplated by s 68(3) of the Constitution to regulate administrative conduct. Section 3(2) of that Act provides

that for an administrative action to be taken in a fair manner, an administrative authority shall give the person whose rights, interests or legitimate expectations may be affected by such action adequate notice of the nature and purpose of the proposed action, and a reasonable opportunity to make adequate representations.

[33] The applicant submits that, in contrast, s 58 of the Income Tax Act does not require the first respondent to give either a notice of its intention to invoke garnishment procedures, or a reasonable opportunity for the targeted taxpayer to make representations. It submits that, apart from this being a constitutional breach, the conduct is also in conflict with the common law rules of natural justice, namely:

- *audi alteram partem*, that provides that no man shall be condemned without being afforded the chance to make representations, and
- *nemo judex in sua causa*, that provides that no man shall be judge over his own cause.

[34] Mr *Mafukidze* makes comparisons between our tax regime and those in other countries like South Africa, United States of America, Canada, India and the like. His argument is that modern tax legislation incorporates, *inter alia*, the obligation of the collector of revenue to give some period of notice to the targeted taxpayer. It also gives guidelines on how the collector of revenue may deal with an objection to a tax assessment. In South Africa for example, some of these guidelines include:

- the consideration whether the recovery of the disputed tax will be in jeopardy or whether there will be a dissipation of assets;
- the compliance history of the taxpayer;
- whether *prima facie* fraud is involved in the origin of the dispute;
- whether payment will result in irreparable hardship to the taxpayer;
- whether the taxpayer has tendered adequate security for the payment of the disputed tax.

[35] The applicant's case is that s 58 of the Income Tax Act, not being compliant with modern tax regimes elsewhere, it being in violation of the common law rules of natural justice,

and, above all, it being in conflict with constitutional provisions, must be struck down and deleted from the statute books.

[36] Section 86 of the Constitution provides for the limitation of rights and freedoms. In paraphrase, it says the fundamental rights and freedoms set out in the Bill of Rights may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom, taking into account all relevant factors. One of the factors listed by this section as being relevant to the limitation of rights and freedoms is whether such limitation is necessary in the interests of, among others, the general public interest.

[37] There can be no callipers to measure with absolute precision concepts like reasonableness, proportionality or fairness in the derogation of rights for the public good. These are concepts of a general application, to be considered objectively in any given case. I acknowledge the difference between value added tax and income tax, and the force of Mr *Mafukidze's* argument. But the first respondent is the Biblical Caesar. Like every other subject, the applicant is under the injunction: '***Give to Caesar the things which are Caesar's***'[5]. As observed by **Binns-Ward J** in *Capstone 556* and *Khu*, this is an injunction that does not rest easily with taxpayers. Thus, some smart operators craft tax evasion or avoidance schemes. Others take on Caesar headlong. But Caesar is reposed with enormous powers and all sorts of instruments. He has a standard argument. Public policy demands that revenue inflows to the fiscus should not be interrupted by frivolous objections. An efficient tax collection regime is the life blood of all modern societies the fiscal wheels of which must continue turning.

[38] The power given to the first respondent by s 58 of the Income Tax Act should be looked at in context. Briefly, the respondent's powers begin with the right and obligation to levy and collect taxes in terms of s 6. They then include the power in s 45 to make tax assessments and to make estimates of taxes due from such of the information as may have been provided by the taxpayer. They then proceed to the power in s 46 to levy penalties on taxes due and unpaid; the power in s 58 to appoint another person to be the agent of a taxpayer where there is some money

[5] Matthew 22:21 (NIV)

due by the agent to the taxpayer, and then the power to penalise the agent for any breach of this obligation. Section 69 empowers the first respondent to insist on payment of any tax as levied pending the determination of any objection or appeal against a tax as charged.

[39] I find the applicant's argument on equality rather flawed. Caesar is not equal to his subjects. The applicant and the first respondent may be two parties to a dispute. But that is as far as the equality goes. The respondent must collect the tax due to the fiscus. Government business must not grind to a halt by reason of glitches in the recovery process. The first respondent must be clothed with powers to effectively collect the tax. It must be equipped with powers and instruments to overcome roadblocks in its collection mandate. The first respondent is an administrator. It cannot be said to be equal to the taxpayer. Section 56(1) of the Constitution does not apply. It addresses a position altogether different from the applicant's situation herein. This was crisply set out in *Nkomo v Minister of Local Government, Rural & Urban Development & Ors* 2016 (1) ZLR 113 (CC). **Ziyambi JCC** said[6]:

> "The right guaranteed under s 56(1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to find his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain person have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons."(*my emphasis*)

[40] The applicant's further argument that the power given to the first respondent in s 58 is disproportionate to the need to protect any national interest or that such power is unreasonable, unfair, unnecessary and unjustifiable in a democratic society that is based on openness, justice, human dignity, equality and freedom, is equally flawed. Firstly, the applicant's approach to target for impeachment only s 58 of the Income Tax Act against a whole gamut of the tax legislation is rather curious and somewhat irrational. The respondents questioned such an approach as early as the opposing affidavits. Only in the heads of argument is there an attempt

[6] At pp 116H to 119A – B

to include s 69 for impeachment. But no amendment was sought. The draft order still seeks relief as against s 58 only.

[41] Secondly, and more importantly, tax legislation is complex. It is intricate. The provisions are interrelated. They are interdependent. The whole tax regime is designed to achieve one purpose: the efficient recovery of outstanding taxes unhindered by disruptive and interruptive objections and legal processes. This stems from public policy. Tax legislation is like a gear with several cogs, a wheel with spokes. It makes no sense to me to seek to knock down one cog or one spoke. All what that will do is to impede the flawless function of the gear or the wheel. In the present case for example, if the first respondent has assessed the tax due by the applicant who does not impeach s 69 that allows such tax to be recovered even in the face of an objection, I see little point or the justification to hamstring the first respondent and disable it from going all the way to recover the tax due. What the applicant attacks in this application is the recovery method. Yet one would imagine that, as the respondents argue, that is the tail-end of the entire tax recovery process. The pith of the applicant's problem is the legislative provision that allows an impugned tax to be recovered, that is, the pay-now-and-argue-later principle.

[42] The pay-now-and-argue-later principle of tax collection is so entrenched in our legal system. It is futile to isolate for impeachment a single provision out of the whole gamut. I acknowledge that the South African Constitutional Court left open scrutiny of this principle as it relates to income tax particularly. In *Capstone 556* above, it was said different considerations may apply. But I am not persuaded that any such different considerations have been identified in the present case as to warrant the plucking out of s 58 from the statute books so as to restrict the powers of the first respondent to recover outstanding tax.

[43] The applicant's submissions regarding the Administrative Justice Act gloss over the fact that the powers given the first respondent in s 58 of the Income Tax Act are the tail-end of the recovery process. Preceding them is the provisions allowing for intense engagements between the first respondent and the taxpayer. The records over which the first respondent uses to audit and re-assess the impugned tax are those of the tax payer. The taxpayer himself first

makes a self-assessment. The taxpayer is given the chance to object. He has the opportunity to make representations. He has the right to appeal where the first respondent overrules the objection. It may be an imperfect system. But all that man makes is fallible. Only divine systems are infallible. I disagree that the rules of natural justice are violated.

[44] Much can be said of the tax regimes of other countries that have now expressly incorporated the need for notice before garnishment procedures are invoked and the inclusion of some guidelines before the collector of revenue exercises his discretion in dealing with objections. This is certainly a development that could well be recommended to our own Parliament. However, I am not convinced that there are such gross deficiencies in our tax legislation as should lead one to declare as unconstitutional the first respondent's powers in s 58 of the Income Tax Act. As observed by **Wunsh J** in *Hindry v Nedcor Bank Ltd & Anor* [1999] 2 All SA 38 (W), the garnishee procedure is recognised in all other countries which have open and democratic societies based on freedom and equality and which recognise, protect and enforce human rights.

[45] In the draft order the applicant seeks alternative relief. This is to compel the first respondent to table before Parliament, within certain specific time frames, a Bill to amend the Income Tax Act so as incorporate three things:

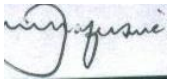
- limiting the first respondent's powers to incept garnishee orders only to cases of spurious objections;
- including judicial control over the first respondent's powers to issue such garnishees, and
- providing for the right of a taxpayer to make representations before an impartial arbiter in relation to the inception of garnishees.

[46] There is a further adjunct sought in the draft order. If the first respondent should fail to move the amendment, or if the amendment should fail to pass, then s 58 of the Income Tax Act should automatically be deemed struck down within the times frames proposed in the draft order.

[47] However, in view of my findings in this judgment, the alternative prayer cannot succeed. It is still an impeachment of s 58 of the Income Tax Act in another form. In the circumstances, I would dismiss the application. However, I consider the matter to be public interest litigation. Therefore, in line with precedent, I shall make no order as to costs.

[48] The application is hereby dismissed with no order as to costs.

12 February 2020



Coghlan, Welsh & Guest, applicant's legal practitioners
Kantor & Immerman, first respondent's legal practitioners
Civil Division of the Attorney-General's office, second's respondent's legal practitioners