FMC FINANCE (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 11 May 2022

Ruling on Costs

M. Tshuma for the Appellant
E. Bishi for the Respondent

MUSITHU J: This brief judgment is concerned with the question of costs. At the hearing of the appeal counsel for the parties were agreed that there was no proper appeal before the court as it was based on assessments that were not only irregularly issued, but were themselves defective. This point was raised in the appellant's supplementary heads of argument that were filed on the eve of the hearing. Counsel were agreed that the appeal ought to be struck off the roll in light of the preliminary points raised in the appellant's supplementary heads of argument.

Mr *Tshuma* for the appellant sought an award of costs of suit on the ordinary scale arguing that respondent had been unreasonable in the manner in which it had handled the case, and such conduct deserved to be censured by an order of costs. Ms *Bishi* for the respondent submitted that the respondent's conduct was not unreasonable to warrant an adverse order of costs.

To place the issue into perspective, it is necessary to give a brief background to the dispute. The appellant, an entity incorporated according to the laws of Zimbabwe, operates a microfinance business and the bulky of its customers are public service employees, as well as those employed by some State organs. The respondent is an administrative authority established in terms of the Revenue Authority Act[1]. It is charged with the collection of revenues on behalf of the State, and one such key revenue head is income tax which is levied and collected in terms of the Income Tax Act (ITA)[2].

[1] [*Chapter 23:11*]
[2] [*Chapter 23:06*]

In the course of conducting its investigations to check on the level of tax compliance by micro-finance institutions, the respondent established that the appellant was providing financial loans to employees in State institutions such as the Zimbabwe National Army, the Public Service Commission and the Zimbabwe National Army. The appellant had written agreements with these institutions in terms of which the institution would deduct the loan repayments from the concerned employees' salaries and remit such amounts to the appellant. On its part, the appellant would pay these institutions a commission ranging between 2.5% and 5% for that service provided by the institution.

The investigation further revealed that the appellant failed to withhold 10 *per centum* from the amounts paid as commissions to the said institutions that had no valid tax clearance certificates. Section 80(2) of the ITA obliges the appellant, as a paying officer to withhold 10 *per centum* of each amount payable to a payee under a contract, and thereafter remit the amount so withheld to the commissioner on or before the tenth day of the month following that in which the payment was made. The appellant was presented with a bill in the sum of ZWL$1,139,279.08, representing the principal withholding tax it allegedly failed to withhold, plus 15% penalty, and interest claimed at the rate of 10% compounded up to 31 December 2019. Engagements between the parties resulted in the principal amount being revised downwards to ZWL$1,025,351.17 and later to ZWL$783,913.65. Assessments were then issued in respect of that liability. The appellant objected to the assessments, but the objection was disallowed. The appellant noted an appeal against the commissioner's decision. The grounds of appeal were confined to the grounds of objection that had been considered by the commissioner.

The parties appeared before me for a pre-trial case management meeting on 24 February 2022. At the meeting it was agreed that the issues for determination were wholly legal and resolvable by way of a stated case. The parties were directed to file a statement of agreed facts and heads of argument within certain timelines. The matter was then set down for hearing on 11 May 2022.

On the day of the hearing as already stated, the appellant filed supplementary heads of argument which raised three key legal points for the first time. These were that: assessments did not contain taxable income and were therefore unlawful; an assessment cannot be subject to an audit; and that the respondent could not issue an assessment for withholding tax. The appellant cited several case law in support of the position of the law. At the commencement of the hearing, the parties counsel were agreed that the assessments were not only irregularly

issued, but were equally defective. The appeal had to be struck off. They were however disagreeing on the question of costs.

Mr *Tshuma* submitted that the assessments were unreasonably issued. The appellant was prompted to come to court on the basis of assessments that were irregular. The Supreme Court judgment in *Nestle Zimbabwe (Private) Limited v ZIMRA*[3], had clearly spelt out the requirements of a valid assessment. The respondent had also adopted a wrong procedure. The law did not allow it to issue an assessment for withholding taxes. It ought to have instituted proceedings to recover the amounts in a court of competent jurisdiction. As an administrative authority, the respondent had acted unreasonably in failing to apply its mind to the facts and the law. The appellant was unnecessarily put out of pocket as a result of that conduct. An order of costs was therefore justified in terms of s 65(12) of the ITA.

Ms *Bishi* submitted that the respondent's conduct could not be deemed unreasonable for purposes of s 65(12) of the ITA. In any case, assessments were raised on 17 March 2020, long before the *Nestle* judgment was handed down on 23 November 2021. In a brief exchange with the court, Ms *Bishi* conceded that the respondent was aware of the Nestle judgment at the time this matter was set down for hearing. The respondent had not taken a position much earlier because of internal consultations that were underway.

This court is endowed with judicial discretion in deciding whether or not award costs to a successful litigant, and the level at which such costs must be awarded. Authors *Herbstein & Van Winsen*[4], had this to say about the award of costs of suit:

> "The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. In leaving the magistrate (or judge) a discretion,
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> > …..the law contemplates that he should take into consideration the circumstances of each case[5], carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties…..[6]"

In terms of s 65 (12) of the ITA, an adverse order of costs will be made against the commissioner if the court finds that his claim was unreasonable. That section states as follows:

> "(12) The High Court or the Special Court to which an appeal is made under this section shall not make any order as to costs save when the claim of the Commissioner is held to be unreasonable or the grounds of appeal therefrom to be frivolous."

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[3] SC 148/21
[4] *The Civil Practice of the High Courts of South Africa, Fifth Edition,* Vol 2 p964-965
[5] *Cronje v Pelser* 1967 (2) SA 589 (A) at 593
[6] *Erasmus v Grunow* 1980 (2) SA 793 (O) at 797B-D

In determining whether the respondent's claim was unreasonable, one must out of necessity consider all the circumstances of the case leading to the concessions made by the respondent on the points of law. The objection process as set out in s 62 of the ITA is intended to afford a taxpayer an opportunity to make further representations that may persuade the commissioner to reconsider his earlier decision. Section 62(4) of the ITA provides that:

> "(4) On receipt of a notice of objection to an assessment, a decision or the determination of a reduction of tax the Commissioner—
> *(a)* may reduce or alter the assessment, alter the decision or, as the case may be, increase or alter the reduction or may disallow the objection; and….."

It is seldom that the law accords a party a second bite at the cherry so to speak. The commissioner makes a decision or issues an assessment based on the information supplied by or obtained from a tax paper. Yet the same taxpayer is then allowed to object to an assessment or decision made based on information that the taxpayer itself would have supplied. It must have occurred to the drafters of the law that the taxation regime is highly complex and technical such that the parties must be permitted the highest latitude to place all information on the table to allow for an extensive ventilation of the issues before the dispute is escalated to courts of law.

The appellant's supplementary heads of argument raised new legal issues that were never placed before the respondent at the objection or appeals stage. The respondent was never given an opportunity to consider these fundamental and far-reaching legal points at an earlier stage. Mr *Tshuma* argued that the respondent acted unreasonably because it is expected to know its own processes. In any case, the courts had already pronounced on those same issues in the past. I do not believe that it is the intention and spirit of the law that the respondent should not be allowed any room for error. The circumstances would have been different if these pertinent legal points were brought to the attention of the respondent earlier than on the eve of the hearing. The administration of the law is not a mere stroll in the park so to speak. This why in spite of the existence of volumes of legal precedent parties still bombard the courts with the same legal problems that would have long been pronounced upon in earlier judgments.

When the legal issues were brought to the attention of the respondent, albeit rather belatedly, the respondent promptly conceded leaving the parties with no option but to ask that the matter be struck off the roll. While it is the position of the law that a point of law can be raised at any stage of the proceedings, courts must be wary of litigants who seek to ambush their adversaries by springing surprises on the eve of a hearing. Litigation is not a hide and seek game. A party must know the case they are required to answer to in good time to allow

them to prepare adequately or reconsider their position. It is for this reason that s 65(4) of the ITA exists. It states:

> (4) At the hearing of any such appeal the arguments of the appellant shall be limited to the grounds stated in his notice of objection:
> Provided that the High Court or the Special Court which hears such appeal may, on good cause being shown or by agreement of the parties, grant leave to the appellant to rely on other grounds.

In determining whether there is good cause to allow the appellant to rely on other grounds other than those stated in the notice of objection, the court must endeavour to strike a balance between the interests of justice and the likely prejudice that may be occasioned to either party by the granting of leave or denial of such leave. While the court was persuaded to grant the appellant leave to rely on the additional grounds set out in the supplementary heads of argument, it was not persuaded to make an adverse finding on the question of costs. The respondent's claim was not unreasonable to warrant such a finding. It is befitting to order that each party bears its own costs of suit.

Resultantly, it is ordered as follows;

1. The appeal be and it is hereby struck of the roll
2. Each party shall bear its own costs of suit.

BeraMasamba, legal practitioners for the appellant
ZIMRA Legal Services Division, legal practitioners for the respondent