UNKI MINES (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY
and
STANBIC BANK ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 19 September & 19 October 2022

Urgent Chamber Application

M. Tshuma, for the applicant
T. Magwaliba, for the 1st respondent
Ms M. Khumalo, for the 2nd respondent

MUREMBA J: The applicant is a company that carries mining operations in Zimbabwe. The first respondent is an administrative authority established in terms of the Revenue Act [*Chapter* 23:11] tasked with the administration and collection of revenues due in terms of various statutes that it is obliged to enforce. Pursuant to its duties the first respondent issued garnishee notices against the applicant's banker, Stanbic Bank Zimbabwe which is cited as the second respondent in this matter. One garnishee notice is for the remittal of the sum of USD 24,076,521.04 from the applicant's account to the first respondent. Consequently, the applicant filed the present urgent chamber application seeking the following interdict.

> **"Final Order Sought**
> That you show cause why an order should not be made as follows;
> 1. The provisional order be and is hereby confirmed.
> 2. The notices issued by the 1st respondent on the 15th of June 2022 against the applicant be and are hereby set aside.
>
> **Interim Relief Sought**
> Pending final determination by this Honourable Court on the validity of the notices issued by the 1st respondent on the 15th of June 2022, the 1st respondent be and is hereby interdicted from instituting any and all collection measures under the aforesaid notices."

The dispute between the parties relate to the payment of mining royalties that are due by the applicant to the first respondent in terms of the Mines and Minerals Act [*Chapter* 21:05]

as read with the Finance Act [*Chapter* 23:04]. The first respondent has accused the applicant of underpaying its mining royalties. The main bone of contention between the parties is how these mining royalties should be or are computed. They have different interpretations of the applicable law on how the computation should be made.

The parties have exchanged various correspondences over the issue from November 2018 to 2 June 2022 when the first respondent finally rejected the applicant's computation and contended that its computation is the correct one. By letter dated 2 June 2022, the first respondent advised the applicant that this was its final position on the matter. It further advised the applicant that the presented total amount remained payable. On 15 June 2022 the first respondent then sent schedules detailing the amounts owed by the applicant: ZWL 3,774,495.75 and USD 23,898,803.98. On 27 June 2022, the applicant wrote to the first respondent restating its grievances. However, it also proposed a payment plan on a without prejudice basis. On 29 July 2022, it went on to pay what it believed was the amount due to the first respondent. It made that payment in Zimbabwean dollars. The payment was not acceptable to the first respondent which took issue with the payment in Zimbabwean dollars. It indicated that payment should be made in United States Dollars in terms of s 4A (1) of the Finance Act [*Chapter 23: 04*].

The parties held a meeting on 17 August 2022 over the issue of the currency in which payment should be paid. They failed to agree. Consequently, in a letter dated 18 August 2022, the applicant was advised to settle its debt in United States dollars. On the morning of 9 September 2022 the first respondent placed garnishee notices with the applicant's bankers. One is for the remittal of USD 24,076,521.04. The applicant's deponent averred that he was surprised to be advised by the second respondent, Stanbic Bank Zimbabwe that the applicant's accounts had been garnished by the first respondent. The applicant's deponent averred that the garnishee came as a surprise because it was done before the applicant had been granted the audience it had sought with the first respondent's Commissioner General. The applicant's deponent further averred that the applicant had not been given a final warning to pay nor told that the first respondent no longer viewed negotiation as a viable dispute resolution mechanism between the parties. The parties met again on the same day as the applicant was asking the first respondent to lift the garnishee notices. The applicant was advised to submit a payment plan for consideration before the garnishee could be lifted. The meeting ended with the applicant promising to revert with a response on 12 September 2022. However, it is on that date (9 September 2022) that the applicant approached this court and filed the present urgent chamber

application. The contention is that the garnishee was not done procedurally and is therefore unlawful. A further contention is that should the first respondent continue with the garnishee, the applicant will face financial ruin as the amount to be garnished is huge. The applicant requires working capital and will not be able to pay its suppliers, workers, and make loan repayments. It is the applicant's contention that the amount the first respondent seeks to garnish is not owing as it paid the entire amount that was due to the first respondent when it made the payment in Zimbabwean dollars.

In response to the application the first respondent raised a number of points *in limine* which I deal with hereunder.

The matter is not urgent

The first respondent averred that the applicant was aware of its tax obligation since the 2nd of June 2022 and was on diverse occasions until the 18th of August 2022 reminded by the first respondent to pay but it refused to budge. This is what caused the first respondent to finally exercise its garnishee powers on 9 September 2022. The first respondent averred that the applicant had sat on its laurels and waited until it was issued with garnishee notices to approach the court. The first respondent further averred that besides, the garnishee arose as a result of the applicant's own unlawful conduct of failing to pay tax due timeously. The first respondent contended that its conduct of trying to recover taxes due from the applicant is lawful and as such this court cannot intervene on an urgent basis to interdict conduct which is lawful. This will render s 58 of the Income Tax Act [*Chapter* 23:06] which enables the first respondent to appoint an agent to recover monies owed to the fiscus nugatory. It was further averred that threats of financial ruin or collapse made by the applicant were bald and unsubstantiated as there were no figures backed by books and bank statements to prove this.

In response to this point *in limine* the applicant averred that the urgency was created by the first respondent when it unlawfully issued notices garnishing its accounts and served them on its banker on 9 September 2022. The applicant contended that it denies the existence of the alleged tax liability and obligation as it believes that it paid all that was due to the first respondent. It was the applicant's further contention that the first respondent has no power at law to recover royalties in the manner it did. This is not an income tax matter and as such the first respondent cannot rely on its powers under the Income Tax Act to garnishee its accounts in respect of mining royalties before doing an assessment. The applicant averred that if the

matter is not heard on an urgent basis and the first respondent is allowed to collect the amount of USD 24, 076,521.03 from its account it will face financial ruin. Relying on the cases of *Bulawayo City Council* v *Button Armature* HC 2070/14 and *Tianze Tobacco* v *Vusumuzi Muntuyedwa* HH 626/15, Mr *Tshuma* further submitted that the applicant's affidavit is acceptable evidence of proof of financial ruin.

After hearing submissions from both counsels it is my considered view that the matter is urgent. This is because despite the applicant being aware of its tax obligation as far back as 2 June 2022, the need to act as far as the present application is concerned only arose on 9 September 2022 when the first respondent gave notices to the second respondent to garnishee the applicant's account. I do not agree with the first respondent's argument that the need to act on the part of applicant arose on 2 June 2022. That argument suggests that the applicant ought to have done something in June 2022. The question is what could the applicant have done? There was nothing to interdict back then because the first respondent had not issued any garnishee notices against the applicant's accounts. The applicant was correct in arguing that what jostled it into action were the garnishee notices. If the first respondent had not issued the garnishee notices, the applicant would not have filed the present application because there were no circumstances that were prejudicial to it. Whilst the applicant became aware of its tax obligation on 2 June 2022, the first respondent did not do anything which the applicant considered harmful to it back then. In fact the parties were engaged in negotiations as shown by the various correspondences that were exchanged between the parties after 2 June 2022. On that basis the applicant believed that the parties were going to find a way of resolving the matter amicably.

From the submission by the parties it is clear that the parties are not in agreement in their interpretation of the law in relation to whether or not the first respondent is empowered by the law to garnishee the applicant's bank accounts to recover mining royalties. The applicant does not believe that the first respondent was correct in issuing the garnishee notices without doing an assessment. The first respondent believes that it was correct in doing what it did. If we go by the applicant's understanding of the law, it can only therefore mean that the garnishee notices took it by surprise and as such it is the issuing of these notices that marked the need to act on its part, hence the filing of the present application. By filing the application, the applicant wants the *status quo ante* preserved pending determination of the dispute between the parties on the correct interpretation of the law over the issuing of garnishee notices. The argument by the first respondent at this stage that the applicant cannot seek to interdict a lawful conduct is

in my view misplaced. This is not an issue that can be raised as a preliminary point in arguing whether or not the matter is urgent. Once the court starts delving into the lawfulness of the first respondent's conduct in issuing the garnishee notices, it will be getting into the merits of the case. Clearly this is an issue which determines the merits of the application.

In terms of the time within which the application was filed, I make the observation that the applicant did not delay. The application was filed on the very day the applicant became aware that its accounts had been garnished. The argument that the applicant dealt with the threat of financial ruin in a perfunctory manner because it did not provide evidence or proof of how the garnishee can lead to its liquidation is a valid argument. However, I cannot say the matter is not urgent on this basis because there is also the issue of whether or not the first respondent lawfully issued the garnishee notices against the applicant's bank accounts. If the issuing of notices was unlawful then the unlawful conduct will need to be urgently interdicted regardless of the applicant's failure to illustrate how the garnishee will lead to its liquidation.

In view of the foregoing, I thus dismiss the point *in limine* for lack of merit.

The applicant is seeking an incompetent relief

It was averred by the first respondent that the applicant cannot seek to interdict it from doing that which it has already done. A person cannot interdict an action that has already been executed. An interdict is not a remedy for past invasion of rights. The court cannot thus prohibit the appointment of an agent already appointed. In *casu* the second respondent has already been appointed by the first respondent to garnishee the applicant's accounts and remit money to it. A further averment was made that a person cannot seek to interdict that which was done in accordance with the law. The first respondent is allowed by the law i.e. s 58 of the Income Tax Act to appoint an agent for the collection of tax. Let me hasten to point out that this further averment is disputed between the parties. They are not in agreement on this issue as the applicant is of the view that the first respondent is not authorized by the law to issue garnishee notices in the manner it did. It is my considered view that this issue cannot be raised as a point *in limine*. It is an issue for argument on the merits. The answer to this issue is what decides whether or not the interdict can be granted in the interim. It is also the issue that decides whether or not the garnishee notices that the first respondent issued are invalid and ought to be set aside on the return date. It is therefore the issue that is central to the dispute between the parties.

In response to this point *in limine* the applicant's deponent averred that the applicant has approached this court to stop the first respondent from effecting collection measures in terms of the garnishee notices it issued. It was contended that the applicant can interdict the first respondent's garnishee notices as they were issued on the basis of incorrect legal provisions.

I am in agreement with the first respondent that the applicant cannot seek to interdict that which it (the first respondent) has already done. It has already issued garnishee notices to the second respondent, the bank. Whether or not the notices were wrongly or correctly issued at law is not the issue now. Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th Ed at p 1465 state that an interdict is appropriate only when future injury is feared. When the wrongful conduct giving rise to the injury has already occurred, either it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated for a person to seek an interdict. In *casu* as was correctly submitted by Mr *Magwaliba*, the applicant's recourse as against the first respondent under the circumstances would be to challenge the validity or legality of the notices that it has already issued and seek to have them set aside. In light of this, I asked Mr *Tshuma* to explain the interim relief the applicant is seeking. The relief sounded vague in as far as it was seeking to interdict the first respondent from "*instituting any and all collection measures under the aforesaid notices*." When the application was filed, the first respondent had already served the garnishee notices on the applicants' bank, the second respondent to deduct money from the applicant's accounts and remit it to it. All that the first respondent was now waiting for was for the second respondent to garnish the money form the applicant's account and remit it to it. The first respondent therefore did not need to take any further step or action except to wait for the money from the applicant's account to hit its account. It is on this basis that I asked Mr *Tshuma t*o explain that which the applicant was seeking to interdict the first respondent from doing pending the return date.

In response Mr *Tshuma* applied to amend the terms of the interim relief so that it could provide that the first respondent should "*be interdicted from effecting collection measures in terms of the garnishee order effected on 9 September 2022*." I still felt that the use of the words "effecting collection measures" was not clear enough and rather cryptic considering that the first respondent had already appointed the second respondent to be its agent for the purpose of garnishing the applicant's bank accounts and remitting money to it. With that the first respondent could not effect any other collection measures other than wait for the remittal or payment of the money by the second respondent.

At law once a bank has been appointed as an agent by the first respondent, it may not refuse to pay the money that is due from the client's account unless the first respondent uplifts or suspends the garnishee order it issued or unless the court issues an order suspending payment or implementation of the garnishee notice(s). I thus asked Mr *Tshuma* if the applicant was not seeking an order against the second respondent in the interim but he was adamant that no relief was being sought against the second respondent. I went on to ask him why then the applicant had sued the second respondent, more so, in view of the fact that on the return date, the applicant will only be challenging the validity of the garnishee notices issued by the first respondent. From the draft order, the applicant will not be seeking any relief against the second respondent on the return date. This means that the importance of the second respondent in the whole case is at the present stage of seeking interim relief. This is because the first respondent already have issued garnishee notices and served them on the second respondent. It is the second respondent that now has the outstanding obligation to effect the garnishee notices by deducting money from the applicant's bank accounts and remitting same to the first respondent. I must say despite all my efforts to guide Mr *Tshuma* and open his eyes, Mr *Tshuma* remained adamant that no relief was being sought against the second respondent. He did not explain why then the second respondent was sued in the proceedings. Mr *Magwaliba* then submitted that the effect of the applicant not seeking an order against the second respondent was that the second respondent was going to walk out of this court with no order to stop it from complying with the garnishee notices that were issued by the first respondent. It will therefore be mandated to comply and make payment to the first respondent. I am in agreement with Mr *Magwaliba*. What this means is that if I am to proceed to determine the matter on the merits, and happen to find in favour of the applicant, that finding will not be of any use or benefit to the applicant since I will not be able to grant relief that will interdict the second respondent from deducting money from the applicant's account and making payment to the first respondent in terms of the garnishee notices issued by the first respondent. Put differently, the second respondent will still be expected to comply with the garnishee notices as there will not be any order interdicting or barring it from complying with the garnishee notices.

There is credence in the point *in limine* raised by the first respondent that the applicant is seeking an incompetent relief against it in the interim. Garnishee notices have already been issued, whether rightly or wrongly, it does not matter at this stage. Since the applicant is challenging the legality of the issuing of those notices by the first respondent, what is therefore critical at this stage is to temporarily interdict their implementation. The applicant therefore

ought to have sought to suspend their operation or implementation in the interim pending the return day. It is the failure by the applicant to seek that specific relief for the suspension of the implementation of the garnishee notices that renders the applicant's application fatal. In view of this, it will therefore be a futile exercise to go into the merits of the case. A determination on the merits will not take the matter anywhere. The point in *limine* that the applicant is seeking an incompetent relief is thus upheld. Having upheld this point *in limine* which renders the application fatally defective, there is therefore no point in dealing with the rest of the points *in limine*.

In the result, it is ordered that:

1. The application is struck off.
2. The applicant shall pay the respondent's costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Zimbabwe Revenue Authority, first respondent's legal practitioners
Atherstone & Cook, second respondent's legal practitioners