EDGARS STORES LIMITED
versus
THE MINISTER OF FINANCE
and
THE COMMISSIONER GENERAL

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 8 May 2014 and 10 September 2014

Opposed application

P.C Paul, for the applicant
Advocate Magwaliba, for the respondent

NDEWERE J: The applicant is Edgars Stores Limited, a Public Limited Company with several retail stores throughout the country. The applicant is a registered operator in category C in terms of s 27 of the Value Added Tax Act [*Cap* 23:12] and s 3 of S.I 104 of 2010.

The basic facts are common cause. The respondents introduced a system of fiscalisation in terms of which all Vat registered operators were required to install electronic signature devices which record all transactions which are subject to value added tax (VAT) and which are electronically connected throughout the Zimbabwe Revenue Authority showing the transactions conducted by registered operators and determining the amount of tax which is payable.

The requirement for registered operators to install such devices was set out in the Value Added Tax (Fiscalised Recording of Taxable Transactions) Regulations, Statutory Instrument No. 104 of 2010. The regulations required that registered operators install the apparatus by a given deadline and provided for criminal prosecution of non-compliant operators. Due to the highly technical and complicated procedure in the installation of the devices, the deadline was initially 1 April 2010, then it was extended to 1 October, 2010 and further extended to 1 January, 2011.

The respondents say the extensions were meant to give operators including the applicant ample time to purchase and install the devices before the final deadline. The first respondent further states that suppliers of the devices were increased to ensure the applicant and other operators had a wide range from which to select suppliers.

The initial Value Added Tax Regulations S.I 104 of 2010 were amended by statutory instrument 153 of 2011. The amendment, in s 10 of S.I 153 of 2011, empowered the second respondent to impose civil penalties per point of sale on operators who did not comply with the regulations. The penalty was $25-00 daily per non-compliant point of sale. As a result of this penalty the applicant accumulated a total penalty of US$ 187 100-00. This was later reduced to $134 712-00 by the second respondent after considering the applicant's circumstances in terms of s 10 (1) (a) of S.I 153 of 2011. The applicant has applied to the court for a declaratory order against S.I 153 of 2011.

Applicant's prayer is that Statutory Instrument 153 of 2011 be declared null and void as being ultra *vires* the Value Added Tax Act, [*Cap* 23:12] and that the respondents pay costs of suit. Applicant's argument was that first respondent, the Minister of Finance, exceeded his powers when he enacted Statutory Instrument 153 of 2011. Applicant said the Act only permitted second respondent to impose a penalty involving the non-payment of tax; any other contravention which is not non-payment of tax was reserved for criminal prosecution.

The applicant also said the amendment was ultra *vires* the Constitution of Zimbabwe because it deprived registered operators of their constitutional right to have access to the courts.

Both respondents opposed the application, arguing that Statutory Instrument 153 of 2011 is not *ultra vires* the Value Added Tax Act or the Constitution of Zimbabwe.

Applicant has since complied with the fiscalisation process but it is aggrieved by the penalty imposed on it for failing to complete the process within the prescribed time; hence this application.

During the hearing, applicant's counsel amended some of the applicant's submissions outlined above. Applicant's counsel abandoned the argument that the whole of Statutory Instrument 153 of 2011 was *ultra vires* and should be declared null and void. It said it is only s 10 (1) (a) of the Statutory Instrument which should be declared null and void.

Section 10 (1) (a) of S.I 153/11 provides as follows:-

"**S.I 153/11 Section (1) (a)**

Section 10 (1)

Any person, who fails to comply with section 3 on the fixed date or within any extension of that date granted by the Commissioner-General in terms of Section 5 (5) shall –

(a) Be liable for a civil penalty of US$25-00 per point of sale, for each day the tax payer remains in default, not exceeding a period of one hundred and eighty-one days:

Provided the authority shall have power to waive the payment or refund the whole or part of any penalty under this paragraph if it is satisfied that the contravention was not wilful or not due to want of reasonable care"

Applicant's counsel also said the basis of its complaint about s 10 of S.I 153/11 is that in terms of the Finance (No. 2) Act, of 2011, S.I 153 of 2011 became effective from 1 January, 2012. He said that means that when the civil penalty was levied on the applicant, the Regulations were not yet effective.

The challenge with applicant's argument above is that the applicant did not tell the court the date when the penalties on the points of sale were levied in its founding affidavit. The applicant just provided the global figure of $187 000-00 which was later reduced to $134 712-00 by the second respondent. In the absence of information on the dates the penalties which total $134 712-00 were levied, the court cannot determine whether at the time the penalties were levied, the Regulations were not yet effective. The applicant should have provided all relevant information in its founding affidavit. It is trite law that an application stands or falls by its founding affidavit. That omission by the applicant is fatal on whether at the time the penalty was levied, the Regulations were no yet effective.

In addition, if the applicant is now saying that the problem is that the Regulations were used before the effective date, in essence, it is saying the Regulation is in order; but it was prematurely utilised. This amounts to a concession that there is nothing wrong with Statutory Instrument 153 of 2011.

Indeed, there is nothing wrong with Statutory Instrument 153 of 2011. As correctly submitted by respondent's counsel, s 78 of the Value Added Tax Act [*Cap* 23:12] (VAT) gives the Minister of Finance wide powers to make Regulations in three instances. The first instance is when the VAT Act requires the Minister to do so, the second instance is when, in the Minister's opinion the regulation is necessary to give effect to the VAT Act and the third

instance is when, in the Minister's opinion it is convenient for something to be prescribed for carrying out or giving effect to the Act. Section 78 (5) of the VAT Act provides that the Regulations by the Minister may provide for civil penalties by the Commissioner. So Statutory Instrument 153 of 2011 simply fulfilled provisions that are contained in the parent Act itself, it did not create any new thing.

The applicant accepts that it failed to fiscalise its records within the prescribed time; even after numerous extensions of the deadline. The consequence for that failure in terms of the regulations are civil penalties only for a period of up to 181 days. After 181 days, if the operator is still in default, then criminal sanctions begin to apply. The fact that the criminal sanction after the 181 days includes imprisonment for up to 12 months in addition to any fine that may be imposed is an indication of the seriousness with which the non compliance is viewed even from a criminal point of view.

The applicant appears to have confused criminal sanctions and civil sanctions. The two sanctions are distinct and separate. One sanction may be imposed or both. As submitted by the second respondent in its Heads of Argument, the civil sanction is primarily to provide some restitutional relief to the wronged party. In this instance, the restitutional relief provided by the civil sanction is $25-00 per point of sale per day. The magnitude of the civil sanction is then determined by the number of points of sale, the number of days in default and the prescribed amount of $25-00 per point of sale. The civil sanction is also meant to induce compliance with the regulations and to prevent default as opposed to a criminal sanction which punishes non-compliance and default after the event. The civil sanction cannot be compared with the criminal sanction. The two are different and belong to different realms of the law. The applicant could not therefore convince the court that because the total penalty amounted to US$134 712-00, this means the civil penalty is excessive as compared to the criminal penalty.

Initially, applicant had submitted that S.I. 153 of 2011 was unconstitutional, saying it denied operators the right to access the courts. This submission was strongly opposed by the respondents on the basis of s 78 (6) of the VAT Act which requires the second respondent to go to court to recover the penalty as a debt. During the hearing, applicant's counsel conceded that he was not asking the court to strike out S.I. 153 of 2011 for being unconstitutional. The concession by applicant's counsel was properly made because applicant's draft order did not include any relief for being unconstitutional. The court could not therefore have granted applicant the constitutional relief which he had not sought.

In view of all the factors outlined in this judgment, the applicant failed to convince the court that s 10 (1) (a) of Statutory Instrument 153 of 2011 was *ultra vires* the Value Added Tax Act [*Cap* 23:12].

The application is therefore dismissed, with costs.

Messrs Wintertons, applicant legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners