FBC BANK LIMITED
versus
PACKERS INTERNATIONAL PVT LTD
and
THE ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 14 January 2016

Opposed application

F Girach, for the applicant
T R Tanyanyiwa, for the 1st claimant
M Sakhe, for the 2nd claimant

FOROMA J: This is an application for interpleader relief by FBC Bank Ltd (applicant) which claims it was caught in between the demand for monies held in the 1st claimant's accounts with it and the 2nd claimant which has been demanding compliance with a garnishee order requiring that it (the applicant) remit to it all monies held in the 4 accounts that the 1st claimant held with it. At the close of argument I granted the applicant some relief i.e. an order in terms of the alternative draft order with 2nd claimant paying the costs on the higher scale and indicated that my reasons for the judgment would follow. These are they.

The background to the application is succinctly summarised in the applicant's founding affidavit and it is that:

1. 1st claimant (Packers International P/L) was assessed for taxes by ZIMRA (2nd claimant) for a figure around US$19 696 645.44.
2. 1st claimant appealed to the Fiscal Appeal Court against the tax assessments.
3. Meanwhile 2nd claimant appointed the applicant on 13 June 2014 as agent of Packers International P/L in terms of s 58 of the Income Tax Act and s 48 of the Value Added Tax Act for purposes of collecting the unpaid assessed taxes from Packers International P/L by way of a garnishee order.
4. In terms of the appointment as agent the applicant by operation of law was required to remit funds already in the 1st claimants accounts at the time of appointment as agent and to come into these accounts in future. The details of the

four accounts affected by this garnishee order are common cause between the parties.

The applicant complied with the garnishee until 10 July 2014 when it learnt and confirmed that the High Court had issued a judgment suspending the garnishee forthwith at the instance of the 1st claimant with the result that applicant immediately permitted the 1st claimant to operate its accounts. The details of the transaction on the bank accounts are not material to this judgement. Suffice it to say that when second claimant got to know that applicant had stopped remitting monies from the 1st claimant's accounts in terms of the garnishee order it raised issue by demanding payment from the applicant.

In response to ZIMRA's demand for payment in terms of the garnishee order (which was accompanied with a threat to recover all monies that the applicant had allowed 1st claimant to withdraw out of its 4 accounts from the applicant personally) the applicant explained to ZIMRA the reason why it had allowed the first claimant to access its funds. There was an exchange of correspondence the effect of which is best appreciated by quoting from the said correspondence. The relevant correspondence between ZIMRA and the applicant commenced with letter from ZIMRA to applicant dated 29th September 2014 which is reproduced herein below. The letter addressed to the Public Officer FBC Bank and marked for the attention of Mr Magwaza read as follows:

> "I refer to the access to information forwarded to your Bank on 25 September 2014 requesting the bank statements for all accounts held by Packers International P/L for the period 15 July 2014 to 26 July 2014.
>
> I have noted with concern that you have allowed your client Packers Internationalto withdraw money from the Pakers's International Accounts held with you despite the fact that there is an appointment of an agent placed with your bank for the recovery of tax due that you have partially honoured to date.
>
> May you rectify the oversight by remitting to ZIMRA the equivalent of the amount withdrawn by Parkers International P/L from 15TH June 2014 to date. Please note that recovery measures will be instituted from your account in terms of section 56 of the Income Tax Act [Chapter 23] and section 495 of the Vat Act Chapter 23:12 if the funds are not remitted by 30/09/14. Your cooperation will be appreciated.
>
> Yours faithfully."

In response to this letter the applicant wrote letter dated 30 September 2014 addressing The Commissioner Investigations and International Affairs ZIMRA for the attention of Mayisiri as follows:

> "The above matter refers…….

> Please be advised that we agreed to allow the customer to transact on their accounts based on the High Court order that we received on 10/01/14. The High Court in case No. HH328/14 issued an order on the 25/06/14 which had the effect of uplifting and suspending the garnishee order that had been placed upon our client on 13/06/14. In light of the above we write to advise that our actions of allowing Packers International to transact without sending the proceeds to yourselves were premised on this court order.
>
> We wish to state that upon being served with the said order we proceeded to verify its authenticity in the High Court of Zimbabwe wherein we established that indeed it was genuine.
>
> The bank proceeded to allow the customer to transact based on this position as anything to the contrary would have been viewed as contempt of a lawful court order……
>
> We hope the above clarifies the position undertaken by the Bank and we would be grateful to meet your good offices should there be need for further clarification."

It is important to note that by the date of this letter (30th September 2014) ZIMRA had already appealed against the High Court judgment referred to in the applicant's letter even though neither 1st claimant nor 2nd claimant had brought this fact(noting of appeal) to the attention of the applicant.

The next correspondence from the 2nd claimant to the applicant was letter dated 2 October 2014 effectively disputing the applicant's right to act on the High Court's judgement. It suffices to quote only those portions of the letter which assist in illustrating the unfortunate position taken by the 2nd claimant-unfortunate because it was not necessary to be belligerent in circumstances where tender of relevant information could have achieved the desired result.

In its letter to the applicant dated 2 October 2014 ZIMRA wrote as follows-

> "I acknowledge receipt of your letter dated 30 September 2014.
> ……
>
> Since you dishonoured the Appointment of Agent by allowing your client, (Packers International) to withdraw some money from their bank accounts held with you, ZIMRA will invoke the provisions of section 56 of the Income Tax Act [*Chapter 23:06*] which states that:
>
> > 'Every representative taxpayer shall be liable personally for any tax payable by him in his representative capacity if, while it remains unpaid-
> >
> > (b) he disposes of or parts with any fund or money which is in his possession or comes …….
>
> and section 49 (6) of the VAT Act [Chapter 23:12] which also states that:
>
> > 'Every representative registered operator shall be personally liable for the payment of any tax additional tax, penalty or interest payable by him in his representative capacity, if, while the amount thereof remains unpaid-

(a) He alienates, charges or disposes of any money received or accrued in respect of which tax is chargeable; or
(b) He disposes of or parts with any fund or money belonging to the person whom he represents which is in his possession or comes to him after the tax, additional tax, penalty or interest has become payable, if such tax, additional tax, penalty or interest could legally have been paid from or out of such fund or money.'

Kindly note that the above provisions will only be invoked if the funds released to Packers International P/L are not remitted to ZIMRA by 4 October 2014. You will be issued with assessments equivalent to the amount withdrawn by your client and these will be delivered to you in due course……

Yours faithfully"

With respect ZIMRA ought simply have informed the applicant at this point that the High Court judgement applicant had relied on in granting 1st claimant access to transact on its accounts had in fact been appealed against and that legally the effect of such appeal was to suspend the judgement appealed against. This is the position that ZIMRA regrettably only communicated too late after creating apprehension in the applicant's mind-regrettable because this noting of appeal was only brought to the applicant's attention through the 2nd claimant's notice of opposition to the proceedings *in casu* on 22 January 2014.

Meanwhile and as a result the applicant which had already felt threatened by both claimants and did not wish to take sides in regard to who between the claimants it should allow access to the monies in dispute decided to file this application so that the court could determine who if any as between the claimants had a lawful claim to the monies in question.

A proper appreciation of this straightforward background should leave no doubt in the mind of any person who understands the purpose of interpleader procedure as to the appropriateness of the action taken by the applicant in instituting interpleader proceedings in these circumstances. The applicant had no option but to institute these proceedings especially given its ignorance of the appeal noted by the 2nd claimant against the High Court judgement aforesaid. See *Deputy Sheriff Harare* v *Conview Energy and Anor* 2012 (1) ZLR 546 (H), *Kanfer* v *Redlot Haulage (Pty) Ltd* 1979 (3) SA 1149 W 1152.

Both claimants but for different reasons argued that the applicant had adopted the wrong procedure by filing the interpleader application. Mr *Tanyanyiwa* for the 1st claimant relying on the interpretation of s 14 of the Fiscal Appeals Act by Chigumba J in her judgment HH 328/14 in the matter between 1st and 2nd claimants (which interpretation incidentally 2nd claimant disputes) argued that the noting of an appeal to the Fiscal Appeal Court against an

assessment of tax suspends the payment of the disputed tax unless the Commissioner whose decision is subject of the appeal otherwise directs. He therefore submitted that 1st claimant did not owe 2nd claimant any tax. The full text of s 14 of the Fiscal Appeal Act reads as follows:

> 14 Suspension of tax on noting of appeal
>
> "Where any person has given notice of intention to appeal in accordance with section eleven or thirteen payment of so much of the tax which he has been called upon t pay as would not be payable by him if the appeal were allowed shall be suspended until the appeal has been decided unless the Commissioner whose decision is the subject of the appeal otherwise directs".

Mr *Tanyanyiwa* thus argued that 1st claimant does not owe the tax assessed which is the subject of its appeal to the Fiscal Appeal Court as the Commissioner had not directed otherwise. An extension of 1st claimant's argument is that even if the 2nd claimant noted an appeal against Chigumba J's judgment in HC 4847/14 which appeal would ordinarily suspend Chigumba J's judgment the *status quo ante* would obtain which is that payment (by operation of law) of disputed tax assessed would remain suspended and this would not render it liable to pay the disputed tax to the 2nd claimant pending appeal. The argument though very forceful and persuasive begs the point that what is suspended only is that tax which the person noting an appeal is challenging and not the tax he admits as the admitted tax amount is both recoverable and payable. Clearly therefore the US$900 000-00 plus admitted by 1st claimant which is not the subject of appeal did not fall under the ambit of so much of the tax which it had been called upon to pay as would not be payable by it if the appeal were allowed.

Mr *Sakhe* for the 2nd claimant argued that the applicant adopted the wrong procedure and that there are no competing claims to monies held in 1st claimant's accountswith the applicant in light of the notice of appeal against Chigumba J's judgment as the said judgment of Chigumba J is suspended once appealed against. 2nd claimant initially argued that the applicant got to know of the noting of appeal on 10 July 2014 but could not justify this date as the effective date for attributing knowledge of appeal to the applicant. It is clear that the applicant only first became aware of the noting of an appeal when the 2nd claimant's notice of opposition filed on the 22 October 2014 was served on the applicant. This 2nd claimant appreciated without conceding that until then the applicant's interpretation of Chigumba J's judgement aforesaid could not be dismissed as palpably unreasonable. It was as a result of its ignorance of the 2nd claimant's appeal that applicant considered itself as caught in between

the claimants' demands for payment of the amounts in the 1st claimant's 4 bank accounts with the applicant. Clearly after becoming aware of the filing of the notice of appeal against Chigumba J's judgment the applicant could no longer be heard to argue that it was still caught in the middle of conflicting claims by the claimants. It was on the basis of the foregoing that I granted 2nd claimant relief in terms of the draft order in the alternative as amended and awarded the applicant's costs on a higher scale against 2nd claimant.

Dube, Manikai & Hwacha, applicant's legal practitioners
Manase & Manase, 1st claimant's legal practitioners
Kantor & Immerman, 2nd claimant's legal practitioners