MGZ (PVT) LTD
versus
THE COMMISSIONER GENERAL
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
MTSHIYA AJ
HARARE, 10 September 2019 , 26 November 2019, 29 January 2020, 27 February 2020,13 July 2020, 2 November 2020, 22 March 2021 and 1 June 2021.

Income Tax Appeal

D. Ochieng, for the appellant
T Magwaliba, for the respondent

MTSHIYA AJ **:** This is an appeal in terms of section 65 of the Income Tax Act, (ITA) where on 10 October 2018 the parties agreed that the main issues for determination would be the following:

> "1. Whether or not the separate mining operations under the Appellant's portfolio were inseparable and substantially interdependent, such that capital allowances in respect of the different mines should have been allowed under one tax return for each tax year period.
>
> 2. In the event of a finding being made that the issuance of separate income tax assessments for each mining unit was proper, whether or not such assessments were invalid to the extent that they did not take into account various expenses incurred by the Appellant's head office and it's mining units."

The background and facts.

The Appellant is a limited liability company, registered and incorporated in Zimbabwe. The appellant carries on mining business and is one of the largest gold producers in Zimbabwe. The appellant has five mines which are located in various parts of the country. The mines report to the Head office in Harare. The Head Office in turn reports to the Regional Head Office in South Africa. The five mines are registered separately with the Registrar of Companies.

The respondent, an administrative authority tasked with the collection of taxes in Zimbabwe, carried out tax investigations on the affairs of the appellant for the tax years 2009 to 2012.

The income tax collection system in Zimbabwe is embodied in the ITA and involves submission of self-assessments of one's income tax, which is however subject to audit by the respondent. The system therefore largely relies on self-assessments by the income earners. This is so mainly because the Respondent does not have the requisite capacity, technology and manpower to effectively monitor every income earner's liability for income tax. To ensure that tax payers comply with the requirements of the ITA, the respondent carries out periodic audits.

On 18 July 2014 the respondent issued amended assessments namely 3331, 3332, 3510, 3511,3512, 3513, 3514, 3515, 3516, 3517,3518, 3519, 3520-3227 inclusive.

On 15 August 2014, the appellant objected to these assessments through its tax advisors. The respondent dismissed the objections filed and notified the appellant of its decision on 9 November 2015.

This appeal is against the respondent's dismissal of the appellant's objections.

The grounds of appeal were listed as follows:

> "1. Whether or not the separate mining operations under the appellant's portfolio were inseparable and substantially interdependent, such that capital allowances in respect of the different mines should have been allowed under one tax return for each tax period.
>
> *2.* Whether or not such assessments were invalid to the extent that they did not take into account various expenses including those expenses incurred by the appellant's Head Office and it's mining units."

Evidence

In support of its case the appellant called two witnesses. However, in view of my decision on the *point in limine* raised by the respondent, it will now not be necessary to narrate the witnesses' evidence.

The respondent did not lead evidence but instead indicated that it would rely on the papers filed of record.

***Point in limine* raised by the respondent and resolution of same.**

At the close of the hearing, I allowed parties to file written submissions as follows:-

appellant: 25 March 2021

respondent: 30 March 2021

The respondent filed its closing submissions on 26 March 2021 while the appellant then filed its own on 6 April 2021.

In its written submissions, filed before the appellant's submissions as indicated above, the respondent raised, for the first time, a *point in limine* based on what it termed "a fatally defective appeal". To that end the respondent submitted:

> "1. The first instance, the citation of the Respondent renders the appeal fatally defective. The person cited as the Respondent is the Commissioner General, Zimbabwe Revenue Authority.
>
> 2. Section 3 of the Revenue Authority Act (Chapter 23: 11) provides for the establishment of the Zimbabwe Revenue Authority in the following manner:
>
> > "**There is hereby established an authority, to be known as the Zimbabwe Revenue Authority, which shall be body corporate capable of suing and being sued in its own name and, subject to this Act, of performing all acts that bodies corporate may by law perform."**

To support the above position relating to the *point in limine* Mr *Magwaliba*, for the respondent cited a number of authorities which included the recently decided case, *G (Pvt) Ltd* v *The Commissioner General Zimbabwe Revenue Authority*, HH347/20, where ZIYAMBI, AJ, said:

> "It seems to me that the law on the matter has been clearly stated. For the purposes of this application there is no legally recognized respondent before this court. Unfortunately for the appellant, there is no mis-description that can be rectified by amendment. It is an invalid citation contrary to statute- the Revenue Authority Act [Chapter 23:11] which has specific power to litigate to the Zimbabwe Revenue Authority. It is a nullity and cannot be amended. In the circumstances, the application is invalid in that there is no respondent before the court. The matter must be accordingly be struck off the role."

In response to the above, Mr *D. Ochieng*, for the appellant made the following submissions:

> "13. For its part the respondent chose not to lead any evidence and is content to rely on the documents filed prior to the hearing. Only after the hearing was complete did the respondent affect to raise some objections *in limine* in its submissions. It would appear that it chose not to object during the five years that this matter has been pending out of the realization that there was no objective prejudice to it on account of the matters that it now pleads. The unfortunate impression is formed that it is only after it was further confirmed through the evidence that its position was untenable on the merits that the respondent

> scrambled to gather some dust to throw about in the hope of detracting from the substance of the matter:
>
> *Telecel Zim (Pvt)Ltd* v *POTRAZ & Ors* 2015 (1) ZLR 651 (H) at 659D-
>
> 14 . In the first objection, taken after the conclusion of the hearing but expressed in terms that reveal a much earlier decision, the respondent affects to dispute the validity of proceedings in which it freely participated for years- even to the point of seeking resolution of many of the known issues. In the circumstances, and as the Supreme Court held in *Muskwe* v *Nyajina & Ors* S-17-12, the respondent should not be permitted even too take the point. The respondent admits its true identity in the second paragraph 2 of the Commissioner General and no 'the Commissioner." On the face of its own pleadings, therefore, the reality is that the true respondent is the Zimbabwe Revenue Authority. This creates an issue estoppel as regards the *locus standi* and identity of the respondent:
>
> *Galante* v *Galante (1)* 2002 (1) ZLR 144 (H).
>
> According, and in reliance on *Muskwe*'s case, it is submitted, the common cause position as regards the identity of the respondent reveals that any error the pleadings with regard to the description of that known respondent does not beget a nullity:
>
> *McFroy* v *United Africa Co Ltd* [1961] 3 AIIER 1169 (PC) at 1173B-D"

Admittedly, this issue, which is a point of law capable of being raised in the manner it was, came in the form of an ambush to both the court and the appellant. This practice, if deliberate, should be frowned upon. The points raised in the authorities quoted by the appellant in the above passages, particularly the issue of prejudice, are important. However, in terms of applying the law as stated in *G (Pvt) Ltd supra*, l find myself in a situation where departure from the already stated position will not enjoy the support of the law. That stated position of the law does not allow the issue of estoppel as suggested in the case cited in the second passage above. That position is further enhanced in *MARANGE RESOURCES (PRIVATE) LIMITED* v *CORE MINING & MINERALS (PRIVATE) LIMITED (IN LIQUIDATION) AND 3 OTHERS.* SC 37/16 where the Supreme Court quoted from the *Civil Practice of the High Court of South Africa* as follows:

> "The need for the proper citation of parties is highlighted in, Cilliers, A.C. et al in Herbstein & van Winsen's *The Civil Practice of the High Courts of South Africa*, 5th ed, vol.1 page 143 as follows: "Before one cites a party in a summons or in application proceedings, it is important to consider whether the party has *locus standi* to sue or be sued (*legitima persona standi in judicio*) **and to ascertain what the correct citation of the party** is." (emphasis added)."

In dismissing the application for wrong citation in that case, the Supreme Court went further to say:

> "Thus, the fate of an application where a wrong party is cited is clear. The proceedings cannot be sustained……."

Apart from dwelling on the issue of possible prejudice, the appellant does not deny that a wrong party was cited. The appellant merely objects to the timing with respect to the raising of the *point in limine*. Unfortunately the law permits the raising of the issue at any time before judgment. In view of this position of the law, l am disabled from rejecting the point in *limine* raised by the respondent. To that end, the point in *limine* should be upheld. That means the appeal should be struck of the role. That decision means there is no appeal before this court and accordingly the merits of the case, and indeed any other issue pertaining to the case, cannot be addressed. Proceeding further, would be improper because there is no proper appeal before the court.

Dispositon

I therefore order as follows:

1. The appeal is struck off the roll; and
2. Each party shall bear its own costs.

Atherstone & Cook, appellant's legal practitioners
The Legal Department, respondent's legal practitioners