REPORTABLE (136)

MBCA BANK (PRIVATE) LIMITED
(Now known as Nedbank Zimbabwe Limited and styled "MR Bank" in the judgment appealed against)
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
GUVAVAJA, UCHENA JA & MAKONI JA
HARARE, 7 SEPTEMBER 2020 & 12 NOVEMBER 2021

D.Ochieng, for the appellant

T. Magwaliba,for the respondent

UCHENA JA: This is an appeal against the whole judgment of the Special Court for Income Tax Appeals dated 28 November 2019, upholding the respondent's amended assessment of tax against the appellant.

FACTS

The facts of the case can be summarised as follows;

The appellant is a registered Bank in Zimbabwe. It is also a subsidiary of MBCA Holdings Limited a local holding company which in turn, is a subsidiary of Nedbank Limited (Nedbank) a South African company.

The respondent is an authority established in terms of the Revenue Authority Act [*Chapter 23:11*]. It is responsible for assessing, collecting and enforcing payment of taxes to the State.

On 5 June 2012, the appellant filed its income tax self-assessment with the respondent for the tax year ending 31 December 2011. On 27 June 2012, the respondent's Commissioner of Investigations and International Affairs launched a tax review of the appellant's operations for the period spanning January 2009 to May 2012. The exercise resulted in the respondent issuing amended manual notices of assessment for Income Tax numbers 203324818 and 20324821 for the tax years 2010 and 2011 respectively. The amended notice of assessment in respect of the 2010 tax year was subsequently withdrawn whilst the amended assessment in respect of the 2011 tax year resulted in additional tax and penalties amounting to US$ 944 614.80.

The appellant objected to the amendment for the tax year ending 31 December 2011. The respondent dismissed the objection after which the appellant appealed to the Special Court for Income Tax Appeals (the court *a quo*).

The issue before the court *a quo* was the validity of the amended assessment of Income Tax number 20324821, for the 2011 tax year. The respondent disallowed the appellant's deductions pertaining to "expenditure incurred on general administration and management" in terms of s 16 (1) (r) of the Income Tax Act [*Chapter 23:06*] and debts written off by the appellant in its income tax self-assessment as "bad debts" in terms of s 15 (2) (a) as read with s 15 (2) (g) of the Income Tax Act.

It was established before the court *a quo* that the appellant is a subsidiary of MBCA Holdings Limited a local holding company which in turn, is a subsidiary of Nedbank Limited (Nedbank) a South African company. In terms of s 143 (1) (b) of the then Companies Act [*Chapter 24:03*] the appellant was deemed to be a subsidiary of Nedbank (South Africa).

During the 2011 tax year, Nedbank (South Africa) met several expenses on behalf of the appellant including travelling costs, telecommunications costs and postage and freight costs. It also rendered services such as group technology infrastructure and operation support services, system support service for the Africa Banking and e-commerce, strategic planning assistance and risk advisory service assistance. The appellant subsequently paid Nedbank (South Africa) for the incurred expenses and accounted for all the payments made thereto, including reimbursement, payment for services rendered and general and specific administration costs through a single ledger account headed "Operating Costs".

The respondent's amended assessment was based on its treatment of all the payments made to Nedbank (South Africa) by the appellant as general administration and management costs. The respondent disallowed all amounts in excess of limits set in terms of s 16 (1) (r) (ii) of the Act. In respect of bad debts, the respondent's position was that bad debts could only be claimed in terms of s 15 (2) (g) of the Act and that the debts written off as "bad debts" by the appellant, for the 2011 income tax year, failed to meet the criteria established in terms s 15 (2) (g) of the Act.

PROCEEDINGS BEFORE THE COURT *A QUO*

In proceedings before the court *a quo* the appellant submitted that general costs and not specific costs fell under the purview of s 16 (1) (r) of the Act, while the respondent adopted the contrary view that s 16 (1) (r) of the Act did not differentiate between general and specific costs, but rather gave effect to all costs incurred by a subsidiary company to its holding company as general administration and management expenses which were deductible in terms of the formula provided by s 16 (1) (r) (i)and (ii) of the Act.

In determining the appeal, the court *a quo* held that s 16 (1) (r) of the Act constituted an anti-tax avoidance measure against a local taxpayer by limiting its allowable deductions in respect of general administration and management expenses incurred by a foreign holding company. It held that the provisions were enacted by the legislature to prevent local sudsidiary companies and their foreign holding companies from colluding to overload expenses on the local entity whilst simultaneously reducing its Zimbabwean tax liability and increasing the foreign entity's profits.

In respect of all the payments made by the appellant to Nedbank (South Africa), the court *a quo* held that s 16 (1) (r) as read with s 26 (2) of the Act was applicable. The appellant was therefore confined to the prescribed deductible income limits provided for in s 16 (1) (r) (ii) of the Act.

In view of the foregoing, the court *a quo* determined that the expenses deducted by the appellant in favour of Nedbank (South Africa) fell into the category of "expenditure on general administration and management" in terms of s 16 (1) (r) of the Act. The court *a quo* took into consideration t*he Shorter Oxford English Dictionary* definition of the term "administration" and "management" respectively, and determined that the former related to "the act of administering, management" and the latter to "the act or manner of managing, administrative skill". The court *a quo*, was however, of the view that the definitions were not the determinant factors of the issue, as "all of the appellant's contracted functions (were) headlined as management of sorts" in the appellant's accounting books. It held that the pertinent issue for consideration was the proper definition of the word "general", which definition was held to pertain to "all or most of the parts of the whole, completely or approximately universal within implied limits."

After determining the issue of deductible income in terms of s 16 (1) (r) of the Act, the court *a quo* considered whether or not the bad debts claimed by the appellant were allowable deductions in terms of s 15 (2) (g) of the Act. The bad debts claimed by the appellant in its 2011 tax assessment pertained to the sum of US$2 250 365.17 being unsatisfied loans due to the appellant from its four Bulawayo based corporate clients. The respondent was not satisfied, that the debts written-off by the appellant constituted bad debts in terms of s 15 (2) (g) of the Act.

The appellant contended that loss sustained and written off by a banking institution or money-lending business (such as itself) from loans, constituted a deductible loss as contemplated in s 15 (2) (a) of the Act. The appellant argued that bad debts in the case of banking institutions and money-lending institutions come into existence by operation of law as contained in paragraphs 20, 22, 24 and 25 of the Banking Regulations, 2000 (S.I 205 of 2000), (the Regulations). The appellant wrote off the four unsatisfied loans in terms of para 22 (e) of the Regulations, at the lapse of 360 days, which it argued placed them in the ambit of s 15 (2) (a) of the Act.

The court *a quo* held that a past due date loan could not be categorised as a loss when the loan was well secured and/or where legal action to satisfy the loan has commenced. It held that a loan could be classified as a loss when it is established that it can no longer be recovered.

It was established that the appellant had not commenced legal proceedings against its first borrower when the debt was written off. It was therefore held that the appellant had failed to discharge the onus upon it to prove, on a balance of probabilities, that the loan was not recoverable at the time that the loss was declared. In respect of the appellant's remaining three borrowers, it was established that their matters were under legal proceedings, wherein the respondent had secured judgments against the borrowers but had only partially recovered the total amount due to it**.** Sureties for the three borrowers had not yet been sued.

The court *a quo* held that the appellant had failed to establish, on a balance of probabilities, that the debts written-off were unrecoverable and constituted a loss. It held that the appellant had failed to establish loss as provided for in terms of para 22 (e) of the Regulations or debt in terms of s 15 (2) (g) of the Act, thus precluding the appellant from claiming income tax deductions thereon. The court *a quo* therefore dismissed the appellant's appeal.

Aggrieved by the decision of the court *a quo*, the appellant noted an appeal to this Court on the following grounds:

GROUNDS OF APPEAL

"1. The court *a quo* erred in finding that there is no distinction between the expenditure incurred on general administration and management as contemplated by s 16 (1) (r) of the Income Tax Act (Chapter 23:06) and remuneration for reimbursement of specific services or expenses paid by a subsidiary to a holding company.

2. The court *a quo* erred in finding that the disputed expenses constituted expenditure on general administration and management as contemplated by s 16 (1) (r) of the Income Tax Act and were properly disallowed.

3. The court *a quo* erred in finding that bad debts written off by a commercial bank (specifically in terms of the Banking Regulations S.I. 205/2000) cannot constitute

expenses incurred for the purpose of trade or in the production of income as contemplated by s 15 (2) (a) of the Income Tax Act.

4. The court *a quo* erred in finding that the disputed debts could not be categorized as losses in terms of para 22 (e) of the Banking Regulations.

5. Alternatively, the court *a quo* erred in finding that the disputed debts were not bad debts and therefore deductible from the appellant's income in terms of s 15 (2) (g) of the Income Tax Act."

The appeal raises two issues for determination.

1. Whether or not the court *a quo* erred in determining that there was no distinction between general costs as provided for in s 16 (1) (r) of the Act and specific costs incurred by a subsidiary in favour of its foreign holding company
2. Whether or not the court *a quo* erred in finding that the disputed debts were improperly written off as bad debts and therefore not deductible from the appellant's income in terms of s 15 (2) (a) or s 15 (2) (g) of the Act.

<u>SUBMISSIONS MADE BY THE PARTIES</u>

Mr *Ochieng* for the appellant submitted that the court *a quo* did not make a finding on the nature of the services but rather the recipient of the services. He further submitted that the nature of the expenses was not distinguished as that is not in the judgment of the court *a quo.* On the deductibility of bad debts, he argued that as per *Salisbury Board of Executors Ltd v Commissioner of Taxes* 1941 SR 147, such deductions depended on whether the losses are in the course of the business of banking or money lending. He contended that debts written off constitute losses of a revenue nature. Mr *Ochieng* submitted that s 15 (2) (a) and (g) of the Act are distinct and it was difficult to see which one the court *a quo* was using between the two. He asserted that s 15 (2) (a) applied primarily to and regulates a situation where there is a secondary consideration. He contended that in terms of s 15 (2) (a) all that needs to be proved is that bad debts were written off. Counsel for the appellant argued that the criterion in the banking regulation was met bringing the claim in the purview of s 15 (2) (a) and not (g).

Mr *Magwaliba* for the respondent submitted that the judgment of the court *a quo* is correct. He argued that when interpreting any statute, the context is a major consideration as indicated in *Zambezi Gas (Pvt) Limited v N. R Barber (Pvt) Limited & Anor* SC 3/20. Counsel for the respondent submitted that the appellant and Nedbank (South Africa) are related parties. He further argued that the agreement between the parties stated that the services were general. He contended that the heading thereon is management support agreement between the appellant and Nedbank (South Africa) and that the nature of the services is clear from the agreement itself. Mr *Magwaliba* argued that the purpose of s 16 (1) (a) is not to distinguish between general and specific costs. He submitted that a specific service maybe paid for in an exercise of rendering general and administrative services. He further submitted that in any event, the appellant's witness stated that all expenses can be labelled under specific expenses.

Concerning the issue of bad debts, counsel for the respondent submitted that the *Salisbury* case, *supra*, is not relevant in this case as s 15 (2) (g) was not in existence in its current form at the time of the (1941) judgment. He argued that the thrust of the respondent's submission is that there were no actual losses incurred. He further argued that in 2011, the appellant held security which was sufficient to cover the debts and that it was its duty in terms of s 15 (2) (g) of the Act to be satisfied that the debts were bad. Mr *Magwaliba* contended that the discretion of the Commissioner was properly exercised.

In response, counsel for the appellant submitted that the respondent was attempting to use the agreement to blanket all expenses as general when there is a clear distinction in the provision of services. Concerning the issue of bad debts, he argued that the main consideration was that it was a loss incurred in the course of trade.

APPLICATION OF THE LAW TO THE FACTS

1. Whether or not the court *a quo* erred in determining that there was no distinction between general costs as provided for in s 16 (1) (r) of the Act and specific costs incurred by a subsidiary in favour of its foreign holding company.

The first and second grounds of appeal raised by the appellant challenge the application of s 16 (1) (r) of the Act to the expenses it incurred in favour of its holding company, Nedbank (South Africa).

The appellant contends that it made payments for specific services to Nedbank (South Africa), which payments were distinct from general administration and management expenses as contemplated in s 16 (1) (r) of the Act. The appellant is of the view that had the legislature intended that there should be no distinction between general and specific expenses, the inclusion of the qualifying term "expenditure incurred on <u>general administration and management</u>" would not have been included. The appellant further submitted that the interpretation adopted by the court *a quo* would be applicable had the relevant provision read "expenditure incurred in favour of a holding company" without the aforementioned qualification.

In the case of *Parkington v Attorney General*, 1869 LR 4 H.L. 100, 122 LORD CAIRNS commenting on interpretation of fiscal statutes said:

> "As I understand the principle of all fiscal legislation it is this. If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

I respectfully agree with the position of the law as stated by his Lordship. To this I would add that if an amount to be taxed or the percentage at which a subject has to be taxed or the formula for taxation is established the subject will be taxed at the established amount, percentage rate or in terms of the amount established by the formula.

The law applicable to the determination of this issue is provided for by s 16 (1) (r) (i) and (ii) as read with s 26 (2) of the Act.

Section 16 (1) (r) (i) and (ii) provides as follows:

> "(1) Save as is otherwise expressly provided in this Act, **no deduction shall be made in respect of any of the following matters ---**
> (*r*) <u>**in the case of expenditure incurred on general administration and management in favour of a company of which the taxpayer is the subsidiary or holding company or (where the company is a foreign company) the local branch**</u>
>
> (i) incurred prior to the commencement of trade or the production of income or during any period of non-production, **any amount in excess of zero comma seventy-five *per centum* of the amount obtained by applying the following formula—**
>
> **A – (B + C)**
>
> Where—
>
> A represents the total expenditure qualifying for deduction in terms of section *fifteen*;
>
> B represents the expenditure on general administration and management paid outside Zimbabwe by such local branch or subsidiary, whether or not such expenditure was incurred by the head office of that foreign company;

C represents expenditure qualifying for deduction in terms of section (2) of paragraph (*f*) of subparagraph (i) of section *fifteen*;

(ii) **incurred after the commencement of trade or the production of income, any amount in excess of one *per centum* of the amount obtained by applying the above formula"** (Emphasis added)

Section 26 (2) of the Act provides as follows:

"(2) For the purposes of this section, **any amount paid outside Zimbabwe by a local branch or subsidiary of a foreign company in excess of the amount allowable as a deduction in terms of paragraph (*q*) or (*r*) of subsection (1) of section *sixteen* shall be deemed to be the payment of a dividend upon which non-resident shareholders' tax shall be charged, and the term "dividend" shall** be so construed for the purposes of the Ninth Schedule." (emphasis added)

It is trite that the objective of interpretation of statutes is to discover the intention of the legislature, which once established must be applied as the law governing the interpreted provisions of the statute. It is also trite that provisions of a statute must be interpreted within the context of the statute in which they are found. The Constitutional Court in the case of *Chihava & 2 Ors v Provincial Magistrate Francis Mapfumo N.O & Anor* CCZ 6/15 at p 6-7 said:

"The starting point in relation to the interpretation of statutes generally would be what is termed 'the golden rule'of statutory interpretation. This rule is authoritatively stated thus in the case of *Coopers and Lybrand & Others v Bryant* 1995 (3) SA 761 (A) at 767;

> 'According to the 'golden rule' of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.'…
> (emphasis added)

In his book *'Principles of Legal Interpretation - Statutes, Contracts and Wills'* 1st Ed. at p 57, E A Kellaway echoes this statement … The learned author, at p 62, states:

> 'Even if a (South African) court comes to the conclusion that the language is clear and unambiguous, it is entitled to reject the purely literal meaning if it is apparent from the anomalies which flow therefrom that the literal meaning could not have been intended by the legislature"…

At pp 7 to 8 the court said:

> "The principles set out in the *dicta* cited above can aptly and instructively be summarized as follows:
>
> (i) the Legislature is presumed not to intend an absurdity, ambiguity or repugnancy to arise out of the grammatical and ordinary meaning of the words that it uses in an enactment.
>
> (ii) **therefore, in order to ascertain the true purpose and intent of the Legislature, regard is to be had, not only to the literal meaning of the words, but also to their practical effect.**
>
> (iii) In this respect,
>
> **a) the words in question must be capable of an interpretation that is 'consistent' with the rest of the instrument in which the words appear;**
>
> b) the state of the law in place before the enactment in question, is a useful aid in ascertaining the legislative purpose and intention, and
>
> c) where an earlier and later enactment (or provision) deals with the same subject matter, then, in the case of uncertainty, the two should be interpreted in such a way that there is mutual consistency'" (emphasis added)

Section 16 (r) (i) and (ii) as read with s 26 of the Act establish that the intention of the legislature was to prevent related parties from colluding to overload expenses on the local entity whilst reducing Zimbabwean tax liability and increasing the foreign entity's profits. It is clear that the limitation of deductible expenses provided for by s 16 (r) (ii) in respect of expenses **incurred after the commencement of trade or the production of income,** arrived at after calculations in terms of the fomula in s 16 (r) (ii) cannot be exceeded. The use of the words "**any amount paid outside Zimbabwe by a local branch or subsidiary of a foreign company in excess of the amount allowable as a deduction in terms of paragraph (*q*) or (*r*) of subsection (1) of section *sixteen* shall be deemed to be the payment of a dividend**

upon which non-resident shareholders' tax shall be charged", limits the amount allowable to the amount imposed by the formula**.** It is apparent from these provisions that a limit of allowable deductions has been set and has to be complied with by a tax payer and enforced by the respondent.

I am satisfied that the interpretation adopted by the court *a quo* is consistent with the intention of the legislature and cannot therefore be said to constitute a misdirection. The intention of the legislature in s 16 (r) (i) and (ii) as made clear by s 26 must be given effect.

Whether or not the court *a quo* erroneously made findings concerning the literal and ordinary grammatical meaning of the term "general administration and management" as averred by the appellant, is of no consequence as the overriding consideration in the circumstances, in my view, is that the intention of the legislature supersedes a literal interpretation of a provision of a statute. To uphold the assertion that a subsidiary "will be unduly taxed for expenses legitimately accrued to its holding company" would be incorrect because that provision specifically relates to foreign incurred expenditure and the need to avoid abuse of the local tax system to the benefit of foreign entities. I am of the view, that the interpretation proffered by the appellant would have the effect of creating room for every local entity in a similar position to claim expenditure for specific costs to the detriment of the objectives of the law. I respectfully associate myself with the reasoning and interpretation of the court *a quo*. Its decision should therefore be upheld.

1. **Whether or not the court *a quo* erred in finding that the disputed debts were improperly written off as bad debts and therefore not deductible from the appellant's income in terms of s 15 (2) (a) or s 15 (2) (g) of the Act.**

The court *a quo* upheld the decision of the respondent that the disputed debts were improperly written off as bad debts as the appellant had collateral security in respect of each debt. The evidence placed before the court *a quo* establish that each debt was secured by a mortgage bond over immovable property and sureties.

It held that the appellant had failed to produce any documents justifying the need to write-off the debts and that the Commissioner had properly disallowed the deductions of bad debts.

Mr Ochieng relied on the decision in *Salisbury Board of Executors Ltd v Commissioner of Taxes* 1941 SR 147, where it was held that such deductions depended on whether the losses are in the course of the business of banking or money lending. The court *a quo* held that the issue before that court was not on the interpretation of s 15(2)(g) but was an obiter statement hesitantly made in passing. A reading of the case confirms the court *a quo's* observation. Commenting on the effect of the Salisbury case Mr *Magwaliba* for the respondent said it was an irrelevant precedent as the case was considering the statute as it then was and not as it now is. I agree with his submission. A statute which has been amended should be interpreted according to its current wording. An interpretation given to it before an amendment which substantially altered the law is not binding precedent. In this case s 15 (2) (g) was amended and substituted by Act 10 of 2009 and now reads as follows:

> "(*g*) the amount of any debts due to the taxpayer to the extent to which they are proved to the satisfaction of the Commissioner to be bad, if such amount is included in the current year of assessment or was included in any previous year of assessment in the taxpayer's income either in terms of this Act or a previous law;
> [Paragraph substituted by Act 10 of 2009]"

The section must be read together with the Banking Regulations S.I 2005 of 2000 which also came into force long after the 1941 decision. These changes must therefore be taken into account in interpreting the amended law. I therefore agree with the court *a quo* that the *Salisbury* case is not a reliable precedent, and had no binding effect on the court *a quo*. The purpose of amending a law is to bring into effect the legislature's current intention. The legislature's new intention must prevail over its former intention. Reference to the former law must be construed to mean the law which was in existence immediately before the amendment and subsection of s 15 (2) (g) by Act 10 of 2009. It does not mean the law as it was in 1941 as the 1941 provision and those which followed it were rendered inoperative by the coming into force of the 2009 amendment.

Section 15(2)(a) of the Act provides for deductions which can be made by a taxpayer as follows:

> "(2) The deductions allowed shall be—
>
> (a) expenditure and losses to the extent to which they are incurred for the purposes of trade or in the production of the income except to the extent to which they are expenditure or losses of a capital nature;"

The provisions of s 15 (2) (a) provide in general for deductions of expenditure and losses incurred for the purposes of trade which can be deducted to the extend to which they are expenditure or losses of a capital nature. It is apparent that s 15(2)(a) is of general application. Its provisions are subordinated to those of s 15 (2) (g) which provides for the circumstances under which the deduction of losses can be allowed.

Section 15 (2) (g) of the Income Tax Act which provides for the circumstances under which bad debts can be deducted provides as follows:

"(2) The deductions allowed shall be—

(*g*) **the amount of any debts due to the taxpayer to the extent to which they are proved to the satisfaction of the Commissioner to be bad,** if such amount is included in the current year of assessment or was included in any previous year of assessment in the taxpayer's income either in terms of this Act or a previous law;" (emphasis added)

Section 15 (2) (g) should be read together with s 22 (e) and 24 of the Banking Regulations, 2000 S.I. 205 of 2000, but what is apparent from the reading of s 15 (2) (g) is that the loss must be proved to the satisfaction of the Commissioner to be a bad debt. It therefore will not be granted on the say so of the tax payer to be a bad debt. The taxpayer has to prove to the Commissioner that it is a bad debt. If the Commissioner is not satisfied that it is a bad debt he is at law entitled to disallow the deduction.

Section 22 (e) of the Banking Regulations reads as follows:

"22 For the purpose of this Part, every banking institution shall classify all assets according to the following gradations-

(a)---n/a
(b)---n/a
(c)---n/a
(d)---n/a
(e) "loss", if the asset in question-

(i) is past due for more than 360 days, **unless such asset is well secured and legal action has actually commenced which is expected to result in the timely realisation of the collateral or enforcement of any guarantee relating to the asset**; or

(ii) ---n/a

(iii) is otherwise considered uncollectable or of such little value that its continuance as an asset is not warranted:

Provided that a loss classification shall not preclude the possibility of recovering the asset or securing a salvage value for it."(emphasis added)

Section 22 of the Banking Act clearly states that the purpose of the gradations is for the classification of a banking institution's assets. This means they remain assets of the bank as s 22 ends by saying "Provided that a loss classification shall not preclude the possiblity of recovering the asset or securing a salvage value for it." This means mere classification as a "loss" does not prove an irrecoverable loss of the asset. The Commissioner will in such circumstances be justified in disallowing the deduction, if he is not satisfied that such a "loss"is a bad debt. The tax payer must therefore prove to the satisfaction of the Commissioner that the debt is no longer recoverable. It is not enough to merely deduct it as a bad debt without attaching proof that it is no longer recoverable.

Section 24 of the Banking Regulations provides as follows:

> "A loan or asset graded "loss" shall be immediately written off, **whether or not the banking institution intends or is in the process of attempting to recover the loan or asset" .**(emphasis added)

This again proves the inconclusiveness of the gradations, as an asset can be written off even if the bank intends or is in the process of attempting to recover it. The Commissioner can not be expected to be satisfied that such a "loss" constitutes a bad debt.

The law requires the Commissioner to be satisfied that the debt is indeed a bad debt in terms of s 15 (2) (g) before allowing deductions to be made.

The Commissioner should therefore carefully assess the alleged bad debts for him to be satisfied that they have been properly claimed in terms of the law. If he is reasonably and justifiably not satisfied the law allows him to refuse to allow the deduction of the alleged bad debts.

A perusal of the record establishes that in respect of each borrower the appellant had indeed not exhausted its rights against sureties and was receiving payments from the borrowers during the period of litigation. It was, therefore, not legally correct for such debts to be deducted as bad debts whilst they could still be recovered from the sureties and while the borrowers were making further payments.

Commenting on the status of the four borrowers whose debts the appellant had written off as bad debts and deducted in its self assessment of 2011, the court *a quo* said:

> "The appellant declared the losses on 29 April 2011. At that time it was the mortgagee of the encumbered propery, which belonged to a third party and not the first borrower. That property had been independently valued by valuators engaged by appellant a year before on 11 February 2010 at US$1.1 million. The appellant did not conduct another independent valuation before declaring the loss. We know from the letter written by NSSA on 23 February 2011 that independent valuers engaged by NSSA between 11 February and 23 March 2011 had valued the property at US$ 2.7m. The pleadings and the evidence of the head of credit never did explain why the appellant never sought satisfaction of the loan from that property and other properties encumbered by unlimited guarantees such as the amalgamated contiguous building guaranteed by LB (Pvt) Ltd, which according to the letter of the borrower's managing director of 2 April 2009 was unencumbered.------
>
> The head of credit did not produce any evidence of the valuations done in 2011 either by an independent valuer or by a desktop valuer. He did not intimate that any such evidence was availed to the investigators or the Commissioner. I have already highlighted the weaknesses in the evidence provided by the appellant in respect of the first borrower. Those findings apply with equal force in the consideration of the satisfaction issue. I am not satisfied that there was an unlikelihood of realization of the securities held by the appellant against the debt of the first borrower.
>
> In regards to the second borrower, the security would have been sufficient to meet its indebtedness had it been executed in 2011. The debt went 360 days past due in July 2010. The head of credit was wont to say *ad nauseum* that properties were overvalued in 2009 when the United States dollar was introduced into the multicurrency monetary basket in Zimbabwe and progressively fell in nominal terms in subsequent years. Apparently, the trend was debunked by the residential property that secured the second borrower's debt for it was sold by the Sheriff in 2015 for US$57 500 and the surety complained that the price was too low. I agree with Mr *Magwaliba* that the property could have been worth much more in 2011. It would have been able to cover the second borrower's debt. The appellant wrongly considered the debt bad. The Commissioner properly disallowed it from the appellant's 2011 income tax return.

> In respect of the third borrower, the debt went 360 days past due in May 2010. The security was disposed of in the Sherff's sale in execution in November for US$35 000, an amount which was greater than the debt owing but which the Sheriff considered too low such that he invoked the private treaty route. The reasoning adopted in the second borrower's case applies with equal force to the present matter. I am satisfied that the value of the security would have most likely covered the debt that was considered bad by the appellant in the 2011 tax year. The Commissioner correctly disallowed it from the appellant's 2011 income tax return.
>
> Lastly, the debt of the fourth borrower went 360 days past due in March 2010. The debt had increased to US$26 225.78 from the original amount of US$20 000 by the time judgment was taken in 2011. The property was valued at US$31`250 at the time the facility was availed to the fourth borrower. The property attracted the highest bid of US$7 000 at the Sheriff'sale in execution conducted in March 2015, a price which at the date of hearing of this appeal was still awaiting the Sheriff's confirmation. The appellant did not produce any valuation evidence which would have tended to justify the partial write off of the debt. The appellant failed to show on a balance of probabilities that the security was inadequate to cover the outstanding debt in 2011. I am not satisfied that the security was inadequate to cover the outstanding amount. The Commissioner correctly disallowed the deduction claimed in respect of the fourth borrower in the appellant's 2011 income tax return."

When legal proceedings were instituted the second borrower owed the appellant US$ 40 000-00. During the contested action the second borrower made intermittent payments of US$ 17 191-13. The mortgaged property was sold at US$ 57 500-00 at the Sheriff's sale, a price much higher than the amount owed.

The third borrower owed US$ 26 677-27. The mortgaged property was sold for US$35 000-00 at the Sheriff's sale again a price much higher than the amount owed.

The fourth borrower had been placed under liquidation. The appellants argue that that rendered the debt a bad debt. This is not correct as a debt can be recovered even if a company is under liquidation subject to certain conditions. A debt can only be rendered irrecoverable when the company has wound up and closed. In *Allied Bank Ltd v Dengu & Anor* SC 52/16, this Court remarked as follows:

> "The court was not persuaded by Mr *Matinenga's* submissions. Section 213 of the Companies Act provides as follows;
>
> > 'In a winding up by the court—
> >
> > (a) <u>no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose</u>;
> >
> > (b) any attachment or execution put in force against the assets of the company after the commencement of the winding up shall be void;
> >
> > (c) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.'
>
> <u>What can be noted from the above section is that where the company is a defendant, no action can be proceeded with or commenced against the company without leave of the court</u>. This section states that the only circumstance in which the leave of the court is required 'to proceed' or 'to continue' with the proceeding is where the company that fell under liquidation during the proceedings, is a defendant/respondent."(emphasis added)

In light of the above, it is clear that a company under liquidation can be sued subject to being granted leave to do so by the court. It is my view, that if sureties have not yet been sued a debt cannot be classified as a bad debt. The court *a quo* was therefore correct when it held that there was still a possibility of recovering the appellant's money from the borrower. The appellant should therefore not have passively rendered it a bad debt. The appellant had to join the queue of other creditors and could only treat it as a bad debt if all this had been exhausted. Over and above the fourth borrowers ability to liquidate its debt through sureties and payments to creditors by a company under liquidation, the appellant had during litigation received intermittent payments of US$13 123-55 from the borrower.

<u>DISPOSITION.</u>

The court *a quo* correctly interpreted s 16 (1) (r) as read with s 26 of the Income Tax Act as having been enacted to prevent Zimbabwean companies which are subsidiaries of foreign holding companies from colluding to overload expenses on the local entity whilst reducing Zimbabwean tax liability and increasing the foreign entity's profits.

The court *a quo* took into consideration the facts of each borrower's debt and correctly held that the security provided for each debt plus the value of the properties mortgaged for each debt did not prove that the debts were unrecoverable. It correctly dismissed the appellant's appeal.

There is no merit in the appellant's appeal. In respect of costs there is no reason why they should not follow the result.

It is accordingly ordered as follows:

'The appeal be and is hereby dismissed with costs.'

GUVAVA JA **:** I agree

MAKONI JA **:** I agree

Atherstone& Cook, appellant's legal practitioners.

Legal & Corporate Services Division, respondent's legal practitioners.