PACKERS INTERNATIONAL PRIVATE LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 15 June 2014, 20 June 2014, 25 June 2014

Urgent chamber application

Mr. *J Samukange*, for applicant
Mr. *A. Moyo,* for respondent

CHIGUMBA J: **"Pay now, argue later"**, is a pithy phrase that is used as a different expression of the biblical injunction to **"render unto Caesar what belongs to Caesar".** Put differently, it means that the obligation to pay tax is inviolable, one cannot escape from that obligation, and, one is required to discharge the obligation first, and then raise objections after paying. This case concerns a taxpayer who has approached the court for relief, after its bank accounts were garnished by the revenue authority, on the basis that the effect of the garnishee is to force it into liquidation. The question that arises for determination is whether the circumstances are such that, this court can intervene and accede to the relief that is sought, in the face of certain statutory provisions that appear to give the tax collector absolute power to impose and collect taxes. This is an urgent chamber application for a provisional order in which the applicant seeks the following interim relief:

INTERIM RELIEF GRANTED

1. That the respondent uplifts the garnishee order, and/or letter of appointment of agency placed/served to applicant's bank, FBC bank, immediately and forthwith.

2. That respondent revoke and /or withdraw the appointment of applicant's FBC bank as its agent in terms of section 58 as read with s 59 of the Income Tax Act [*Cap 23:06*] immediately and forthwith.
3. That the respondent shall not unlawfully interfere with applicant's business operations and day to day activities, including the placing of its officers or agents at applicant's business premises.

The Applicant is a Private Limited company, duly registered and operating in terms of the law of Zimbabwe. The respondent is the Zimbabwe Revenue Authority, an administrative authority established in terms of s 3 of the **Revenue Authority Act [*Cap 23:11*]** and tasked with collecting revenues due in terms of the **Value Added Tax Act [***Cap 23:12***]** (hereinafter referred to as the VAT Act). The Finance Minister is mandated to administer VAT Act.

The applicant is a registered operator in terms of the VAT Act. The country's value added tax system is embodied in the VAT Act. The system involves the imposition of value added tax at each step in the chain of manufacture and distribution of goods and services that are supplied to the country in the course of business; and it is calculated on the value that will have been added at each step of the supply process, at a specified rate. The revenue collection system is based on a self assessment system by registered operators. The VAT Act provides a detailed mechanism for vendors to keep certain kinds of records and to calculate, account, and pay value added tax to the Taxing Commissioner. Respondent does not have the capacity or manpower to effectively monitor every transaction liable to value added tax that is why registered operators have to assess themselves. In order to ensure compliance, the respondent carries out periodic investigations and audits the operators to ensure full compliance by the operators, of the obligation to declare and remit in full, any value added tax that will be due.

Applicant has approached this court because sometime at the end of April in 2014, Respondent carried out a tax investigation and audit of its affairs. It is common cause that Respondent's officers removed and took possession of certain documents from applicant's operations, in terms of s 60 of the VAT Act. In its founding affidavit, applicant avers that respondent advised it to make a voluntary declaration to enable tax which was due to be assessed. It was alleged that the voluntary declarations were done under duress and extortion, an allegation which was vigorously denied by respondent's Chief Investigations officer Oppah Zinhumwe. Applicant complied with the request, and attached copies of the voluntarily declared

figures, to its founding affidavit. Applicant attached a schedule which stated that it opened its branches as follows, Mvuma in September 2010, Angwa in May 2013, Slice Groceries in December 2012, and Speke in December 2013. According to annexure 1 to the founding affidavit, in 2010 applicant's total sum of declared tax was US$522 012-95, in 2011 it was USD$ 2 323 234-06, in 2012 it was USD$3 510 189-01, and in 2013 it was USD$6 952 536-43.

On realising that there were some significant discrepancies between its self assessed figures and those of the respondent, applicant wrote to the respondent on 4 April 2014, (annexure B), and confirmed that, in terms of its proposal to respondent, it was paying USD$2000-00 per day, to respondent, as a compromise and as a sign of its intention to cooperate fully with respondent's investigations. Copies of the tax assessment schedules are attached to the notice of opposition as E1 to E4. For the period January to June 2013, the VAT due was assesses at USD$1 856 837-14, for the period January to December 2012, the VAT due was assessed at USD$3 489 955-17, for the period January to December 2011 the VAT due was assesses at USD$1 585 356-69, for the period February to December 2010 the VAT due was assessed at USD$ 321 441-92. It appeared that the assessment were a result of calculating the VAT which was deemed to be due, subtracting the Vat which was paid, and then imposing a 100% penalty.

Respondent wrote a letter attached as annexure F1 to the opposing papers dated 4 April 2014, in which it advised applicant that it had been penalised for gross under declaration of sales, which had resulted in VAT underpayments, and that this information had been gleaned from applicant's own documents. In that letter, the respondent advised that:

"…the USD$5000-00 weekly payments are not commensurate with the debt at hand and therefore not accepted".

That letter also reminded the applicant of its as yet unassessed obligation to pay Income Tax, and Pay as You Earn (PAYE) for its employees. Applicant accepted, in its founding affidavit, para 5 thereof, that according to its calculations, and its voluntarily declared liability, an amount of **USD$905 801-32** had not been paid to the respondent. It stated that its decision not to pay any more money was based on advice from its accountant, that respondent's tax assessments were incorrect and highly exaggerated, for failure to take into account non taxable products such as goat meat, beef, chicken, bread and other groceries.

Applicant stated that it has been advised that it does not owe the respondent anything at all, and had taken the position that it has in fact, overpaid the respondent and will be refunded some of the monies that it alleges it has overpaid to the respondent. Applicant averred that it suspects the hidden hand of its competitors who have lost a significant market share to it, to be behind its perceived "persecution" by the respondent. Applicant alleged jealousy and malice as the cause of the threats to close it down, and to deploy respondent's employees to man its operations. Applicant cites, as an example of mala fides and malice, the refusal by respondent to accept its payment proposal when it had paid a total of USD$204 000-00 in terms of that proposal. On 2 May 2014, applicant wrote a letter to the respondent (Annexure C) in which it raised objections to the tax assessments set out in Respondent's letter to it of 4 April 2014. The merits of the objections need not detain us. They will properly be assessed by the appropriate court. These objections were dismissed in their entirety by the respondent, and this decision was communicated to the applicant in a letter dated 12 June 2014 (Annexure D founding affidavit).

It is common cause that applicant has appealed to the **Fiscal Appeal Court [*Cap 23:12*]** On 13 June 2014, it is alleged that respondent's officers, without any prior notice, garnished the applicant's account held at FBC bank for the sum of twenty million United States Dollars. Applicant alleges that respondent's officers have advised it that officers are due to be posted to all its branches to man them forthwith, Applicant alleges that it was told that it could no longer transact as a result of the garnishee order. Applicant alleges that this conduct on the part of the respondent is unlawful as its net effect is to close down its business, by rendering it inoperable. Applicant alleges that respondent's conduct is unconstitutional as the quantum of the garnishee order is arbitrary, and was imposed without notice. Applicant alleges that the quantum of the garnishee ought to be in the amount that it admitted to owing, of about USD$900 000-00, because at law, the disputed amount is suspended by the noting of the appeal.

Applicant alleges that it is facing imminent closure if it remains unable to operate, it cannot pay its suppliers, or its workers, and is being force marched into liquidation by the respondents. The welfare of its one thousand plus employees is at risk, and is being ignored by the respondent, contrary to the provisions of the Constitution. Finally, applicant avers that it has no other remedy. Respondent denied that it acted unlawfully, maliciously, capriciously or unconstitutionally. It averred that it was perfectly lawful for it to impose the garnishee in the way manner that it did, and reiterated that the applicant ought to have exhausted its domestic remedies first by approaching the Commissioner for relief as provided for in the VAT Act, and the Income Tax Act. It was submitted that this court lacked the power to consider the merits of the tax assessment that was the exclusive purview of the Fiscal Appeal Court. **The question that is exercising the court's mind is whether there are any circumstances in which this court can examine the rationality or the reasonableness of the Commissioner of Tax's decision, specifically to place a garnishee on the applicant's account, in circumstances where the effect of the garnishee order is to render the applicant incapable of funding its operations, forcing the applicant into insolvency, and ultimately shooting itself in the foot by killing the goose that lays the golden egg?** A necessary offshoot of that question is whether this matter deserves to be heard on an urgent basis.

COMPLIANCE WITH RULES

Counsel for the respondent raised a point in *limine* that the application before the court contravened the provisions of r 241 of the High Court Rules 1971 by not having attached to it the correct form of 29B, or of form 29. He relied on the case of *Inyanga Downs Orchards* v *Edward Buwu*[1] *See also:*[2] *And:*[3] Counsel for the applicant, implored the court to use its discretion

[1] HH 108-10 @p6 where the court stated that Form 29B requires the applicant to set out in summary the basis of the application, and that this requirement is mandatory as stipulated by Order 1 rule 4. See also:

[2] New Vision promotions V T Ganya & Ors HB54-07 @p3

[3] Mandlenkosi Nhliziyo v Greys Services Station & Ors HH 194-10 @p3, Zimbabwe Open University v Dr O. Mazombwe HH 43-2009

in applicant's favor, in the interests of justice. The court was referred to the following[4] and to [5] I associate myself fully with these sentiments. Legal practitioners in this jurisdiction increasingly appear to trawl through court documents with a magnifying glass in search of the littlest anomaly in their opponent's papers. Much time is wasted in court whilst they wax lyrical on a myriad "points in limine" which are not conclusively dispositive of the matter. It is time to curtail this practice, and to advocate that points in limine be raised only where their resolution disposes of the issue under consideration. The court is perfectly capable of defending its rules, or lack of compliance with them where necessary. In this case I find that the effect of applicant's failure to comply with r 241 is not fatally defective. The court can use its discretion in terms of r 4C, and condone the lack of compliance, in the interests of doing justice.

URGENCY

In terms of Order 22 r 244, where a chamber application is accompanied by a certificate from a legal practitioner in terms of para (b) of sub-rule (2) of r 242 to the effect that a matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge who shall consider the papers forthwith. In this case the certificate of urgency was filed by Ticharwa Garabga, who stated that applicant's business had literally been shut down and that the garnishee order for twenty million dollars was for money which was not due to the respondent, and was imposed arbitrarily.

[4] Tarumbwa v Tarumbwa 1997 (1) ZLR 211 @ p215 "…the court can fall back on its inherent powers to control its own procedures and fulfil its core mandate of doing justice for all.

[5] Khunon & Ors v Filrer & SCN 1982 SA 353 (W @ 355 E-H- Szedlacsek v Szedlacsek 200 (4) SA 147E @ 149-"It is trite that rules are there for the court, not the court for the rules and this court must zealously guard against its rules being abused, particularly the making of unnecessary procedural related applications which are not truly required in order for justice to be done for the speedy resolution of litigation.."

Other reasons advanced for the urgency of the matter were: " applicant was set to lose one thousand workers, in a country where the unemployment rate was 90% ,the threat to send respondent's employees to man applicant's tills would send the wrong message to applicant's investors and competitors, respondent's conduct would result in the closure of applicant's business and this was counterproductive, especially since applicant was cooperating fully with the respondent and had paid mote that two hundred thousand dollars by way of daily installments since April 2014, the appeal to the Fiscal Appeal Court would be rendered nugatory." The test for urgency is objective. See *Document support Centre P/L* v *T.F. Mapuvire* [6] This case also found that, in some cases, even purely commercial interests can be protected urgently in appropriate cases and considered the case of *Silver's Trucks & Anor* v *Director of Customs & Exercise* [7]

Counsel for the respondent submitted that this matter was not urgent, and relied on the case of [8] as its authority. See also: [9]Can it be said that in the circumstances of this case, where the applicant has averred that it cannot operate and is facing insolvency and liquidation, in these current harsh economic times, a delay in the hearing of this matter would not cause harm?

[6] HH 117-2006

[7] 1999 (1) ZLR 490-the matter of the release of certain attached imported goods was considered on the basis that applicant would face bankruptcy and its 67 employees would lose their jobs as a result-it was found that, had the court waited, there would have been no need to act subsequently-the applicants would have been liquidated.

[8] Triple C Pigs & Anor V Commissioner general, Zimra HH-7-07: "…in order to then give effect to the intention of the courts to dispense justice fairly a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm..

[9] Dilwin Invetsments P/L t/a Formscaff V Jopa Engineering Company Ltd HH 116-98: A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently…for instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it".

The court was urged to desist from usurping the powers of the administrative agency, and referred to the following cases[10] The court should decide whether the threat of being forced into liquidation constitutes a violation of some legitimate interest that applicant has, that the obligation to discharge its tax liabilities to the respondent does not result in the applicant closing its doors. Surely, by the respondent's own test referred to in *Triple C Pigs (Supra),* if applicant is not heard immediately, and is forced into liquidation, any relief given in future would be a *brutum fulmen,* and there will be no applicant company to speak of. Respondent sought to rely on the judgment of my brother Judge MAFUSIRE Fairdrop *Trading (Private) Limited* v *The Zimbabwe Revenue Authority HH 68-14.* With all due respect to counsel for the respondent, that judgment was concerned with the vicissitudes of s 69 on the Income Tax Act.

While I accept that s 36 of the VAT Act is similarly worded to s 69 of the Income tax Act, in my view the two tax regimes are based on different premises, different methods of calculation and an over-simplistic view of the similarities would set a dangerous precedent, as each case must be decided on its own peculiar circumstances. The applicant Fairdrop Trading did not cooperate with the respondent or make payment proposals to discharge its liability to the respondent, that applicant denied being indebted to the respondent at all. That distinguishes the circumstance of that case from the case under consideration. I found this matter to be urgent, not because I disapprove of the conclusion of the respondent to garnish applicant's account, or because I wish to usurp the authority of the respondent. I formed the view that the respondent did not carry out its functions in a fair or reasonable manner, in arriving at the decision to garnish applicant's account in the sum of twenty million dollars. I concluded that previous decided cases, of persuasive authority, have set precedents that allow a matter to be heard urgently, where applicant's commercial interest are at risk, in circumstances where failure to hear the applicant

[10] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & Ors [2004] ZACC 15-where the court affirmed that the court's task is to ensure that decisions taken by administrative agencies fall within the bounds of reasonableness.

See also: **Affretair (PVT) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S) @p22 where the SC stated that " The duty of the courts is not to dismiss the authority and take over its functions, but to ensure that…it carries out its functions fairly and transparently"**

urgently would make it unnecessary for applicant to be heard at all in future, it would be a futile exercise, because the harm that the applicant fears would have already caught up with the applicant.

MERITS

The cannons of statutory interpretation are well established.

> "It is a generally accepted rule of interpretation that the use of peremptory words such as 'shall', as opposed to 'may' is indicative of the legislature's intention to make the provision peremptory. The use of the word 'may' as opposed to 'shall' is construed as indicative of the legislature's intention to make a provision directory. In some instances the legislature explicitly provides that failure to comply with a statutory provision is fatal. The difficulty arises where the legislature has made no specific indication as to whether failure arises where the legislature has made no specific indication as to whether failure to comply is fatal or not" See[11]

Francis Bennion in his book *Statutory Interpretation* at p 21-22 writes as follows:

> "Where a duty arises under a statute, the court, charged with the task of enforcing the statute, needs to decide what consequences Parliament intended should follow from breach of the duty. This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of command. They say that a thing 'shall' be done. Too often they fail to consider the consequences when it is not done…"

It has been suggested that breach of a mandatory duty which is set out in a statute invalidates the thing done. Section 36 of the Value Added Tax Act [*Cap 23:12*] provides that:

> **"36 Payment of tax pending appeal**
> The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the Fiscal Appeal Court or such court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate (but subject to section *forty-six*) and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received, and amounts short-paid being recoverable with penalty and interest calculated as provided in subsection (1) of section *thirty-nine*." (my underlining for emphasis)

[11] Moyo & Ors v Zvoma & Anor SC 28-10-Dr Daniel Shumba & Anor v The Zimbabwe Electoral Commission & Anor SC 11-08

My reading of s 36 is that the liability to pay remains extant until the appeal is finalised, or in the alternative, unless the Commissioner directs that the obligation falls away pending appeal is finalised. Applicant in this matter has not argued that the effect of the noting of the appeal is to extinguish its obligation to pay. Section 33 of the VAT Act provides for the circumstances in which an aggrieved person can appeal to the Fiscal Court, against the exercise of discretion by the Commissioner. The right to appeal against the exercise of discretion by the respondent's officers, to the Commissioner, is provided for in terms of s 32 of the VAT Act. My reading of s 32 is that, when the Commissioner notifies, in writing, a person who is liable to pay tax to the respondent, of any decision or assessment made against that person, then that person may lodge an objection, also in writhing, specifying the grounds of the objection, to the Commissioner, within a specified time period. Section 32(1) (a) (i), (ii), (iii), 32 (1) (b), and 32(1) (c) provide all the prescribed circumstances where the Commissioner must give a decision in writing, which decision must be objected to, in writing.

These circumstances include:

(a) Refusal to register that person in terms of the VAT Act
(b) Cancellation of that person's registration in terms of the VAT Act or refusal to cancel registration.
(c) Refusal to make a refund.

(d) An assessment made in terms of s(s) 31,36,37
(e) Any direction or supplementary action made by the Commissioner in terms of s 52(3), 52(4)

The applicant has appealed to the Fiscal Court against an assessment made in terms of section 31 of the VAT Act. It is clear that the applicant correctly appealed to the Fiscal Court against the dismissal of its objection, in terms of s32 (1) (d). The respondent itself advised the applicant to appeal to the Fiscal Appeal Court if was dissatisfied with the dismissal of its objection to the tax assessment. In terms of section 32(4) of the VAT Act the Commissioner, on receiving an objection is entitled to:

(4) After having considered the objection, the Commissioner may—
(*a*) alter any decision pursuant thereto; or
(*b*) alter or reduce any assessment pursuant thereto; or
(*c*) disallow the objection

In this case the Commissioner exercised his discretion and disallowed the objection to the tax assessment, in terms of s 32(4) (c). So which exercise of discretion by the Commissioner is being challenged by the applicant in this application? It appears as if the applicant is challenging the Commissioner's appointment of agents in terms of s 48 of the VAT Act, and the consequences that flowed from such appointment, the imposition of a garnishee order on applicant's account. The Commissioner's power to appoint agents is found in s 48 of the VAT Act:

"48 Power to appoint agent
(1)…
(*a*) …
(*b*)…
(*c*)…
(*d*) …
(2) The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent of such other person for the purposes of this Act, and, notwithstanding anything to the contrary contained in any other law, may be required to pay any amount of tax, additional tax, penalty, or interest due from any moneys in any current account, deposit account, fixed deposit account or savings account or any other moneys—
(*a*) including pensions, salary, wages or any other remuneration, which may be held by him…
(*b*) …" (my underlining for emphasis)

My reading of s 48 of the VAT Act is that the Commissioner of Taxes has a discretion to declare any person to be respondent's agent, and that once such a declaration is made, the proposed agent has no choice but to pay any amount of money held on behalf of the applicant, to the respondent, as long as it is required for purposes of fulfilling tax obligations, and must even pay to respondent money that will be held in an account for wages.

This obligation on the part of the appointed agent is not subject to any other law except s 48. Section 48 overrides anything that is contrary to it which may be set out in any other law. In my view s 48 of the VAT Act does not override the Constitution, and the discretion exercised by

the Commissioner is reviewable because of the use of the word 'may' which is not peremptory. I hold the firm view that the intention of the legislature was that s 48 protect designated/appointed agents of the respondent from litigation in terms of other laws for the act of forwarding money in their client's accounts to the respondent. Its purpose is to absolve the designated agents from liability if their act of forwarding their client's money to the respondent results in loss or prejudice to their clients the account holders. I hold the respectful view that it could not have been the intention of the legislature to put the exercise of discretion by the Commissioner beyond the reach of the law. However, I respectfully decline to accede to the relief sought by the applicant, to direct the respondent to revoke the appointment of FBC bank as its agent. There is no evidence before me that the discretion exercised by the Commissioner in making the appointment, violated any of the tenets by which the exercise of administrative justice ought to be guided.

I accept the argument proffered by counsel for the respondent that the act of designating an agent was lawfully done by the respondent as provided by the law, section 48. What I find difficulty with, is whether that exercise of discretion which resulted in a garnishee order being placed over applicant's account, is reviewable, for compliance with the tenets of administrative justice. Section 14 of the Fiscal Appeal Act provides that:

> **"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 to 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."

My interpretation of this act is that applicant in this case should not be required to pay the twenty million dollars that respondent has garnished its accounts for. I hold the considered view that, the noting of the appeal suspended actual payment of only that portion of the twenty million dollars that applicant is disputing liability for. This interpretation is subject to the rider: "…unless the Commissioner…otherwise directs". It is arguable that, by directing that a garnishee order in that sum be imposed, the Commissioner has directed that the full amount of the tax assessed be paid. In my view however, the Commissioner is required to expressly say this, and to reduce his direction to writing, and notify the applicant of his direction, in writing, which was not done in this case. In the circumstances, I maintain that, only the approximately

one million dollars that the applicant admitted to owing in its founding papers would, on the face of it, remain payable until the appeal to the Fiscal Court is finalized.

It should be emphasized that my reading of section 14 is that the obligation to pay is not suspended, otherwise that would result in conflict with s 36 of the VAT Act. The obligation /liability to pay is not suspended by the noting of the appeal. The appeal will establish whether the taxpayer is indeed liable to pay the assessed sum. What is suspended is the actual payment of the assessed sum, in full. I am fortified in my view by certain *orbiter dicta* in the case of *Metcash Trading Limited* v *The Commissioner for the South African Revenue Service & The Minister of Finance*[12] At p 104, para 71 of that judgment the South African Constitutional Court stated that:

> "…that does not mean that a court is prohibited from hearing an application for interlocutory relief in the face of a pending VAT appeal, or from granting other appropriate relief. Nor does it mean that the jurisdiction is theoretically extant but actually illusory".

For this reason the court must examine whether the exercise of discretion by the Commissioner of Taxes, in directing its designated agents, to garnish applicant's accounts in the full sum of twenty million dollars, when s 14 of the Fiscal Appeals Act provides that payment of the disputed sum is suspended until the appeal is finalized by the Fiscal Appeals Court, is reasonable, or rational, or procedural.

I propose to start by looking at what the highest law in this land has to say about the exercise of discretion by an administrative body. **Section 68 of the Constitution of Zimbabwe** provides that[13] **Section 3 of the Administrative Justice Act** provides as follows[14] **Section 2**

[12] CCT3/2000 @p50, par 33: "…common law judicial review as now buttressed by the right to administrative action under s33 of the Constitution, and as fleshed out in the Promotion of Administrative Justice Act…the Act nowhere excludes judicial review in the ordinary course…it leaves intact all other avenues of relief." For the scope and origin of the common law judicial review, see *Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111*

[13] Amendment (No. 20) Act 2013-Right to Administrative Justice

1. Every person has a right to Administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

[14] [cap 10:28] Duty of Administrative Authority.

1. An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall-

provides for Interpretation and application[15] Respondent by its own description in para 5 of its notice of opposition is an administrative authority. My reading of the interpretation section of the Administrative Justice Act is that any action taken by the respondent or any of its employees, is administrative action, and that in exercising discretion in any administrative action, the conduct must be reasonable, and substantively and procedurally fair. Applicant has not denied that the respondent's actions were lawful. It has not sought to challenge the powers of the respondent to act in the manner that it did. My understanding of applicant's contention is that the exercise of discretion by the respondent was not reasonable, in the sense of violating the provisions of s 3(1) (a) of the Administrative justice Act, and s 68 of the Constitution, in the sense that the exercise of discretion was not reasonable, or proportionate, or both substantively and procedurally fair to it.

Applicant contended that it has been rendered unable to operate, and consequently unable to discharge its tax obligations to the respondent. Applicant contended that respondent is shooting itself in the foot, which indicates that its decision is irrational. The argument is that respondent ought to cooperate with the applicant so that if applicant remains a going concern, it is likely to discharge its tax obligations in full, now and in the future. Applicant has contended that it stands to lose its workforce of over 1000 workers. Applicant has contended that the prevailing economic conditions, where at least ten companies every month are being liquidated, make it irrational and unreasonable of the respondent to order a garnishee of twenty million dollars when it is clear that the effect of that directive will be to force the applicant into liquidation. Applicant's contention that its right to administrative action that is fair and reasonable has been violated can be examined further.

Irrationality, in relation to the exercise of discretion by an administrative body had been defined as a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the issue to be decided would have arrived at

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(a) Act lawfully, reasonably, and in a fair manner

[15] 'administrative action' means any action taken or decision made by an administrative authority

'administrative authority' means any person who is an officer, employee, member, committee, council, or board of state or a local authority or parastatal

it. See *CCU* v *Minister for the civil Service*[1617]. What has come to be known as "Wednesbury unreasonableness" was described, by Lord Greene, as follows:

> "When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of cases".

Counsel for the respondent sought to argue that applicant has not exhausted its domestic remedies and therefore should not be heard by this court, it should instead appeal to the Commissioner, and thereafter to the Fiscal Appeals Court. With all due respect to counsel, that argument failed to find favor with me, for the reason that s 32 of the VAT Act does not mention the directive to issue a garnishee order as one of the issues that an aggrieved taxpayer can object to. Section 32 mentions: the refusal to register that person in terms of the VAT Act, cancellation of that person's registration in terms of the VAT Act or refusal to cancel registration., refusal to make a refund, an assessment made in terms of ss31, 36, 37, any direction or supplementary action made by the Commissioner in terms of s 52(3), 52(4). None of these areas cover the discretion to place a garnishee order over the taxpayer's account. It is my respectful view that s 48 does not oust this court's inherent power of judicial review of an administrative body, to scrutinize the exercise of discretion by that body, at any time and to ensure, on the limited grounds provided in s 68 of the Constitution and s 3 of the Administrative Justice Act, that there has not been any element of "Wednesbury unreasonableness".

It is this court's considered view that the imposition of a garnishee order on applicant's accounts was an exercise of discretion on behalf of the respondent, and that, in view of the provisions of s 14 of the Fiscal Appeal Act, the figure of twenty million was not proportionate, or reasonable, and was outrageous in its defiance of logic, in the Wednesbury sense. The Fiscal Appeals Act, in s 14 clearly stipulates that applicant is liable to pay the admitted amount which in this case is about a million dollars. Its **liability** to pay the disputed amount of nineteen million dollars was not automatically suspended by the noting of the appeal in terms of s 14. What was

[16] [1984] All ER 939 HL @p950-51-followed in Zimbabwe in Patriotic Front-ZAPU v Minister of Justice, Legal & Parliamentary Affairs 1999(2) ZLR 305(SC). The Wednesbury principle was laid down by Lord Greene MR in Associated Provincial Picture House Ltd v Wednesbury Corporation [1984] 1 KB 223 9 CA in the context of judicial review.

suspended was the **requirement to make actual** payment of the disputed nineteen million dollars (my underlining for emphasis). To direct that the applicant's account be garnished for the full twenty million dollars was grossly unreasonable. To infer that applicant ought to beg the Commissioner to revise or reconsider an exercise of discretion which was made in violation of its right to fair, reasonable and proportionate administrative justice, is in my view, also grossly unreasonable. This court is not agitating for the watering down of any powers that respondent has in respect of various tax instruments to appoint designated agents, and to direct that taxpayer's accounts be garnished. This court is merely reminding the respondent, that as an administrative body, its power and discretion must always be exercised reasonably and fairly, at all stages at all times, particularly because, by the very nature of tax collection some of the action that respondent is authorized to take may be considered necessarily draconian.

Respondent submitted that its actions were not unlawful and relied on the case of *Rudolph & Anor* v *Commissioner of Inland Revenue & Ors*[18] [19] This case begs the question of what happens where these lawful powers are not exercised properly. It is not only unlawful exercise of power which may establish a *prima facie* right for purposes of qualifying for an interim interdict. Failure to take relevant principles into consideration may result in the improper exercise of rights which are lawfully conferred on an administrative body. In my view, the applicant has a prima facie right conferred on it by s 68 of the Constitution, by s 3 of the Administrative Justice Act, by the principle of 'Wednesbury unreasonableness, to administrative justice. This means that it has the right to administrative conduct that is reasonable, proportionate and both substantively and procedurally fair.

Imposing a garnishee order of twenty million on applicant's account was not procedurally fair because s14 of the fiscal Appeals Act stipulates that the disputed amount of the tax assessment be suspended pending the determination of the appeal. It was not substantively fair because there is no provision, in s 32 of the VAT Act for objection to the Commissioner against the imposition of a garnishee order.

[18] 1994 (3) SA 771- Stauffer Chemicals v Monsato Company 1988 (1) SA 805 AT 809 F-G

[19] In which the court made a finding that the applicants had failed to establish a prima facie right because the respondents had acted lawfully in terms of the powers granted to them by an existing Act of parliament, and that they had properly exercised those rights.

I find that the applicant's fear that it will be forced into liquidation if the garnishee order remains in place in its current form constitutes irreparable harm to it. By the time damages are ordered to be paid, there will likely be no applicant to receive the damages, because applicant is not likely to remain in business, at this time when our economy is in freefall, under these circumstances The balance of convenience favors granting an interim order that the directive to garnish twenty million dollars on applicant's account be suspended. In my view there is no alternative remedy that is effective. In the result the following interim order is granted by the court.

IT IS HEREBY ORDERED THAT

1. The respondent uplifts and suspends the garnishee order placed on applicant's accounts with FBC bank, immediately and forthwith, until the appeal that is pending before the Fiscal Appeals Court is finalised.
2. The respondent shall allow a period of seven working days to elapse after the up-liftment and suspension of the original garnishee order, where-after it shall replace it with a fresh garnishee order for the sum of USD$905 801-32 (nine hundred and five thousand dollars eight hundred and one dollar and thirty two cents), which shall remain in place until the appeal is finalized or payment is made in full, whichever comes first.
3. The respondent shall not unlawfully interfere with applicant's business operations and its day to day activities, including the placing of its officers or agents at applicant's business premises.

Venturas & Samukange, applicant's legal practitioners
Kantor & Immerman, respondents' legal practitioners