MUROWA DIAMONDS (PVT) LTD
versus
CHIVI RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J
HARARE, 11 July 2018 & 17 October 2018

Civil appeal

Mr *T.A. Chiurai,* with him Mr *I.H. Chiwara,* for the appellant
Mr *M. Mavhiringidze,* for the respondent

MAFUSIRE J:

[1] This was a civil appeal. The dispute was deceptive in its simplicity. In the court *a quo* the parties even went on a stated case. But it was a tricky matter of interpretation of a statute. We thank counsel for commendable research and able argument.

[2] The appellant is a mining concern. The respondent is a local authority. The appellant is the holder or owner of some two hundred diamond mining claims in rural land under the respondent's jurisdiction. It is common cause those claims were dormant. No mining activity was going on. The appellant employed no workers at the sites. But for years the respondent had been billing the appellant for levies in respect of them. And for years the appellant had been paying with no objection. That was until 2008 when the appellant decided it was not liable for the levies. The respondent, plaintiff in the court *a quo*, sued. The appellant, defendant in the court *a quo*, defended. There being no factual dispute the parties agreed on a stated case.

[3] The arrear levies were in the sum of US$288 000. The figure was not in dispute. The parties agreed that if the appellant was found liable, that would be the amount payable.

[4] The issue for determination was whether or not the appellant is liable for the levy that is prescribed under s 96(1)(*b*)(i) of the Rural District Councils Act, *Cap 29:13* ("***the Act***").

[5] The court *a quo* found the appellant liable. The substance of its reasoning was that the appellant's liability did not stem from its workers having to be physically present at the mining locations. That would be tantamount to adding words into a statute that are not there. As long as the appellant was an owner of the mining locations and employing more than five workers (no matter where stationed), then it was liable for the levy.

[6] Unhappy with the magistrate's court's judgment, the appellant appealed. It maintained it was not carrying out any mining activities at any of the sites in question and that it employed no workforce there. It said the intention of Parliament in promulgating that provision was to levy mine owners in respect of mining locations at which they are actually carrying out mining operations and employing more than five workers.

[7] Under the heading "**Levies in rural areas**", s 96(1)(*b*)(i) of the Rural District Councils Act reads:

> "(1) Subject to this Part, a council may impose a land development levy upon all persons who, on the fixed date, are or who, at any time during the period of twelve months next following the fixed date, become—
>
> (*a*) ……..…; or
>
> (*b*) owners of mining locations situated on rural land within the council area, mining for—
>
> (i) gold, silver, platinum or precious stones and employing more than five workers; or
>
> (ii) ……..."

[8] What is a "land development levy"? The Act's definition is unhelpful. It says it is a land development levy imposed by a council in terms of s 96(1) of the Act. The definition of "levy" is also largely unhelpful. It means a land development levy, a special land development levy, a development levy or a special development levy! It is like a game of ping pong!

[9] But shorn of excessive verbiage, and duly paraphrased for simplicity, s 96(1)(*b*)(i) is saying a council may impose a land development levy upon all owners of mining locations in the council's area of jurisdiction and who are mining for, among other things, precious stones, and employing more than five workers.

[10] Dissecting that provision and applying it to the facts superficially: the respondent is a council. The appellant is an owner of some 200 mining locations. They lie on rural land within the respondent's area. The respondent's mining locations are diamond mines. Diamonds are precious stones in terms of the Precious Stones Trade Act, *Cap 21:06*. A council's decision to impose a land development levy is discretionary. The respondent did impose it. For years the appellant was paying.

[11] At first brush there can be no question the appellant is liable. Section 96(1)(*b*)(i) does not say the land development levy is payable only by mine owners whose workers, should they be more than five, are stationed on the mining sites. It was common cause the respondent employed several workers at its head office in Harare and elsewhere. They were more than five. Requiring that they be physically stationed at the mining locations is to add words into the statutory provision that are not there. That was the decision of the court *a quo*. And at first glance it seemed right. Courts are extremely loath to read into legislation words which are not there[1].

[12] However, on closer look the wording of s 96(1)(*b*)(i) is illusory. So also was the decision of the court *a quo*. It was rather superficial. Whether the more than five workers need, or need not be physically stationed at the site was a cogent question. It was a perfect brainteaser. The Act is silent. But that is not the end of the matter. Despite their aversion to read into an Act words that are not there, the courts sometimes do. They do so where not to "… will lead to an absurdity so glaring that it could never have been contemplated by the legislature."[2]

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[1] *van Heerden, N.O. & Ors v Queen's Hotel (Pvt) Ltd & Ors* 1972 (2) RLR 472 (A), at 494 and *KDB Holdings (Pvt) Ltd v Medicines Control Authority of Zimbabwe* 2011 (2) ZLR 398 (S), at 401C – D

[2] per BEADLE CJ in *van Heerden's* case, *supra*.

[13] Section 96(1)(*b*)(i) of the Act needs to be interpreted in accordance with the rules of interpretation to unpack the intention of the Legislature. It is necessary to find out if Parliament meant that the workers need be physically present on the site, which it did not actually say, or that they need not be, again which it did not actually say either.

[14] It is not uncommon that words sometimes say one thing on the surface but mean quite another beneath it. Sometimes even mere silence communicates something. At all times the function of the court is to come up with the true meaning of the enactment or the document. Rules have been developed over time to aid interpretation. The starting point is the golden rule of construction. McNally JA put it this way in *Chegutu Municipality v Manyora*[3]

> "There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, … 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.'"[4]

[15] When a statute is ambiguous, and its meaning is lost, and disputes arise, the court does not throw its hands in the air in despair. It gets to work. It sets out to unravel the hidden meaning. DENNING LJ (as he then was) said in 1949[5]:

> "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave

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[3] 1996 (1) ZLR 262 (S)
[4] See also *Zimbabwe Revenue Authority & Anor v Murowa Diamonds (Pvt) Ltd* 2009 (2) ZLR 213 (S), at 217H – 218A
[5] In *Seaford Court Estates Ltd v Asher* [1949] 2 All ER 155 (CA) at 164 E – H, quoted with approval in *S v Aitken* 1992 (2) ZLR 84 (S), at 89A – D

rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature."[6]

[16] In this appeal, the respondent's argument, though not in so many words, was that s 96(1)(*b*)(i) of the Act imposes some kind of strict liability on mine owners with locations on rural land. For support, reference was made to the judgment of this court in *ZETD v Bindura RDC & Ors*[7]. The applicant, the Zimbabwe Electricity Transmission & Distribution Company (Private) Limited, was found liable to all the sixty rural district councils for "way leave" charges in respect of its countless transmission poles and lines straddling over rural territory, and its numerous substations located in those arears which fall under the jurisdiction of the rural district councils. The court said what these rural district councils are charging for is the right of way over their land or property.

[17] But the *ZETD* case above has no relevance. The court was concerned with the right and power of a rural district council, under s 76 of the Act, to fix, by resolution, charges and tariffs for some myriad of things mentioned therein, which include services rendered, or acts, matters or things done by them in terms of the Act. Although the court did consider s 96 of the Act in relation to the land development levy payable by owners of rural land; licensed dealers; specified businesses, and so on, it specifically skipped dealing with owners of mining locations. Poignantly, and rather incongruous to the respondent's argument herein, the court found Z.E.T.D. not liable for any of those levies on the basis that none of them applied to it.

[18] When interpreting an ambiguous provision in a statute it is permissible for a court to go outside the confines of that provision and consider the entire statute: see *Chegutu Municipality v Manyora*[8]. In this case, apart from the unhelpful definition of "land development levy", the Act gives no further explanation of its meaning or purpose. But s 76 gives a glimpse. In terms of it a council may fix charges for a myriad of reasons which are listed as certificates; licences or permits issued; inspections carried out; services rendered, or any act or thing done by the council in terms of the Act. "Charge"

[6] Quoted with approval in *S v Aitken* 1992 (2) ZLR 84 (S), at 89A – D
[7] 2015 (1) ZLR 1 (H)
[8] *Ibid*

is defined in s 95 to mean, among other things, any levy. A council may also fix rents and other charges payable in respect of property let by it.

[19] None of the parties explained what purpose is a land development levy as it relates to mine owners. None of them explained for what particular reason, amongst those listed in s 76 as aforesaid, is it payable by mine owners. Does a rural council issue out certificates or licences or permits to mine owners in respect of their mining locations and for which they have to pay this levy? Does a council carry out inspections or render services? Does it do any act or thing in respect of mining locations for which the mine owners become liable? Is the levy some kind of rent payable to it given that the term "owner" as it relates to an owner of a mining location, is not owner in the sense of a holder of title, but is merely an "owner" in the sense of his mining location having been registered with the Secretary for Mines?[9] Just what is this land development levy for?

[20] However, and be that as it may, it seems obvious that the appellant, as an owner of mining locations in rural land under the jurisdiction of the respondent, is in principle liable for the land development levy. If he may be exempt at any given time, it cannot be on the basis that the levy has not been specifically or purposefully defined in terms of the reasons laid out in s 76. It can only be on the basis of some qualifying criteria that may lie either in s 96 itself, or elsewhere in the Act. So the starting point is obviously s 96 itself. As discussed earlier in this judgment, the one qualifying criterion that is relevant is the number of workers employed by the mine owner. It should be six and above. A mine owner employing five workers or less is not liable. In this case the appellant employed more than six workers. So on that score it is not exempt. And this was not even the appellant's argument.

[21] The second qualifying criterion in s 96 that is relevant is that the owner of the mining location must be "… **mining for** …", among others, precious stones (*emphasis by appellant's counsel*). On this, the appellant dug its heels. It argued that "… **mining for** …" meant actually physically carrying out mining operations. Given that all its sites

[9] S 95 of the Rural District Councils Act

are dormant, and this was common cause, there was no "… **mining for** …" anything going on there, the argument concluded.

[22] The third qualifying criterion that is relevant is found partly in, and partly outside s 96. Section 96(3)(*a*)(i)(B) says a levy shall be assessed in accordance with the Third Schedule. In the Third Schedule "worker" is defined to mean any person who is employed to perform work. It excludes a skilled worker or a domestic worker. What that "work" may be is again not defined. All that we know is that it is unskilled work, namely work that is not done by a qualified journeyman[10]. We also know that it is not the work a domestic worker does, namely rendering domestic services in and around a private household or an establishment of a welfare organisation[11]. Perhaps if "work" was expressly defined it would probably have given a glimpse as to whether it is such type of work as would be normally carried out at a mining site. As it is, any person carrying out any type of work other than the two specifically singled out, is a worker. That is not very helpful. It does not answer the question whether that worker has to be on site or not.

[23] Related to the third criterion is a fourth one found in s 1(3)(a) of the Third Schedule. This provides that for the purposes of the Schedule, workers employed by an owner of a mining location shall be deemed to include all workers employed for **mining purposes** (*highlight by appellant's counsel*) on the mining location, whether by an independent contractor or not. This seems to provide the answer to the puzzle. But it does not quite do so because if there are only five or less workers at the mining location, but at head office or elsewhere there are other workers who together make up the threshold of six, does the levy kick in? According to the appellant it would not because on site the workers are less than six. But according to the respondent it would, because by combining both sets of workers the qualifying threshold of six is reached.

[24] Despite its promising wording, s 1(3)(a) of the Third Schedule seems to be addressing something completely unrelated to the problem. The words "… whether by an

[10] See definition of "skilled worker" in s 1(1) of the Third Schedule.
[11] See definition of "domestic worker" in s 1(1) *ibid*

independent contractor or not …" simply mean that those workers employed by an independent contractor, but happening to be employed for mining purposes on the mining location, shall be deemed to be employed by the mine owner for the purposes of the levy. Thus where his own complement of workers is less than six, but if together with those of the independent contractor the threshold of six is reached, it will not lie in the mouth of the mine owner to resist the levy on the basis that his own workers are less than six. Those of the independent contractor will be deemed to be his.

[25] The fifth qualifying criterion, and this appeared to be the fulcrum of the appellant's argument, is in s 2(1)(a)(i) of the Third Schedule. The Third Schedule is the instrument that sets out the scales of the development levies. The levy is calibrated in units per sets of workers. Where he is mining for, *inter alia*, precious stones, and he employs more than five (5) workers, but not more than one hundred (100), the levy payable by the mine owner is one (1) unit. Where he employees more than 100 workers, for the first 100 workers, the levy is one unit. Thereafter, for each fifty (50) workers or part thereof, the levy is also one (1) unit.

[26] The appellant argued that the definition of "**mining purposes**", as used in the Third Schedule, is to be imported from a kindred Act, the Mines and Minerals Act, *Cap 21:05*. That Act defines the phrase to mean "… the purpose of obtaining or extracting any mineral by any mode or method or any purpose directly or indirectly connected therewith or incidental thereto". The appellant said it was doing none of those things on the sites in question. Thus the workers referred to in s 96, as read with the Third Schedule of the Rural District Councils Act, are not just mere employees employed elsewhere. They must be workers employed for mining purposes at the mining location itself, the argument concluded.

[27] The appellant's other point was that if regard is had to the formula of computing the levy in s 2 of the Third Schedule, it would mean that for every year that its sites lie dormant with no workers carrying out any mining operations, there will always be a nil balance. No unit would be applicable if there are no workers on site as workers engaged

to work elsewhere would not be "… workers employed for mining purposes on the mining location, …" within the meaning of s 1(3)(a) of the Third Schedule.

[28] To drive its point home, the appellant used this illustration. A company may own two mining locations in two different rural district councils, say Chivi and Bindura. The Chivi mining location is dormant. But the company employs six workers who are actually carrying out mining operations in Bindura. Clearly the company employs more than five people. The Bindura rural district council can perfectly charge the land development levy in terms of s 96. But not the Chivi council. The Chivi council cannot be allowed to rely on the number of workers employed in Bindura. This would lead to an absurdity. It is a rule of statutory interpretation that in promulgating an Act of Parliament the Legislature is presumed not to intend an absurdity.

[29] We agree with the appellant's arguments. It is manifest, from a holistic examination of the entire Act, that the liability of an owner of a mining location situated on rural land within the council area, to pay a land development levy in terms of s 96 is restricted to a situation where the owner is mining for the specified minerals and employing more than five workers on that location. In the circumstances of this case, the appellant cannot be liable for that levy when it is common cause that its mining locations are dormant and there are no employees working on those sites.

[30] It is our finding that the land development levy under s 96(1)(b), as it applies to mine owners of mining locations situated on rural land within the council area, is not a "strict liability" tax in the sense argued by the respondent, namely that once a council fixes it, advertises it, and obtains approval for it from central government, it automatically becomes payable. Regard must be had to the qualifying criteria in the Act before the mine owner can be held liable. The so-called "strict liability" tax as contemplated by the respondent, may be chargeable and collectable under some other provision, not s 96(1)(b). The appeal must succeed.

[31] However, in spite of its success, and in spite of the appellant's prayer for costs on a higher scale, we consider that a proper order of costs should be that each party meets

its own costs. In our view, this has been a somewhat novel point. The intention of the Legislature was by no means clear. At any rate, the appellant had been paying this levy for years without question. When it stopped abruptly, it was not unreasonable for the respondent to take it to court.

[32] In the final analysis we make the following order:

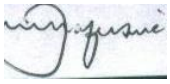
i/ The appeal is hereby allowed.

ii/ The decision of the court *a quo* is hereby set aside and substituted with the following:

"**The plaintiff's claim is hereby dismissed with costs.**"

iii/ There shall be no order as to costs.

17 October 2018



Mawadze J: I agree _____

Coghlan, Welsh & Guest, appellant's legal practitioners
Mavhiringidze & Partners, respondent's legal practitioners