

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) NO. 29/2018**

**CIV/A/14/2016**

In the matter between:

**THE LESOTHO REVENUE AUTHORITY**

**APPELLANT**

**And**

**BOSIU CONSULTANCY (PTY) LTD**

**RESPONDENT**

**CORAM:           K. E. MOSITO, P**  
**P. MUSONDA, AJA**  
**N. T. MTSHIYA, AJA**

**HEARD            :**     22 JANUARY 2019

**DELIVERED     :**     01 FEBRUARY 2019

**SUMMARY**

*Appeal based on the interpretation of Section 6 (1) (a) (b) and (c) of the Value Added Tax Act of 2001 Appeal struck off for failure to*

comply with Section 20 (2) of the Revenue Appeals Tribunal Act No. 5 of 2005.

## **JUDGMENT**

### **MTSHIYA, AJA**

[1] This is an appeal anchored on the interpretation of the provisions of a statute, namely section 6 (1) (a) (b) and (c) of the Value Added Tax Act of 2001. The said section provides in part as follows:

*“Exempt Supplies and Exempt Imports*

6. (1) *In this section,*

.....

*‘Financial services’ means-*

- a) Granting negotiating and dealing with loans, credit, credit guarantees, and any securities for money, including management of loans, credit or credit guarantees by the grantor;*
- b) Transactions concerning deposit and current accounts, payments, transfers, debts, cheques and negotiable instruments, other than debt collection and factoring;*
- c) Transactions relating to shares, stocks, bonds and other securities, other than custodial services;*
- d) Management of investment funds.”*

- [2] The facts leading to the dispute *in casu* are common cause. The facts are briefly and correctly captured in the Respondent's Heads of Argument as follows:

**“BACKGROUND FACTS:**

*During or about August 2012, the Appellant herein carried an audit on the Respondent and later issued a final audit report in which it assessed the Respondent's tax liability to be the sum of **Three Hundred and Nineteen Thousand, Two Hundred and One Maloti Thirty Three Lisente (M319,201.33)**. This assessment comprised tax on Directors fees, CIT and VAT. The Respondent accepted the assessment as regards tax on Directors fees and CIT but contested liability as regards VAT. Hence the tax on uncontested items was duly paid and an objection lodged in respect of VAT.”*

- [3] The dispute indicated in the factual background in paragraph 2 above was initially taken to the Commissioner Revenue Compliance, who eventually dismissed the objection and advised the appellant (the respondent in this appeal) to approach the Revenue Appeals Tribunal if dissatisfied with the objection decision. The objection decision reads as follows:-

*“It is perhaps important to note that Section 6 (1) (c) makes provision for the exemption of bonds. This basically means that the legal document conferring real rights to the bank to immovable property is exempted from VAT. It is important to further take cognizance for the purposes of this matter that it is only the bond (s) that is exempt not any other services or transactions surrounding the bond.”*

[4] The respondent *in casu* disagreed with the above objection and appealed to the Revenue Appeals Tribunal. In its appeal the respondent prayed for an order:-

- a) *Declaring as incorrect and in direct conflict with the wording of clause 6 (1) (c). LRA statement that “... it is only the bond” which statement is contained in LRA’s letter of the 30<sup>th</sup> of October 2012;*
- b) *Declaring LRA as having been unfair by ignoring the meaning, significance and the weight of clause 6 (1) (a) which defines “financial services” as “...dealing with **loans, credit, credit guarantees,** and **any security** for money... “ (our understanding);*
- c) *Declaring that **registration of bonds** is a “**financial service**” as defined in clause 6 (1) (a) and clause 6 (1) (c) of the VAT Act; and*
- d) *Declaring that registration of bonds is one of the **services** that has been **exempted from VAT** terms of **clause 6 (2) (a)** of the VAT Act.”*

[5] On 29 April 2016, the Revenue Appeals Tribunal ruled in favour of the respondent in the following terms:

*“We have accordingly reached the conclusion that the Appellant has made out its case that mortgage bonds are exempt from VAT in terms of Section 6 (1) (a) to (c) of the Act and we accordingly allow the appeal.”*

[6] Dissatisfied with the above ruling, the appellant appealed to the High Court. The appellant’s grounds of appeal were given as follow:

*“1. The Revenue Appeals Tribunal erred and misdirected itself in holding that the services of registering mortgage bonds by the respondent on behalf of the bank’s customers, to secure loans to be advanced by them to their customers, amounted to the provision of exempt financial services by the Respondent in terms of section 6 (1) (a) and (c) of the Value Added Tax Act No. 9 of 2001. The Respondent was not involved:*

*a) In the provision of granting, negotiating, and dealing with loans, credit, credit guarantees, and any security for money, including management of loans, credit, or credit guarantees as a grantor; nor*

*b) In the dealing with bonds or securities in the context envisaged by section 6 (1) (c) of the Value Added Tax Act No. 9 of 2001. Bonds or securities referred to in section 6 (1) (c) are of the nature of financing or investment instruments which are normally bought and sold in financial markets, other than and a gleaned from the associated word used in the critical phrase, mortgage bonds, surety bonds or performance bonds.”*

[7] On 17 April 2018, the High Court dismissed the appellant’s appeal with costs and hence the appeal to this court on the basis of the grounds of appeal, contained in the certificate granted by the Judge to the appellant on 17 August 2018.

[8] On 18 January 2019, the respondent filed its Heads of Argument in which it raised a point *in limine*. The respondent argued that the appeal was not properly before the court because:

*“In terms of Section 20 (2) of the Revenue Appeals Tribunal Act, the Appellant was obliged to note an appeal with the Registrar of the High Court within sixty (60) days of being notified of the decision of the High Court. In the present case, it is common cause that the decision of the High Court was delivered on the 17<sup>th</sup> April 2018 and the Appellant only lodged its Notice of Appeal with the Registrar of the Court of Appeal and not the High Court on the 5<sup>th</sup> September 2018.*

*Simply arithmetic will show that at the time the appellant noted and appeal on the 5<sup>th</sup> September 2018, a period of sixty (60) days had long lapsed. The Appellant was obliged to note an appeal within sixty (60) days in terms of the Act. This is mandatory as failure to do so renders a conclusion that such an appellant has abandoned the right of appeal against the decision of the high Court. See **Rampasana Mokete v Likolobe Tsietsi C of A (CIV) No. 55/2011** per Ramodibedi P. (as he then was) delivered on 27 April 2011.*

*The Honourable Court will notice from the record that to date no cause let alone good cause has been shown by the Appellant why the notice of appeal was not filed within the time allowed by the Act. The Appellant has clearly failed to comply with the mandatory provisions of the Act under which it is appealing hence on this ground alone, this appeal ought to be struck from the roll with costs, so it is respectfully submitted.”*

- [9] Section 20 of the Revenue Appeals Tribunal Act No. 2 of 2005 (the Act) provides as follows:

*“Court of Appeal.*

1. *A party to proceedings before the High Court may, with special leave of the High Court, appeal the decision of the High Court to the Court of Appeal.*
2. *A party intending to appeal under subsection (1) shall note an appeal with the Registrar of the High Court within sixty (60) days of being notified of the decision of the High Court; and the party so appealing shall serve a copy of the notice of appeal on the other party to the proceeding before the High Court.*
3. *An appeal to the Court of Appeal may be made on questions of law only the notice of appeal shall state the question or questions of law that will be raised on the appeal.*
4. *A party entitled to appeal but, without good cause being shown, fails to file notice of appeal within the time allowed by subsection (2), shall be deemed to have abandoned his or her right of appeal against such decision.” (my emphasis)*

[10] At the hearing on 21 January 2019, it became necessary to start by hearing both Counsel on the above preliminary issue.

[11] Advocate Shale, for the respondent submitted that no good cause had been shown by the appellant for failure to comply with the requirements of section 20 (1) of the Act. He said notwithstanding the Certificate granted on 17 August 2018, the appellant had failed to note the appeal within sixty (60) days. He said the judgment/decision of the court was made on 17 April 2018 and the appeal was only noted on 5 September 2018. The appeal was therefore out of time and

that irregularity, he argued, took away the court's jurisdiction to hear the matter.

[12] Mr Dichaba, for the appellant, whilst not disputing the fact that the appeal was only filed on 5 September 2018, submitted that section 20 in the Act "was not well drafted". To that end he argued that the word decision in section 20 (1) did not refer to the judgment of the court *a quo* but to the decision relating to the granting of special leave to appeal. He argued that the Certificate from a Judge, granted on 17 August 2018, took the place of the 'special leave' referred to in section 20 (1). It was his submission that the definition of "day" in section 20 (2) should be that of a "court day". I want to quickly state that even if that were to be the case, the appeal would still be out of time and therefore not properly before this court.

[13] Advocate Shale maintained that the word "decision", which is repeated in section 20 (2) means judgment of the High Court. I agree. He noted that the Act, unlike the Court of Appeal Rules, does not define the word "day". However, he stuck to his submission that the appeal was not filed within sixty (60) days as required by section 20 (1) of the Act. That being the case, the provisions of section 20 (4) should be invoked so that the appeal is struck off the roll.



[14] In light of the submissions from both parties, can it therefore be said the appeal was filed out of time? The answer is in the affirmative. I hold the view that subsections (1) and (2) of section 20 of the Act are not ambiguous at all. The words used in that section should carry their ordinary meaning. The word decision in both subsections refers to the judgment of the High Court. The decision to be notified to a party by the Registrar under subsection (2) of section 20 of the Act is the judgment of the High Court which decision in turn informs the party involved on what points of law to raise in terms of subsection (3) of section 20 of the Act. It is the points of law gleaned from the judgment of the High Court that will lead to the granting of special leave. It therefore follows that the special leave should be obtained within the sixty (60) days stipulated in Section 20 (2). The respondent, for reasons unknown, delayed in obtaining that certificate.

[15] As already stated, the Act does not define the word “day” as obtains in other statutes. I do not believe that the definition should be the one given in section 2 of the Court of Appeal Rules, 2006 where the following definitions appear:- “court day” means any day except Saturday, Sunday and Public Holidays and “day” means “court day”.

[16] Accordingly since the act is silent on the definition of “day”, I think, for a legal definition it is appropriate to resort to the

Interpretation Act of 1977. Section 49 (2) of the said Act provides as follows:-

*“If the time limited by an Act for any proceeding or the doing of anything under its provisions expires or fall upon a Sunday or public holiday, the time so limited shall be extended to, and such thing may be done on, the day next following not being a Sunday or public holiday.”*

This, in my view, relates to when the 60<sup>th</sup> day falls.

*In casu*, the filing of the appeal should be within sixty (60) days. One would therefore be correct to be guided by the provision of section 49 (2) quoted above. The Act merely refers to “days”. I am therefore of the opinion that we are talking of ordinary days commencing on the date of notification of the judgment of the High Court. Failure to file the appeal within the prescribed period will therefore render the right to appeal abandoned. Application for condonation may rectify the irregularity. There was none.

[17] A similar problem once arose in the ***Commissioner (Lesotho Revenue Authority) and Thabang Qathatsi and Another C of A (CIV) No. 55/14***. In that case, the issue was mainly whether or not, special leave was required irrespective of whether or not the High Court was exercising its review or appellate jurisdiction. On that case, Mosito P, put the matter to rest in the following terms:

*“I am of the view that it matters not whether the “proceedings” before the High Court in respect of which an appeal to this court has been taken, reached the High Court by way of review or appeal. To my mind, it*

*suffices that the proceedings reached the High Court from the decision of the Revenue Appeals Tribunal. Section 20 (1) of the Act does not seem to draw a distinction on whether the proceedings must have been instituted in the High Court by way of review or appeal. It suffices that the proceedings emanated from the tribunal, the High Court and to this court.”*

*In casu* the proceedings came by way of appeal but the appellant did not, as already stated, comply with subsections (1) and (2) of section 20 of the Act. Accordingly, failure to file the appeal within sixty (60) days from the date of being notified of the judgment, means that the present appeal is not properly before this court. There was no suggestion that the respondent had difficulties in obtaining the Judge’s Certificate in time.

Accordingly it is ordered that:

The appeal be and is hereby struck off the roll with costs for having been filed out of time.

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**N. T. MTSHIYA**  
**ACTING JUSTICE OF APPEAL**

I agree:

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**K. E. MOSITO  
PRESIDENT OF APPEAL**

I agree:

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**P. MUSONDA  
ACTING JUSTICE OF APPEAL**

For Appellants : Mr. M. Dichaba  
For Respondents : Adv. S. P. Shale