IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) No. 37/2019

CIV/APN/245/2018

In the matter between:

COMMISSIONER OF VALUE ADDED TAX **1ST APPELLANT**

LESOTHO REVENUE AUTHORITY **2ND APPELLANT**

and

BKB LIMITED **RESPONDENT**

CORAM : DAMASEB AJA.
CHINHENGO A.J.A.
VAN DER WESTHUIZEN A.J.A.

HEARD : 17 OCTOBER 2019

DELIVERED: 1 NOVEMBER 2019

SUMMARY

Respondent applying in High Court to set aside a notice of income tax assessment by appellants for failure to comply with s 28(5) of the Value Added Tax Act 2001; Appellants conceding that notice was invalid for failure to comply with said provision; Judge granting order setting aside notice and costs against appellants;

Appellants noting appeal against reasoning of judge and not order granted; On appeal appellants withdrawing the appeal and contesting costs order of attorney and client sought by respondent;

Held – appellants having withdrawn appeal, only issue for decision was that of costs; in all the circumstances costs on party and party scale appropriate.

RULING

CHINHENGO AJA:

[1] The heart of the matter giving rise to this appeal is s 28(5) of the Value added Tax Act 2001. That provision reads:

> *"Where an assessment has been made under this section, the commissioner shall serve a notice of assessment on the person assessed, which notice shall state –*
>
> *(a) the value added tax payable;*
>
> *(b) the date the value added tax is due and payable; and*
>
> *(c) the time, place and manner of objecting to the assessment."*

[2] The Commissioner of Value Added Tax served a notice in terms of the above provision on the respondent. That notice did not comply with the above provision in that it did not state the time, place and manner of objecting to the assessment.

[3] The respondent protested by way of two letters that the notice was invalid for failure to comply with s 28(5). It did not receive a response. Fearing that the Commissioner may enforce the assessment based on the defective notice, the respondent applied to the High Court for an order setting aside the notice. The Commissioner defended the proceedings. At the hearing of the application the Commissioner conceded that the notice of assessment did not state the time, place and manner of objecting to the assessment but maintained that the assessment itself was valid.

[4] The issue of the assessment itself was, quite clearly, not before the court. The judge held that in view of the concession by the Commissioner, the only issue for determination was the question of costs. He accordingly set aside the notice of assessment and proceeded to deal in his ruling with the issue of costs only. He was correct. On the merits he rendered himself at paragraphs 1 and 2 of his ruling as follows:

> *"1. A determining factor in this case is that the respondents agree with the applicant that the quantum of tax assessed by the 2nd respondent was not done in accordance with the procedure under section 28(5)(c) of VAT 2001. This is a*

> *procedural prerequisite before the 2nd respondent reaches a final determination. To attest to this, the section provides – … [and quotes the section].*
>
> *2. As a result of the concession tendered by the respondents on the procedural defects, the indication is that the assessment was not arrived at in accordance with the procedural imperatives provided for in the section."*

[5] The learned judge *a quo* then dealt with the issue of costs and determined that the respondent was entitled to its costs, which he granted on the party and party scale of costs.

[6] The appellants were aggrieved by the High Court decision on the merits and appealed to this Court on three grounds:

> *"1. The court a quo erred and misdirected itself in finding that section 28(5)(c) of the VAT Act of 2001 is a procedural prerequisite which had to be satisfied by the appellants before the appellants could reach a final tax determination.*
>
> *2. The Court a quo made an error of fact in concluding that the appellants had agreed that the assessment made against the respondent was to have followed section 28(5) and (6) of the VAT Act of 2001 for purposes of determining the quantum of tax assessed.*
>
> *3. The Court a quo erred and misdirected itself by failing to answer the question which stood for determination before it, namely, whether a Notice of Assessment which does not state the time, place and manner of objecting to it in compliance with section 28(5)(c) is invalid, null and void ab initio."*

[7] It appeared to us that the appellants were not contesting the order granted but were concerned that the reasoning of the learned judge was not correct. It also appeared to us that the

third ground of appeal raised a possible ground for a review and not appeal. These points were raised by the respondent in its heads of argument.

[8] During the course of the hearing, appellants' counsel fielded some questions from the bench. He advised (and this was confirmed by counsel for the respondent) that another notice of assessment fully compliant with the implicated section, had since been issued to the respondent. He then conceded, properly so in our view, that, in substance, the appeal was ill-conceived and withdrew it. That rendered it unnecessary for respondent's counsel to make any oral submissions before us except in relation to costs of the appeal.

[9] In regard to costs, appellants' counsel submitted that in light of the withdrawal of the appeal, it was not appropriate for the court to make any adverse order of costs against the appellants. Counsel for the respondent however contended for costs on the attorney and client scale. This thus became the only issue for decision by the Court.

[10] The ordinary principle in regard to costs is that they follow the result. The appellants lodged an appeal which they withdrew at the hearing. This means that had they properly applied their minds they would not have lodged the appeal in the first place: all they had to do, as they later did, was to issue

a fresh notice of assessment in accordance with s 28(5)(c). That they pursued the matter and withdrew it at the hearing meant that the respondent had needlessly incurred costs defending the matter. There was therefore no sustainable basis for contending, as did the appellants, that the withdrawal itself be regarded as sufficient to disentitle the respondent from getting its costs. In our view the respondent was clearly entitled to his costs. The only issue was the scale thereof.

[11] Attorney and client costs are ordinarily awarded where the other party has conducted itself or the litigation in some reprehensible manner, or in such a manner as constitutes an abuse of the court process.

[12] We took a critical conspectus of the issues in this appeal and the submissions of counsel and came to the conclusion that the appellants did not altogether receive proper or competent advice from their lawyers hence they pursued an appeal which they really should not have pursued. As mentioned above, the appellants in fact issued another notice of assessment to the respondent before the hearing of the appeal. That, to us, begged the question as to why the appeal was lodged at all. We formed the view that this could well be a proper case for costs *de bonis propriis,* but, because that was not canvassed before us, it would be unfair for us to make such an order. We consider that

the appellants were not ably assisted in this appeal and their approach, ill-conceived as it was, was dictated by the advice they received. There is no indication that their approach was informed by any reckless attitude but, in all probability, by a consideration that they have an obligation to recover taxes for the common good. In all the circumstances, we consider that an award of party and party costs sufficiently recompenses the respondent.

[13] After the court adjourned, we were advised by the court's assistant registrar that Mr *Mahao* wished to meet us in chambers to explain that he had, on reflection, no authority to withdraw the appeal and that he wished to urge the court to decide the merits of the appeal. We declined to meet with him as that was unnecessary in view of what we made clear to him during argument that there was no appeal, properly so–called, against the order of the court a *quo* but, in reality, against the court's reasoning.

[14] During argument, Mr *Mahao* conceded that the actual order made by the High Court, i.e. setting aside the notice of

assessment, was ineluctable in view of the appellant's concession a *quo* that the notice was defective. Besides, Mr *Mahao* had placed on record that the appellant had, in any event, issued a new notice accepting that the first notice was bad in law. That concession, by itself, rendered the appeal academic. Courts exist for the ventilation of actual disputes and not to offer advisory opinions on moot questions. [1]

[15] In the result, the appeal having been withdrawn, the appellants shall pay the costs of appeal. We order accordingly.

M.H. CHINHENGO

ACTING JUSTICE OF APPEAL

I agree

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[1] *Mushwena & others v Government of the Republic of Namibia & another* (2) 2004 NR 94 (HC) at 103C-D, para 22.

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P.T. DAMASEB

ACTING JUSTICE OF APPEAL

I agree

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DR J.VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

For Appellant: Adv Mahao

For Respondent: Adv Selimo