CCA/50/2011

IN THE HIGH COURT OF LESOTHO

(Commercial Division)

In the matter between:

ASHRAF ABUBAKER **APPLICANT**

AND

COMMISSIONER FOR LESOTHO REVENUE AUTHORITY **1ST RESPONDENT**

JUDGMENT

Coram : **Hon. Molete J**
Date of hearing : **23rd April, 2013**
Date of judgment : **28th June, 2013**

SUMMARY

Application to review tax assessment – Applicant not agreeable to tax liability assessed at M29,000,000-00 – Parties given opportunity to resolve matter amicably – whether provisions of the law applicable permits the High Court to hear and determine matter at first instance – Applicant's behaviour found to be uncooperative and dilatory – Application dismissed with costs on attorney/client scale.

ANNOTATIONS

CITED CASES

Deacon v Controller of Customs and Excise 1999 (2) SA 905 at 908
Schoombie and Others v MEC for Education, Mpumalanga and Another 2002(4) SA877
S. Mohapi vs Lesotho Revenue Authority CIV/APN/218/2007
Metcash Trading Ltd vs Commissioner, South African Revenue, Service and Another 2001 S.A. 1109 (cc)

STATUTES

Income Tax Act 1993
Revenue Appeals Tribunall Act No2 of 2005

BOOKS

AC Cilliers; Law of costs (3rd Edition) Durban 1997 at 4.13

[1] This application first came before the Court on the 16th December 2011 on an urgent basis by certificate of urgency of Mr Stefan Carl Buys. In the certificate the reasons for urgency were briefly that the Respondent had assessed the Applicant to be owing tax of over M29,000,000-00 and was threatening to invoke harsh execution measures which could lead Applicant to financial ruin. The Respondent insisted on the full amount payable and refused to allow any further extension. He could not be heard in due course because the Court would be going into recess on that very day.

[2] The interim order that was sought; interdicting Respondent from taking immediate enforcement measures against Applicant in terms the Income Tax

Act, 1993 was agreed between the Parties then represented by Mr Mpaka for Applicant and Mr Mathaba for the Respondent.

[3] Mr Mathaba raised for the first time on that date that Applicant had approached the Court Pre-maturely. He also confirmed that there was no immediate threat to Applicant as the Commissioner had not threatened to execute or invoke recovery measures. He raised points of Law *in limine* relating to lack of jurisdiction of the High Court to deal with the merits of the assessment; the Applicantion for interim interdict being premature in that the Respondent had not yet replied to Applicant's reguest for extension made to the LRA on 7th December 2011.

[4] In his replying affidavit on these particular points of law *in limine* the Applicant relied on the inherent power of the High Court to hear and determine matters on review. It was his contention that the jurisdiction has not been ousted by tax legislation. He agreed it has been curtailed by section 136 of the Income Tax Act. He averred that the jurisdiction of the Court must be clearly and specifically intended by the legislation to be excluded and that section did not have that effect.

[5] On the other point in limine about the pre-mature litigation, Applicant said that the issue "has been overcome by events and are no longer relevant." The events referred to were presumably the Court order of the 21st March 2012 wherein the Court in addition to setting a time-table for the filing of documents in the matter; also granted Applicant leave to approach the Court on urgent basis for the interdict relief sought in Part A of the Notice of Motion. This order and the attitude of the Court was prompted by the

assurance that in any event there was no immediate threat or danger of any execution. The matter was then postponed to 22nd May 2012 for hearing. The Court specifically encouraged the parties to resolve the matter before that date.

[6] On the 22nd May 2012 parties appeared before court again, this time represented by Advocates J.M. Barnard for Applicant and H.P. Viljoen S.C. (with R. Mathaba) for the Respondent.

[7] Adv. Barnard for the Applicant started by reporting to the Court that nothing had transpired pursuant to the directive of the Court for the parties to try and resolve the matter. He indicated that there was some exchange of correspondence but nothing came out of it. He stated that Applicant was still willing to negotiate.

[8] On behalf of respondent Adv Viljoen submitted that there was no meeting of the minds between the parties. He maintained that the Applicant had approached the Court prematurely and had ignored the procedure to be followed to raise his objection to the assessment. If he felt it was an incorrect assessment based on the wrong assumptions he had other avenues for redress.

[9] The Court once again put it to both counsel that it was within its discretionary powers to require the parties to settle the matter amicably. The arguments that had started were interrupted by the intervention of the Court seeking and choosing to give Applicant a further opportunity to fulfill his obligations to the Revenue Authority. The assumption of the Court was that

the Applicant is a willing taxpayer with an honest and genuine grievance to be considered. It turned out not to be so.

[10] Advocate Viljoen then agreed to such proposal only if some payment arrangement were to be made by Applicant. He insisted on a repayment schedule and the court then adjourned to allow the parties to agree on reasonable terms, because it would be pointless to argue where the tax liability is not totally denied. This was also to be regretted as a wasted opportunity, because Applicant apparently saw it only as a way to delay the matter judging by his later conduct.

[11] In any event a reasonably detailed proposal of a down payment was made in pursuance of the Courts suggestions. The Applicant proposed one down payment and subsequent monthly instalments. They were not acceptable to Respondent at first but the parties ultimately agreed to an amended schedule of payment up to December 2012. The arrangement was without admission of liability, but it is necessary to mention that the total amount that would have been paid at the end of December 2012 would have been only M1,350,000-00 of the total assessed. It was also agreed that Applicant file with the LRA his submissions regarding the assessments and the LRA was to respond to the submissions on a specified date.

[12] In November 2012 nothing had been received as proposed by Applicant. Respondent then obtained a hearing date for the case in April 2013. A notice of set down was served on applicant's attorneys on 27th November 2012.

[13] The parties once again appeared before Court on the 23rd April 2013. The Court was immediately interested in the outcome of the proposal and arrangements to pay as agreed at the last hearing. Sadly nothing had transpired. The Applicant filed a supplementary Affidavit which sought to explain why he had not attended the hearing about the matter. He basically expressed though his attorney as he had done previously; that he would like attorney and counsel to be available to attend the meeting and since they were given short notice none of them would be attending the meeting including applicant himself.

[14] It is suprising why Applicant wanted counsel and attorney present at a tax assessment hearing; *moreso* why he did not find other Lawyers who would be available to assist to finalise the matter. This Court was further dismayed by the fact that no effort whatsoever was made by the Applicant to make any payment at all after the lapse a period of almost a year. It showed clearly that the court had misconceived the Applicants intentions to begin with. He was apparently unwilling to pay any tax at all, because in any event he was only expected to give written submissions and pay as agreed.

The Respondents on the hearing date also served upon Applicant a notice that in the event of Respondent being successful in his defence costs would be sought on a scale as between attorney and own client.

[15] Mr Barnard argued that since Respodent had raised the point of jurisdiction of the Court then Respondent would have to start arguments first. However the court considered that the matter had already commenced on 22 May 2012 and regarded the proceedings as a continuation. The points

in limine and the merits would be argued together as the matter had already progressed when the court; it could be fairly said; imposed a settlement on the parties. The Applicant did not comply with it. In any event Adv. Viljoen also objected to this and he was correct.

[16] The matter proceeded, and Applicant's argument was otherwise said to be about three issues; namely that the time had expired for the issuance of some assessments; that the wrong person, being himself as opposed to his companies was being held liable and also that the LRA itself had conceeded to some mistakes in the assessments. The argument on jurisdiction was that since the court had not been ousted by clear and unequivocal provisions of the Act, it must still have jurisdiction *albeit* curtailed.

[17] Applicant also cried foul about the fact that only four of his over sixty companies had been assessed. That argument however did not go further to show that even on probability; the over sixty companies would result in any reduction of tax assessed or payable. The common sense approach would suggest that more tax would be levied. It therefore cannot be said to be prejudical to Applicant to assess only four of his many campanies.

[18] On the Review and Jurisdiction of the court it was submitted that it boils down to the merits of the actions of the Respondent measured against the Income Tax Act and Administrative Law principles. Any discrepancy or departure would fall within the jurisdiction of the court. The authority of;

Deacon v Controller of Customs and Excise 1999 (2) SA 905 at 908

And

were relied upon.

[19] On this issue of jurisdiction of the court it seems that Applicant would like the end the inquiry where it suits him, that is to confirm that the court has jurisdiction to review the matter at first instance. It is the Respondents view that section 136 of the Income Tax Act 1993 prohibits that; and provides that objections are to be made to the commissioner at first instance. The Court has appellate jurisdiction only. However even if it is accepted in favour of Applicant that the court has original jurisdiction, does it mean the court should ignore the existence of other mechanisms and procedures to be followed and adopted where such exist. I do not think so, particularly in this case it would be a serious misdirection.

[20] Adv Viljoen for Respondent submitted that an application to review and set aside assessment can only be brought to the High Court on Appeal under part III of the Act which deals with objections and appeals. The objections are made to the commissioner whose decision may be taken on appeal. Initially it was so provided in sections 138 and 139 of the Income Tax Act, but these sections were replealed and substantially incorporated into the Revenue Appeals Tribunal Act No2 of 2005 as sections 3 and 19. These provide appeals only to the High Court from a decision of the Tribunal and further to the Court of Appeal with its leave.

[21] The judgment of my sister Majara J in the case of **S. Mohapi vs Lesotho Revenue Authority** is very relevant and applicable to this case, she stated that;

> *"I therefore accept the submission made on behalf of respondets that at this stage, the common law jurisdiction of the High Court is curtailed by both the VAT Act 2001 and the Revenue Appeals Tribunal Act 2005 so that any issues relating to assessments under the tax law can only come before it by way of appeal from the Revenue Appeal Tribunal. Indeed, applicant herein has failed to exhaust these remedies before approaching this Court for the relief claimed.*
>
> *In other words, all the issues that applicant has raised, to wit, that the business in Mafeteng does not belong to her personally, that she has been paying some amount towards the settlement of the assessed amount etc, constitute the merits for which she should have filed an objection in terms of the above quoted provisions so that they could be properly determined in accordance with the procedure and by the structures that have been provided for under the section. In my view, to find otherwise would have the effect of rendering redundant, the local remedies and/or structures that have been put in place specifically for this purpose"*[1].

[1] CIV/APN/218/2007 (unreported) at Page 13

[22] It will be easily accepted that these structures are more suitable than Courts of law to deal with objections when one consideres that there is in section 171 of the Income Tax Act Provison for the LRA to examine on oath any person concerning his income. The Applicant was called to such inquiry and his answers were not satisfactory to the investigative team.

[23] In the following extract the reference to Mr? Is to members of the LRA Investigative team. Their names were not recorded;

> *"Mr? : (indistinct) number of companies that you have, one would expect that produce some income of some sort that you are getting from these companies, but suprisingly (1) you are only getting income from Northern Star, this (indistinct) arrangement you have, the investment and also you are only getting(indistinct) salaries, you are only getting salaries and also you are getting company fees from only three companies.*
>
> *Mr Abubaker : (indistinct)*
> *Mr? Ja, these companies (indistinct) am I right?*
>
> *Mr Abubaker : Ja (indistinct).*
>
> *Mr? (Indistinct) are you sure of your answer because you see you are still under oath and the questions we want to be answered clearly (indistinct). Are you really sure that out of all the 60 companies…if I am right, are you saying the remaining (indistinct) not paying you anything, no salary, no directors' fees, not dividends?*

Mr Abubaker : That is correct. Only (indistinct).

Mr? The only thing you've done is you just spent your money to start these companies and you don't want to get anything back?

Mr Abubaker : That is right. The other, only thing which I get…well, from certain companies it is loans. If I need a R500 000 loan I get it from a certain company, that is coming, not as an income, as a loan. That will come as a loan.

Mr? Do you normally pay it back?

Mr Abubaker : Well no, it has never been paid back.

Mr? – You've never paid back?

Mr Abubaker : Well, up to no(w) I 've never paid back."

And at page 30 the following passage appears:

"Mr? ... when I look at your lifestyle and I look at the income declared to you, they are not reconcilable. For example I look at the properties you own and the cars you drive, or at least let me say (indistinct) in here, when you are trying to reconcile the income and the kind of property owned …

Mr Abubaker : There is a variance?

Mr? There is a huge variance.

Mr Abubaker : Yes.

Mr? Your (indistinct) is not supported by income generated.

Mr Abubaker : That is correct, so there has been loans from certain companies."

[24] These paragraphs of the inquiry are enough to lead one to the conclusion that it would be wrong to allow courts to interfere at this stage or to allow the parties ignore the more appropriate procedures under the Act. In the short extracts, he has given the interrogators enough to reasonable suspect that he does not declare his earnings in full; and moves funds around amongst his companies and himself that he could be said to be avoiding tax. It would therefore be suitable and correct that the assessments be appealable to the commissioner and then the Revenue Appeals Tribunal to consider before the courts are approached on appeal.

[25] The above extracts also give the impression that the tax payer is not making an honest mistake in his tax affairs, but is probably guilty of having devised a deliberate and planned scheme to defraud the receiver or tax authority. That would be a reasonable conclusion from the above interview: The commissioner and the Appeals tribunal would be able to refer to such records and interviews in considering the matter. In the words of Kriegler J in the case of **Metcash Trading Ltd vs Commissioner, South African Revenue Service, and Another 2001 S.A. 1109 (cc)**

"Having regard to the nature of VAT and its system of primary self- assessment, disputes about the correctness of assessments made by the Commissioner are likely to involve complicated and contentions issues of fact. As has been

observed about the special nature of VAT and VAT returns, assessments under 531 is tentamount to a finding by the Commissioner that the returns rendered by the vendor have not been truthful.Credibility disputes of this kind belong in the special court where the procedure is geared to deal with them"[2]

This is fully applicable to this case before me and I am persuaded to follow and adopt this authority as a good one for this matter.

[26] It is important to note that in the above case, which was a constitutional challenge to Value Added Tax Act 89 of 1991 in South Africa, Applicant who had claimed that the Act was amongst other things unconstitutional for the reasons that it created a special execution procedure which involves employing an extraordinary civil process of execution and was also in violation of the right to access the courts. The court held that even if the relevant provisions of the Act are found to limit rights, the section is limited in scope, temporary and subject to review. The court held further that public interest in obtaining full and speedy settlement of tax debts is significant and the principle of "pay now, argue later" was accepted as reasonable in societies based on freedom, dignity and equality. The court therefore refused to confirm the relevant sections as unconstitutional.

[2] Page 1140

[27] The case before me seems to have been based on the Applicant's eagerness to prevent the operation of the "pay now, argue later" principle in his case, while at the same time unwilling to pay any tax at all and not prepared to negotiate or engage with the revenue authority even after the intervention of the court. This is clear from the initial institution of the proceeding on an urgent basis because the court was starting vacation, and subequent failure to make any positive effort to pay for the whole year despite his undertaking.

[28] This court finds the attitude of Applicant unfortunate and unacceptable. There is no reason to justify his behaviour. The court is satisfied that he only seeks to have the matter drawn out. It is so with most businessmen as Advocate Viljoen pointed out; they would rather not pay tax; but we all must. That is why the mechanisms to ensure compliance are many and extraordinary.

[29] Courts are relunctant to order attorney and client costs. This is based on the right of every person to bring litigation to court to get a decision and not be penalised for that[3]. However; an unsuccessful party's

> *"vexatious, unscrupubus, dilatory or mendacious conduct---- may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs[4]"*

[3] Van Wyk v Millingtom 1948(1) SA 1205
[4] A.C. Cilliers, Law of Costs (3rd edition) Durban 1997 at 4.13

[30] In the circumstances of this case I see no reason to grant the application; and in dismissing it I consider it fair to ensure that the Respondent is not made to incur any unnecessary costs, which would happen if I deprive him of the costs on a higher scale.

[31] I therefore make the following order;

(a) The Applicantion is dismissed.

(b) Costs are awarded to the Respondent on the scale as between attorney and client.

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L.A. MOLETE
JUDGE OF THE HIGH COURT

For Applicant - Advocate J.M. Barnard
For Respondent - Advocate H.P. Vilgoen S.C., (with Adv R. Mathaba)