IN THE HIGH COURT OF LESOTHO

CIV/APN/329/2013

In the matter between:

THABANG QATHATSI **APPLICANT**

And

THE PRESIDENT OF THE REVENUE TRIBUNAL **1ST RESPONDENT**
THE COMMISSIONER (L.R.A.) **2ND RESPONDENT**
THE LESOTHO REVENUE AUTHORITY **3RD RESPONDENT**

JUDGMENT

Coram : Honourable Mr. Justice E.F.M. Makara
Dates of Hearing : 11 April, 2014
Date of Judgment : 21 August, 2014

Summary

The Applicant has asked the Court to review and set aside the decision of the Revenue Appeals Tribunal on the basis of the procedural irregularities committed by the Tribunal and the Respondent. The applicant attributed this to the Tribunal's acceptance of the Pre-Trial minutes in application proceedings and allowing the Respondents to file a statement of opposing the Grounds of Appeal instead of an Answering Affidavit.

The Respondent counteracting that the Applicant is the one who has followed a wrong procedure

Held:

1. *The Respondent has failed to exploit Rule 30 of the High Court Rules as sanctioned under Rule 25 (3) to object to whatever procedural irregularity committed by the Applicant.*

2. *The Tribunal has not demonstratively indicated that it had discretionarily condoned whichever noncompliance with its Rules including its admission of the Pre-Trial minutes.*
3. *Assuring that it had discretionarily condoned the irregularities, there is no indication whatsoever ex-facie the papers that it had explained its innovative procedure to the parties.*
4. *The application succeeds and the proceedings of the Tribunal are set aside.*
5. *The set aside proceedings should start de-novo before a different panel.*

CITED CASES
Income Tax Act
High Court Rules 1980
Revenue Appeals Tribunal Rules 2007

STATUTES & SUSIDIARY LEGISLATION
Judicial Service Commission v Chobokoane LAC(200 – 2004) 859
James Brown and Ano. V Solmons NO1963 (4) SA 656 (AD) @ 660
Mohaleroe Makhaola v the Lesotho Public Motor Transport CO. (Pty) Ltd C of A 6/09
Chotabhi v Union Government (Minister of Justice) and Registrar of Asiatics 1911

MAKAJA J

Introduction

[1] The Court has here been approached by the Applicant through the Notice of Motion proceedings in which he is, contextually, asking it to review through the instrumentality of Rule 50[1]; the procedure followed by the Revenue Tribunal in reaching a decision to dismiss his appeal against the assessment of the *Pay as You Earn Tax (PAYE)* by the 2nd Respondent. His protestation is in a nutshell that the procedure culminated in a legally wrong conclusion. The grounds for the proposed

[1] Rule 50 of the High Court Rules which basically facilitates for the operation of S.119 (1) of the Constitution which empowers the Court to *inter alia review the decisions or proceedings of any subordinate or inferior court, court martial, tribunal, …….. exercising quasi judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this constitution or under any other law.*

intervention on review are in summarised terms that the Tribunal erred and misdirected itself in that:

1. Allowed and accepted the *Pre Trial Minutes* as part of the application proceedings contrary to the Rules read in conjunction with the High Court Rules and, consequently, relied upon those minutes in determining the issues. The basis hereof, being that they had been signed by Adv. Rasekoai who was his Counsel at the material time without having consulted the Applicant about their content.
2. The nature of the proceedings initiated did not warrant the filing of the minutes. According to him, application proceedings do not accommodate the *Pre Trial Minutes.*
3. The minutes misrepresented his position in the matter.

The Respondent resisted the relief prayed for by filing a Notice of Intention to oppose the application and complemented that by introducing the answering affidavit of the 2nd Respondent and his Attorney's supporting one. The defence advanced an impression that the grounds relied upon for the application lacked legal basis and, therefore that it deserves to be dismissed. Interestingly, however, the Respondents subscribed to the conjectural understanding that the application was premised upon Rule 50.

The Common Cause Facts

[2] Appreciably, the parties share a convergence in their recognition of the background reality in this case. The significant ones are that the Applicant was an employee of a company which has not been clearly described and that he was by

operation of the law obliged to pay *the PAYE Tax.* It is his case that the 3rd Respondent had while deducting the *tax* failed to make a distinction between the over charged payee and the unlawfully deducted fringe benefits. The two were refundable in terms of S. 168 of the Income Tax Act. As a result, there had been a procedural misdirection between *reimbursement and refunding.* This according to him, impacted adversely against the appropriate amounts which he qualified to get from the 3rd Respondent in the form of a *refunding or reimbursement.*

[3] The Applicant had in response to what he viewed as a miscalculation of the moneys due to him, lodged *an objection* with the 2nd Respondent in accordance with Rule 5.[2] His objection challenging the correctness of the assessment was unsuccessful. The Applicant reacted to the decision by filing with the 2nd Respondent what he terms *an appeal by way of a Notice of Motion.* He therein sought for an order directing in the main that he be reimbursed with Two hundred and three thousand, seven hundred and one Maluti (M203701.00) which he claimed to have been unlawfully deducted from his salary and paid to the 3rd Respondent. He attributed the action to the overcharged P*AYE.*

[4] Accompanying the Applicant's *Notice of Motion* was his *founding affidavit* and its annexures for the elucidation of the apposite averments in the founding affidavit. The Respondents reacted by filing a document called *Statement of Opposing the Grounds of Appeal.* Ultimately, the Applicant filed his *replying affidavit.* This related to a response to the contents in the *Statement.*

[2] Rule 5 of the Revenue Appeals Tribunal Rules 2007.

[5] During the hearing, the Tribunal admitted the minutes of a *Pre Trial Conference* which had been held between the counsel for the parties and accordingly considered them in its determination of the issues presented before it.

[6] It is the understanding of the parties that their point of divergence materially turns on the correctness or otherwise of the procedure followed by the respondents in responding to the Applicant's motion proceedings and correspondingly on the procedure followed by the Tribunal itself.

The issues

[7] This as it has already been foreshadowed, turns on the disputations pertaining to the procedural rightness of the Respondents and the Tribunal in their respective approaches to the appeal.

The Arguments Advanced for the Parties

[8] The Applicant has primarily premised his argument on the reasoning that the Respondents have not procedurally responded to his *Notice of Motion* through which he had initiated the appeal before the Tribunal and, therefore, their counter tantamount to a somewhat nullity. He cautioned the Court that he introduced his appeal by adhering to the procedure under *Part IV Rule 27.* This notwithstanding, he readily conceded that he had classified the relevant document as a *Notice of Appeal and yet* it was characteristically an application under the same rule. To illustrate this, he invited the Court to a realisation that its Notification commences with the words, "*Take Notice that ..... the affidavit of Thabang Qathatsi* ..... He further drew the attention of the Court to the material similarity between the

format of his application and the *Form B format* which has under Rule 27 been prescribed for the *application* for the lodging of the appeal against the decision of the Commissioner.

[9] According to the Applicant, an application should by operation of the appropriate procedural imperatives be accompanied with a founding affidavit and ultimately with a replying one. On that note, he referred the Court to the existence of the essential documents in his application to demonstrate his compliance with the procedures under the rule. After having made an impression about the relevancy and the materiality of the Rule 27 procedure in the appeal before the Tribunal, the Applicant explained that his papers should have been mandatorily responded to through the Rule 30 procedure.

[10] It is in precise terms against this background that the applicant is adamantly charging that the Respondent has by filing a *Statement of Opposing the Grounds of Appeal,* acted unprocedurally and, therefore, by default failed to resist his application. The consequent suggestion being that the Tribunal should have come to a finding that the Applicant was entitled to the success of his appeal since it had technically and legally speaking, not been opposed.

[11] On a rather different terrain the Applicant has before this Court attacked the procedure followed by the tribunal itself when conducting the appeal proceedings before it. A key ground for the protestation is generally that the Tribunal had demonstratively failed to make a clear distinction between the procedure applicable in the *Notice of Motion Proceedings* and on the other hand the one

which is antecedent to the *Trial Proceedings.* The specifics of his complain is that the Tribunal had committed a procedural irregularity by accepting the *Pre Trial Minutes* and yet this is a document which belongs to the *Trial Proceedings* but not to the *Notice of Motion* initiated litigation unless the latter had been converted to the former. In the same breath, he blames the Tribunal for having unprocedurally admitted the same document and yet it had a fatal defect in that it had not been signed by the Applicant himself but by his erstwhile Counsel.

[12] What appears to be the Applicant's last ground for the relief sought for is that the Tribunal committed a procedural injustice in that it reached its decision unmindful of a distinction between the *Fringe Benefits Tax* and the *Pay as you Earn Tax.*

[13] The responsive arguments mounted by the Respondents proceeded from a strong warning that the Court must be conscientious that while managing the review proceedings its concentration should be on *legality of the decision, not its merit.* The case of the **Judicial Service Commission v Chobokoane LAC**[3] was relied upon for the proposition.

[14] Regarding the correctness of the procedure followed by the Respondents, it was maintained that they had in answering the Application complied with Rule 7(1) and (2). They in precise terms maintain that the Rule prescribes a procedure which the parties should have adhered to in the matter and counter accuse the Applicant of having adopted a wrong procedure by resorting to the *Notice of Motion*

[3] Judicial Service Commission v Chobokoane LAC (200 – 2004) 859

Procedure. The impression radiated is that they had refused to be drifted away from the applicable stipulated methodology in an appeal against the decision of the 2nd Respondent.

[15] As for the admission of the *Pre Trial Minutes* by the Tribunal, the respondents have explained that there has been no irregularity with that since the Applicant's Counsel at the material time had subscribed to their contents by signing them. In addition, he stated that the counsel involved had agreed that the Tribunal could refer to those minutes without any need to bring a *viva voce evidence* for their illumination.

[16] Lastly, the Respondents submitted that the tax calculations which constitute the basis of this litigation, had with reference to the P16 formulation, been accurately determined and that if the Applicant is aggrieved about that decision, his remedy would be to appeal against that decision.

The Findings and the Decision.

[17] It is found to be of paramount significance to be noted from the onset that the impugned procedure has to do primarily with **The Revenue Appeals Tribunal Rules[4] (The Rules)** and incidentally in rather exceptional incidences, with the High Court Rules.[5] The interrelationship has been introduced under 25 (3) which provide:

> Save as is otherwise provided in the rules of this Part, the general practice and procedure of the Tribunal may approximate that of the High Court to the extent

[4] The Revenue Appeals Tribunal Rules 2007.

[5] The High Court Rules 1980.

practicable in so far as such practice and procedure are considered helpful by the President.[6]

[18] In resolving the controversy around correct procedure to have been followed by the parties respectively, it transpires from Rule 7 that it clearly provides a procedural mechanism through which the Applicant could lodge his appeal and correspondingly file his founding papers. Rule 8 complementarily details procedural regimes for the 2nd Respondent to file his opposition to the application and answer the founding papers. Rule 9 epitomises the epoch of the process in that it indicates that the issues in any appeal will be those defined in the statement of the grounds of appeal read with the opposing statement of the grounds of appeal.

[19] It is worthwhile to be noticed that rules 7, 8 and 9 fall under Part III and that Rule 26 is *inter alia* devoted to their application in the administration of the appeal. It materially provides that *for purposes of this part, any application on notice shall be brought in the manner contemplated in the rules.*

[20] Enigmatically with these rules, they under Rule 27 give a direction on the content and the form of the application in contemplation under Rule 27. The two are to be in consonance with *Form B of the 1st Schedule.* The form is, characteristically, a *Notice of Motion* type. The Rule 27 scheme is, in the view of the Court, an instrument for the implementation of the appeal brought for the purpose of Rule 7 and the procedural response thereof. Otherwise, the existence of Rule 27 which is foreshadowed by the well-defined Rule 26 would not make

[6] Ibid

sense. It is imperative that the rules referred to must be read holistically to appreciate the general picture and realise how the Rule 7 procedure is synchronised with Rule 27. For over emphasis sake, the latter is designed for the practical utilisation of the remedy envisaged in the main under Rule 7. This is attested to by the heading of Rule 26 and 27. It stands as, *'Application of Part III'* under which Rule 7 exists. The main heading of Part III is headed, *'Procedure before the Tribunal'.* The Court in this regard, acknowledges that the headings constitute part of the legislation and provide guidance about the intention of the legislature. This has stood the test of time since *inter alia* the case of **Chotabhi v Union Government (Minister of Justice) and Registrar of Asiatics 1911 Ad is at 24** the headings of different portions of a statute may be referred to for the purpose of determining the sense of any doubtful expression in a section ranged under any particular heading.

[21] There is an observation that the 2nd Respondent has under Rule 7 been enjoined to prescribe a form which facilitates for the bringing of a Notice of Appeal. There has been no such a form brought to its attention. This is indicative that the relevant authority may have inadvertently not addressed that assignment or has discovered that it would be a meaningless and superfluous instrument since the requisite particulars for the appeal have already been exhaustively covered under Rule 7, 8 and 27.

[22] The analysis ascribed to the described procedural scheme, leads the Court to a finding that the applicant had basically premised his application upon the content and the form perceived under Part III when viewed as a whole. In its understanding, he appears to have been at large to have proceeded under Rule 7 or Rule 27 or

both since they somewhat complement each other. The two procedural regimes are further alternatively recognised to respectively command self-contained procedural avenues for the appeal. This notwithstanding, the Rule 27 approach followed by the Applicant seems to be the most appropriate and comprehensive route. Thus, the Applicant's charge that the Respondent ought to have strictly adhered to the Rule 7 procedure is found to be endlessly controversial.

[23] The Respondents have unnecessarily complicated the proceedings before the Tribunal by simply resorting to the use of the Rule 7 procedure on their understanding that the Applicant had violated the requisite procedure. They do not appear to have been mindful that they ought to have firstly objected to the Applicant's impugned procedure before the Tribunal and ask that he be ordered to correct it. If that interlocutory measure would succeed, they may have been awarded the costs. They are at this stage, disqualified from raising the issue. Incidentally, they should have permissibly as sanctioned under Rule 25(3) of the Rules, resorted to Rule 30 of the High Court Rules to challenge the regularity of the procedure taken by the Applicant. The former rule renders the High Court rules to be applicable as the reinforcement mechanism under the deserving circumstances. Thus, the challenge under consideration warranted a resort to Rule 30 of the High Court Rules. The rationale behind is to ascertain that procedural justice is being observed throughout towards the attainment of substantive justice.

[24] It would have been more convenient and logical for the Respondents to have exploited the Rule 30 procedural avenue in resisting the application. This is because it commensurately sets out a direct procedure for the measures to be

mounted against the Rule 27 application and prescribes the time limit for the delivery of the answering affidavit and its annexure(s). Rule 30 directs in part:

> If the Respondent wishes to oppose the grant of the order sought for in the notice of motion, he or she shall –
> (a) within 14 days, give the Applicant notice in writing, that he intends to oppose the application;
> (b) .....
> Within 17 days of notifying the Applicant of his intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents. (Emphasis supplied)

[25] The Court despite its finding that it would have made more sense if the Respondents had utilised Rule 30 procedure, finds that they had nonetheless, opposed the application through the Rule 7 procedure. The differences concerning the proper approach appear to be attributable to the conflicting interpretations between the Rule 7 procedure and the Rule 27 one considered side by side with Rule 30. The fact that the application has to do with the proceedings before a Tribunal, suggests that the approach by this Court should not be legalistic. What is of essence here is that the Respondents had opposed the application and provided their answers to it. The contention that they be held to have not resisted it is rejected by the Court.

[26] Attention has been given to the catalogue of the courts decisions to the effect that each party to the application proceedings should in principle file the normal set of affidavits unless the Court on justifiable grounds allows for their supplementation. Thompson JA in J**ames Brown and Ano. V Solmons NO**[7] cautioned:

> It is in the interest of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should be observed.

[7] 1963 (4) SA 656 (AD) @ 660

Also in **Mohaleroe Makhoabe v the Lesotho Public Motor Transport Co. (Pty) Ltd**[8] it was postulated:

> ..... The additional documents were not annexed to any of the affidavits ..... but were apparently handed up to the Judge in the course of counsel's address in the court a quo.

[27] The latter decision is indicative that in the instant case, *the Pre Trial Minutes* should in principle have been annexed to one affidavit for its admissibility. Whilst that could be so, there has to be recognition that the principle enunciated related mainly to litigation before the ordinary courts. This is distinguishable from the conduct of the proceedings before a Tribunal. It is for that reason that its rules are *sui generis* to accommodate appropriate departure from the orthodox adherence to the prescribed procedure provided that the adopted approach is satisfactorily explained to the parties. It is in that context that the *Pre Trial Conference Minutes* **could** have been properly admitted and considered for the dispensation of justice. The only reservation which the Court has with the approach is that there has been no indication that the Tribunal had canvassed the basis of its admission and about the applicable antecedent procedure thereof.

[28] The Tribunal could have through the instrumentality of Rule 25 (3) invoked Rule 59 of the High Court Rules, to *mero muto,* condone any non-compliance with its Rules and dictate its own procedure and explain it to the parties.

[29] In addressing the question concerning the admission of *the Pre Trial Conference Minutes*, it has to be firstly realised that the session is sanctioned under

[8]Mohaleroe Makhaola v the Lesotho Public Motor Transport CO. (Pty) Ltd C of A 6/09

Rule 13 of the Rules. Its purpose is to project the issues, map an evidential way forward and curtail the length of the proceedings. In the Court's view the rules have designed a *sui generis* procedure in which the *pre-trial* is accommodated within the application proceedings for the stated reasons. The innovation is for a just cause and it would not be justifiable to set aside the proceedings since conventionally the process belongs to the trial litigation.

[30] There is no merit in the argument that the minutes should not have been admitted by the Tribunal since they had not been signed by the Applicant but rather by his erstwhile Counsel. The Court recognises that the Counsel had a mandate to sign them. However, there is a merit in his contention challenging the correctness of the Tribunal's admission of the *Pre Trial Minutes* since there is no indication whatsoever, that they were annexed to any one of the affidavits or that they were admitted by consent. There is also no mention from the papers before the Court that the Tribunal had in the exercise of its discretionary powers under Rule 22 (2) condoned the non- compliance with the rules. This is subject to a good cause being shown by the party who applies for the indulgence.

[31] It appears that the Tribunal should have against the backdrop of the uncertainties regarding the procedures, have demonstratively detailed its direction. In that process, it was *ex facie* the rules at liberty to initiate in the interest of justice, any workable procedure. This would pass the test provided that the procedural innovations were explained to the parties for them to apply. The

challenge is analogous to the one applicable to Rule 11 in the Central and Local Courts (Litigation Rules).[9]

[32] In this review application, the Court has relied upon the papers presented before it. It has, nevertheless, not been provided with a copy of the record of the proceedings before the Tribunal. The two counsel never referred to it or placed same under any dispute. Whilst the Court is disturbed about that, it thinks that the concern is not of significance **since the issues centred predominantly on the interpretation of the relevant rules for the determination of the procedural compliance. In any event, there was no contestation over whatever was the content of the proceedings at the forum.** The relief sought for was consequently, considered in that perspective.

[33] The Court has ultimately on the balance of probabilities been persuaded that there is a founded scepticism that the Tribunal has, for the stated reasons, procedurally administered justice. Resultantly, the application succeeds in terms of prayers 1 and 2.

[34] There is no pronouncement on prayer 3 since it has to do with the merits of the case.

[9] Under the rule the President is, in the interest of justice, at large to introduce a procedure or adopt one from the rules of the other courts provided that he explains that to the parties for its application.

[35] The Applicant is awarded the costs on party to party basis.

E.F.M. MAKARA
JUDGE

For the Applicant : Adv. K. Ndebele

For the Respondent : Adv. M. Dichaba