

SWAZILAND HIGH COURT

MAHLALELA LUCKY G.

Applicant

Vs

SWAZILAND ROYAL INSURANCE CORPORATION

1st Respondent

COMMISSIONER OF TAXES

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

PRESIDENT OF THE INDUSTRIAL COURT

4th Respondent

REGISTRAR OF THE INDUSTRIAL COURT

5th Respondent

REGISTRAR OF THE HIGH COURT

6th Respondent

Civ. Case No. 2810/2001

Coram Sapiro, CJ

For Applicant Mr A Shabangu

For Respondent Mr S S Earnshaw

JUDGMENT

The applicant seeks an order that: -

1. The tax directive sought by the first respondent from the second respondent and the consequent deduction and payment of the amount of E148 722-24 to the second respondent, in terms of the aforesaid tax directive be declared unlawful, invalid and ultra-vires the Income Tax Order, 1975.
2. The first, second and third respondent be ordered to pay the amount of E148 722.24 to the applicant.
3. The applicant seeks interest on this amount calculated at nine percent per annum from the 26th

February 2001 to date of payment.

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4. The applicant seeks in the alternative that the interlocutory proceedings commenced before Industrial Court on 17 July, 2001 be reviewed, corrected and set aside.

5. Further, that the respondents are to pay the costs of the application jointly and severally, one paying the other to be absolved.

The applicant has in support of its notice of motion filed a founding affidavit in which he states that he is an adult male resident of Mbabane. The respondents are cited in paragraphs 3 - 8. The applicant thereafter has recited that on or about 16th May 2000 he commenced proceedings before the Industrial Court for the determination of an unresolved dispute in terms of the Industrial Relations Act, and that such dispute arose from what he alleged to be an unfair termination of his employment with the First Respondent. The proceedings were opposed.

In due course the matter was set down for trial before the Industrial Court. A settlement to these proceedings was reached and a deed of settlement was made an order of court.

In terms of the deed of settlement in the amount of E400 000 was to be paid to the applicant. This was categorised in the agreement as an ex gratia payment. Notwithstanding this it could be that this categorisation hides the fact that the amount paid may have been compensation for loss of office. The applicant however states in the affidavit that at the time of

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the signing of the deed of settlement the 1st respondent had no liability to pay any amount by way of remuneration to the applicant as such liability had ceased on the date of dismissal. It is not clear what the applicant has in mind but clearly the money was not paid for nothing and in all probability relates to compensation for his loss of office.

The applicant points out that in terms of the deed of settlement the respondent undertook, subject to clause 16 thereof, to make an ex gratia payment of E400 000 to the applicant upon signature of the deed of settlement. This amount was to be paid without admission of any liability. What is not mentioned in the body of the founding affidavit at this point, (although on reading the agreement a copy whereof is attached such is clearly the case) is that the deed of settlement contemplated that before making the payment the 1st respondent would seek a directive from the 2nd respondent in regard to the deduction and retention of monies from the ex gratia payment in respect of the applicant's liability for tax. The agreement does in fact provide in paragraph 14 as follows: -

" Subject to clause 16 of this deed of settlement the respondent shall, before making payment of the sum of E400 000 to the applicant deduct the following amounts:-

14.1 Such sum in respect of taxes as the Commissioner of Taxes shall determine or direct.

14.2 and 14.3 are not relevant to the present proceedings.

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It is provided in paragraph 15 that the ex gratia payment made by the respondent to the applicant will thus be reduced by the amounts set out in clause 14. Clause 15 stresses that without in any way derogating from what is stated in clause 14 it is reiterated that payment to the applicant shall be subject to any legal obligation upon the First Respondent (my emphasis) to make any tax deduction from the ex gratia payment on behalf of the Commissioner of Taxes.

Intention of the parties is made even clearer by the provisions of paragraph 16 which provide that the respondent was to make part-payment to the applicant of E100 000 upon signature of the deed of settlement and the ex gratia payment would be reduced. The balance of the ex gratia payment was to be paid within 72 hours of receipt of the tax directives by the respondent.

The 1st respondent did indeed seek a directive from the Commissioner of Taxes and received such a directive. It is common cause that in terms of the directive which was identified as number 26492 the First Respondent was obliged to deduct an amount of E156 000 as tax on and from the ex gratia payment..

The applicant on 9th March 2001 lodged an objection with the 2nd respondent. The objection was directed at the 2nd respondent's decision "effectively taxing the ex gratia payment". A copy of a letter of objection was annexed to the founding affidavit marked "E" and was received by the Commissioner of Taxes on the same day. The 2nd respondent dismissed

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the objection on the 9th of March 2001. In this connection it is important to bear in mind that the Income Tax Order makes provision for objections to assessments but not to directives of that presently under consideration.

The applicant then tried to issue a writ on the judgment of the Industrial Court and this was met by opposition from the 1st respondent. Having been unsuccessful in obtaining relief in this manner the applicant has resorted to the present application.

First Respondent appears to have acted in accordance with the provisions of the agreement of settlement and the request for the directive to the 2nd respondent was made as contemplated in and in accordance with the provisions of the deed of settlement itself.

There is no allegation that the tax on the ex gratia payment has been assessed. Nor is there any allegation that the amount deducted from the payment has been remitted to the Commissioner of Taxes, (Second Respondent). I must assume therefore that the amount still remains with the First Respondent.

Essentially the question that has to be answered is whether the lump sum payment was one to which the provisions of section 58 and the Second Schedule of the updated Income Tax Order¹ apply. In other words was there any legal obligation on the First Respondent to seek a directive

1 The Income Tax Order 1975 K-O-I-C 21/1/75

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and to make a deduction in accordance therewith from the amount to be paid to the Applicant.

The Section reads.

Payments of employees tax. (Second Schedule)

58. Payments in respect of the liability (whether or not such liability has been ascertained or determined at the date of any payment) of every employee, as defined in the Second Schedule, for any tax shall be made in accordance with the Second Schedule, and any such payment may be made at such place as may be notified by the Commissioner.

And relevant sections of the Schedule provide

Second Schedule

AMOUNTS TO BE DEDUCTED OR WITHHELD BY EMPLOYERS IN RESPECT OF NORMAL TAX

(Under section 58)

Part

1. Interpretation. 1. In this schedule unless the context otherwise requires -

"employee" means any person (other than a company) who in respect of an employment, office or appointment, receives remuneration from an employer or to whom remuneration accrues;

"employees' tax" means the tax which an employer is required or requested to deduct or withhold from remuneration paid or payable to an employee;

"employees' tax certificate" means a certificate required to be issued by an employer in terms of paragraph 13;

"employer" means any authority or person (including any person acting in a fiduciary capacity or in his capacity as a trustee in an insolvent estate, an executor or an administrator of a benefit fund, pension fund, provident fund, retirement annuity fund or any other fund) who pays or is liable to pay to any person other than a company any amount by way of remuneration, and any company;

"remuneration" means any amount of income which is paid or is payable to any person by way of any salary, leave pay, allowance, wage,

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revenue: k.o-i-c. 21/1975

Second Schedule.

rendered, including an amount referred to in section 7(a), (b) or (c), or the annual value of such benefit or benefits referred to in section 7(f) as the Commissioner may, from time to time, determine in respect of a year of assessment - (Amended A.5/1988.)

(a) any amount paid or payable to any person in respect of services rendered or to be rendered by him as a domestic or private servant if such amount does not exceed the amounts qualifying for exemption under section 12(3); (Amended A.5/1988.)

(b) any annuity under an order of divorce or decree of judicial separation or under any agreement of separation;

Part II

EMPLOYEES' TAX

EMPLOYERS TO DEDUCT TAX

2. (1) Every person (whether or not registered as an employer under paragraph 15) who pays or becomes liable to pay any amount by way of remuneration to any employee on or after the first day of March, 1967, shall, unless the Commissioner has granted authority to the contrary, deduct or withhold from such amount by way of employees' tax an amount which shall be determined as provided in paragraphs 9, 10, 11 or 12, as the case may be, in respect of the liability for normal tax of such employee, and shall pay the amount so deducted or withheld to the Commissioner within seven days after the end of the month during which the amount was deducted or withheld, or in the case of a person who ceases to be an employer, within seven days after the day after which he ceases to be an employer, or in either case within such further period as the Commissioner may approve.

(2) An employer may, at the written request of any employee, deduct or withhold from any amount of remuneration an amount by way of employees' tax greater than that

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revenue: act 21/1975

Second Schedule

required to be deducted or withheld in terms of sub-paragraph (1), and shall remit such amount to the Commissioner, and the provisions of this Schedule relating to employees' tax shall, mutatis mutandis, apply in respect of such amount.

(3) For the purposes of this paragraph, "month" means calendar month.

(4) An amount required to be deducted or withheld from any amount of remuneration under this Schedule by way of employees' tax shall be calculated on the balance of such amount of remuneration remaining after deducting any current contribution by the employee concerned to any pension fund (excluding so much of such contribution to a pension fund not established by law as is made at a rate exceeding the sum specified in section 14(l)(i)) which is calculated with reference to such amount of remuneration or to a portion of such amount or to the period in respect of which the amount of remuneration is paid or payable and which the employer is, vis-a-vis the employee concerned, entitled or required to deduct or withhold from such amount of remuneration. (Amended A.6/1991.)

3. (1) The liability of any employer to deduct or withhold any amount of employees' tax in terms of paragraph 2 shall not be reduced or extinguished by reason of the fact that the employer has a right or is otherwise than in terms of any law under an obligation to deduct or withhold any other amount from the employees' remuneration, and such right or obligation shall, notwithstanding anything in any other law, for all purposes be deemed to have reference only to the amount of the remuneration remaining after the amount of the employees' tax referred to in such paragraph has been deducted or withheld.

(2) Paragraph 2 shall apply in respect of all amounts payable by way of remuneration, notwithstanding any other law which provides that any such amount shall not be reduced or shall not be subject to attachment.

4. Any amount required to be deducted or withheld in terms of paragraph 2 shall be a debt due to the Government, and the employer concerned shall save as otherwise provided, be absolutely liable for the due payment thereof to the Commissioner.

5. (1) Subject to sub-paragraph (6), any employer who fails to deduct or withhold the full amount of employees' tax as provided in paragraph 2 shall be personally liable for the payment to the Commissioner of the amount which he fails to deduct or withhold, and shall, subject to sub-paragraph (2) hereof, pay such amount to the Commissioner not later than the date on which payment should have been made if the employees' tax had in fact been deducted or withheld in terms of paragraph 2.

(2) If the employer has failed to deduct or withhold employees' tax in terms of paragraph 2 and the Commissioner is satisfied that the failure was not due to an intent to postpone payment of the tax or to evade the employer's obligations under this Schedule, the Commissioner may, if he is satisfied that there is a reasonable prospect of ultimately recovering the tax from the employee, absolve the employer from his liability under sub-paragraph (1).

(3) An employer who has not been absolved from liability as provided in sub-paragraph (2) shall have a right of recovery against the employee in respect of the amount paid by the employer in terms of sub-paragraph (1) in respect of such employee, and such amount may in addition to any other right of recovery be

revenue: act 21/1975

Second Schedule

deducted from future remuneration which may become payable by the employer to such employee, in such manner as the Commissioner may determine.

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(4) Until such time as an employee pays to his employer any amount which is due to the employer in terms of sub-paragraph (3), such employee shall not be entitled to receive from the employer an employees' tax certificate in respect of such amount.

(5) Any amount which an employer is required to pay in terms of sub-paragraph (1) and which he is entitled to recover from the employee in terms of sub-paragraph (3) shall, in so far as the employer only is concerned, be deemed to be a penalty due and payable by such employer.

(6) Sub-paragraph (1) shall not apply in respect of any amount or any portion of any amount of employees' tax which an employer has failed to deduct or withhold and in respect of which paragraph 17(3) applies.

6. (1) If an employer fails to pay any amount of employees' tax for which he is liable within the period allowed for payment thereof in terms of paragraph 2 he shall, in addition to any other penalty or charge for which he may be liable under this Order, pay a penalty equal to twenty per centum of such amount. (Amended A.7/1992.)

(2) The Commissioner may, if he is satisfied that the employer's failure to pay the amount of employees' tax was not due to an intent to postpone payment of such tax or otherwise evade his obligation under this Order and was not designed to enable the employee concerned to evade such employees' obligations under this Order, remit the whole or any part of the penalty imposed under sub-paragraph (1).

(3) The penalty imposed under sub-paragraph (1) shall be paid to the Commissioner when payment is made of the amount of employees' tax to which it refers or within such further period as the Commissioner may approve.

7. Any agreement between an employer and an employee whereby the employee undertakes not to deduct or withhold employees' tax shall be void.

8. An employee shall not be entitled to recover from an employer any amount deducted or withheld by the employer from the employees' remuneration in terms of paragraph 2.

Deduction tables.

9. (1) The Commissioner may from time to time, having regard to the rates of normal tax as fixed by law and to any other factors having a bearing upon the probable liability of taxpayers for those taxes prescribe deduction tables applicable to such classes of employees as he may determine, and the manner in which such tables shall be applied, and the amount of employees' tax to be deducted from any amount of remuneration shall, subject to sub-paragraph (3) and paragraphs 10, 11 and 12 of this Schedule, be determined in accordance with such tables, or, if sub-paragraph (3) is applicable, in accordance with such sub-paragraph. (Amended A.6/1994.)

(2) Any tables prescribed by the Commissioner in accordance with sub-paragraph (1) shall come into force on such date as may be notified by the Commissioner in the Gazette, and shall remain in force until

withdrawn by the Commissioner.

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(3) The amount to be deducted or withheld in respect of employee's tax from any lump sum to which the proviso to paragraph (b) of the definition of "gross income" applies or any other lump sum to which the employee is entitled by virtue of the employee's agreement of employment, shall be ascertained by the employer from the Commissioner before paying out such lump sum, and the Commissioner's determination of the amount to be so deducted or with-held shall be final.

11A. (1) When, at the end of the tax year, there becomes known the amount of remuneration received by or accruing to any employee who was in continuous employment with the same employer in respect of such year of assessment, the employer concerned shall calculate and determine the amount of normal tax for which such employee is actually liable in respect of such year of assessment, and, subject to the provisions of paragraph 2(4) and to the applicable normal tax rates as prescribed, make the required adjustments to the amount of employees' tax deductible or withholdable in respect of such employee.

(2) (i) Where at the end of any tax year, the employees' tax actually deducted or withheld from any remuneration paid or payable by an employer to an employee during any tax year exceeds the amount required to be deducted or withheld in terms of subparagraph (1) above, the employer shall repay to such employee the amount of such excess.

(ii) Any amount of employees' tax which has been repaid by an employer to an employee under subparagraph (i) above may be deducted from any subsequent payment of employees' tax due by the employer.

(3) If the amount of employees' tax actually deducted or withheld from any remuneration paid or payable by an employer to an employee during any tax year is less than the amount required to be deducted or withheld in terms of subparagraph (1), then the employer shall pay the shortfall to the Commissioner and recover such amount from the employee.

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Furnishing and obtaining of employees' tax certificates.

13. (1) Subject to paragraphs 5 and 17 every person who during any year of assessment deducts or withholds any amount by way of employees' tax as required by paragraph 2 shall, within the time allowed by sub-paragraph (2) hereof, deliver to each employee or former employee to whom remuneration has during the period in question been paid or become due by such person, an employees' tax certificate, in such form as the Commissioner may prescribe or approve, which shall show the total remuneration of such employee or former employee and the sum of the amounts of employees' tax deducted or withheld by such person from such remuneration during such period, excluding any amount of remuneration or employees' tax included in any other employees' tax certificate issued by such person unless such other certificate has been surrendered to such person by the employee or former employee and has been cancelled by such person and dealt with by him as provided in sub-paragraph (10).

The points to be noted are that

1. The applicant was not at the time of the accrual or payment of the ex gratia payment an "employee" as defined, in that at the relevant time he was no longer in receipt of remuneration by way of salary or otherwise. The applicant was a former employee, who although seeking through the Industrial Court to have his severance reversed, abandoned this claim. He remained therefore at the relevant time a former or ex employee

2. It is doubtful for the same reasons whether the Fist Respondent was an "employer"

3. The amount that was directed to be deducted was not in respect of "employee's tax" as defined as it was not in respect of remuneration of an employee.
4. No certificate in terms of section 13 appears to have been issued. In this section a distinction is made between employees and former employees
5. The lump sum itself is;
 - a. not one to which the proviso to paragraph (b) of the definition of "gross income" (section 7 of the Order) applies as the payment albeit a voluntary (ex gratia and without there being any obligation) it was not received and did not accrue in respect of services rendered or to be rendered. The Applicant had already been fully paid for the services he had rendered up to the date of severance and it was not contemplated that he would render any further services to the First Respondent.
 - b. not one to which the employee is entitled by virtue of the employee's agreement of employment. The amount was payable in terms of the agreement of settlement, not the agreement of employment which had been previously terminated.
 - c. Not necessarily "gross income" as defined as it may well be a payment of a capital nature. It is not necessary for present purposes to decide this question. The issue which has to be decided as I have earlier observed, is whether the provisions of section 58 and the second schedule are applicable, that is whether the first Respondent was obliged to obtain a directive from the Second Respondent and to make a deduction in terms thereof if so directed. The issue is not whether the accrual or receipt of the lump sum is taxable or not.

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These considerations lead me to conclude that the lump sum payment provided for in the agreement was not subject to the provisions of the relevant section and the Second Schedule. But for the provisions of the agreement itself the First Respondent was not obliged or entitled to deduct any amounts from the payment. The agreement however provides that the deduction is to be made in respect of such amounts as the First Respondent was obliged to withhold.

The provisions of the agreement, in so far as they relate to the deduction appear to have been made on the basis of a common mistake. The error was the incorrect assumption that the lump sum payment had to be dealt with in terms of section 58 and the Second Schedule.

It does not seem necessary to categorize this error as one of fact, law, or mixed fact and law.

In *The Law of Contract in South Africa*, Third Edition, at page 369 the author R H Christie in considering the effect of such an error in negotiations preceding a contract states.

"It has generally been regarded as settled that a common mistake of law has no effect on the validity of a contract. This was accepted in *Vluvo Investments (Pty) Ltd v Bezri* 1985 4 SA 367 T, but where neither a landlord nor its tenant realized that the premises was subject to rent control this was held to be a mistake of fact or mixed law and fact and the tenant was entitled to recover the excess rent he had paid. Since *S v De Blom* 1977 3 SA 513 AD discarded the cliché that everyone is presumed to know the law, and *Willis Farber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) equated mistake of fact and mistake of law for the purposes of the *condictio indebiti* the time has surely come to reconsider the significance of a common mistake of law. *Tredgold J's dictum in Bulawayo Municipality v Dundee Butchery Limited* 1944 SR 120 125 has much to commend it;

'where the parties contract under a mutual misapprehension of what the law is, this may be a good ground for holding that the basis on which they contracted was non-existent and that the contract is unenforceable' "

I am persuaded that in the present instance the parties provided for the deductions from the lump sum under the common mistake of fact or laboured under a common misapprehension, that the statutory provisions that have been examined earlier in this judgment applied. In this they were wrong.

The mistake does not affect whole agreement, but renders those portions relating to the First Respondent seeking a directive from the Second Respondent and making deductions from the amount to be paid in terms thereof unenforceable. It follows that the First Respondent must pay the amounts deducted to the applicant. If such amount has been paid to the Second respondent the First Respondent will have to recover it from the Second Respondent.

The order I make is

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The First Respondent shall pay the amount of E148 722-24 together with interest thereon calculated at nine per cent per annum a tempore morae (which is the date on which the lump sum should have been paid without deduction), to date of payment.

The First Respondent is to pay Applicant's costs. There will be no order in regard to Second Respondents and other Respondents' costs.

S W Sapire CJ