

**IN THE HIGH COURT OF SWAZILAND PROCESS AUTOMATED  
(PTY) LTD AND FIVE OTHERS**

Applicants

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**THE COMMISSIONER OF TAXES**

1<sup>st</sup> Respondent

**THE ATTORNEY GENERAL**

2<sup>nd</sup> Respondent

Civil Case No. 1693/2006

—  
For the Applicant For  
the Respondents

**S.B. MAPHALALA - J**  
MR. M. SIMELANE  
MISS MARENGANE

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JUDGMENT

18<sup>th</sup> May 2007

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[1] Before court is an application that came under a certificate of urgency for an order that the 1<sup>st</sup> Respondent be ordered to grant 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Applicants an exemption from the deduction of 10% against settlement fees by their clients and/or parastatals. Alternatively reviewing 1<sup>st</sup> Respondent decision not to grant 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Applicants with exemption on the basis that 6<sup>th</sup> Applicant was in arrears with payment of his tax. Further under alternative relief it was contended that "**all the monies deducted in the 2006 financial year be returned to the Applicant**". The Applicant also prayed for costs.

[2] The application is founded on the affidavit of the 6<sup>th</sup> Applicant Mr. Musa Magongo who is also a Managing Director of the 1<sup>st</sup> Applicant **Process Automated (Pty) Ltd**. The said affidavit is supported by a number of relevant annexures including relevant provisions of the Income Tax Order of 1975 and letters of correspondence between the parties in this dispute.

[3] The Swaziland Government opposes the granting of this application and to this end has filed an Answering affidavit deposed to by the Attorney General where a point of law *in limine* is raised together with an answer on the merits of the case. I must hasten to say that this point of law *in limine* was abandoned by the Respondents when the matter came up for arguments. However, for the sake of completeness I proceed to outline the said point of law *in limine* to the effect that this **application is improperly brought before the Honourable court, in that the order being sought requires the court to change the provisions of an existing law, whereas the duty of the court is to give effect to an act according to its true meaning and not otherwise.** Under 3.2 that the **Commissioner of Taxes in rejecting**

**Applicant's application for an exemption acted in compliance with the provisions of the Income Tax Order No. 21/1975 as read with Legal Notice No. 150/2005. The above Honorable court can only interpret the provisions of the law and not change or amend it.** On the merits the Respondent answers to the Applicants claims in paragraphs 11.2, to 11.3 thereof.

[4] In arguments before me *Mr. Simelane* for the Applicants filed very comprehensive Heads of Arguments, as he usually does before this court and this has always been appreciated by this court. The general argument canvassed in these Heads of Argument at paragraph 11 thereof is that the ground for refusal of tax exemption was unfounded and not in terms of the law. In this regard the court was referred to the landmark judgment in the South African case of *Dadoo Ltd & others vs Krugerdorp Municipal Council 1920 A.D. 530 at 550* and also the case of *Salomon vs Salomon & Co. Ltd (1987) A.C at 30*. The court was further referred to a textbook by *JTR Gibson and R.G. Comrie, South African Merchantile and Company Law*, at pages 261 - 270.

[5] The Respondents on the other hand have contended that the Applicants have not complied with the requirements of the Income Tax Order of 1975 as amended and were thus rightly refused the tax exemption certificate for the following reasons. Firstly, that in respect of the 2 Applicant, an application for an exemption certificate was submitted by the company on the 29<sup>th</sup> November 2005. The request for same was rejected in that the Income Tax returns had not been submitted for the 2003, 2004 and 2005 years of assessment during the period in which they were due to be

submitted; provisional tax payments have not been made; reconciliation statements for employees' tax deducted have not been submitted for the 2005 year of assessment.

[6] In respect of the 3<sup>rd</sup> Applicant it is contended that an application for withholding tax exemption certificate was submitted on the 29<sup>th</sup> November 2005. The request for same was rejected on the following factual grounds. Firstly, Income Tax returns were not submitted for the 2003 and 2004 years of assessment. The 2005 tax returns were not submitted on time. Secondly, that provisional tax for the year 2006 year of assessment was not paid.

[7] In respect of the 4<sup>th</sup> Applicant that an application for withholding tax exemption was submitted on the 29<sup>th</sup> November 2005. The request for same was rejected on a number of grounds (see paragraph 5.3 of the Respondent's Heads of Argument).

[8] In respect of the 5<sup>th</sup> Applicant, that an application for withholding tax exemption was submitted on the 29<sup>th</sup> November 2005. The request of same was rejected on the grounds listed in paragraph 5.4 of the Respondents 'Heads of Arguments.

[9] It is common cause between the parties that the matter for decision by the court relates to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Applicant and not the 1<sup>st</sup> Applicant. The defence by the Respondents is found in paragraph 11 of the Respondents' Answering affidavit.

[10] It appears to me that 1<sup>st</sup> to 5 Applicant fall within the ambit of the definition of persons provided under Section 2 of the Order of 1975 which reads as follows:

**"A person includes a company, a body of persons whether incorporated or not, an insolvent estate, the estate of a deceased person and any trust".**

[11] It appears to me that the Applicants have all met the requirements for exemptions and have submitted all documents relating to same with 1<sup>st</sup> Respondent for approval.

[12] On the Respondent's affidavit it is not shown that the 1<sup>st</sup> Respondent has ever demanded tax and has never been paid, that there are any criminal proceedings and or any signs that Applicants would be liquidated any time or flee Swaziland and thereby be denied of tax. There is no provision in the order which gives the 1<sup>st</sup> Respondent authority to refuse exemption on grounds that the directors of Applicants have in their personal capacity failed to pay their tax. When the director of the Applicant inquired about the progress with regards to the applications for exemptions he had lodged on behalf of the Applicants, he was told that an exemption could not be granted since he was also personally owing tax.

[13] It appears to me on the strength of legal authorities that such ground for refusal for tax exemption was unfounded and not in terms of the law. (see *Dadoo Ltd vs Krugersdorp (supra)* at page 530 at 550 and that of *Salomon vs Salomon & Co. Ltd (supra)* at page 30.

[14] In the result, for the afore-going reasons the application is granted in terms of the notice of motion with costs.

S.1

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