



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.574/2014

In the matter between:

DIESEL ELECTRIC (SWD) (PTY) LTD

Applicant

vs

SWAZILAND REVENUE AUTHORITY

Respondent

Neutral citation: *Diesel Electric (Swaziland) (Pty) Ltd v Swaziland Revenue Authority (574/2014) [2014] [SZHC 379] (24th October 2014)*

Coram: **MAPHALALA PJ**

Heard: 8th August 2014

Delivered: 24th October 2014

For Applicant: Mr. M. Twala

For Respondent: Mr. N. Fakudze

Summary: (i) *Before court is an Application interdicting the Respondent from levying, demanding, and or making an estimated assessment for the tax years, 2009, 2010, 2012 and 2013.*

(ii) *Respondent opposes the Application and contends **inter alia** the Applicants purported objection fall within of the provisions of section 52 as read together with section 53 which stipulates that the standard and **onus** of proof lies with the Applicant.*

(iii) *In the result, this court agrees with the arguments of the Respondent and dismiss the Application with costs.*

Legal authorities cited

1. **Professor H.W.R. Wade, Administrative Law, 5th Edition at page 34.**
2. **Wiseman vs Borman [1971] AC at page 297.**
3. **Eagles Nest (Pty) Ltd & Others vs Swaziland Competition Commission and Another, Civil Appeal No.1/2014.**

JUDGMENT

The Application

[1] The Applicant, Diesel Electric Swaziland (Pty) Ltd a company incorporated with limited liability in terms of the company law of the Kingdom of Swaziland has filed an Application under a Certificate of

Urgency against the Respondent, Swaziland Revenue Authority for orders in the following terms:

- “1. Dispensing with the normal provisions and rules of this Honourable Court as relating to form, service and time limits and enrolling the matter to be heard as one of urgency.**
- 2. Condoning Applicant’s non-compliance with the said Rules of this Honourable Court as to service, time limits and hearing this matter as an urgent one.**
- 3. Interdicting the Respondent from levying, demanding and/or making as Estimated Assessment for the tax years 2009, 2010, 2012 and 2013.**
- 4. Directing that prayer 3, above operates with immediate interim effect pending the finalization of this application.**
- 5. That a rule nisi do hereby cause to issue calling upon the Respondent to show cause, on a date and time to be determined by this Honourable Court, why the prayer 3 above should not be made final.**
- 6. Granting the Applicants costs of this Application only in the event that this Application be opposed.**
- 7. Further and/or alternative relief.”**

[2] The Founding Affidavit of Mr. Franco Colapne who is a Director of the Applicant is filed setting out the background of the Application. Various

annexures pertinent to the Application are also filed in support of the averments in the Founding Affidavit.

The opposition

[3] The Respondent opposes the above Application and has filed an Answering Affidavit of Mr. Dumsani Masilela who is the Commissioner General of the Respondent answering point by point the averments of the Applicant in its Founding Affidavit. In the said affidavit two points **in limine** are raised.

[4] These points being firstly, that the matter was not urgent and secondly, that Applicant has not satisfied the requirements of an interdict. Respondent also filed pertinent annexures in support of his averments in the Answering Affidavit.

[5] The Respondent then filed a Replying Affidavit in accordance with the Rules of this court.

A brief background

[6] The background of the matter is outlined in the Heads of Arguments of the attorney for the Applicant, and for convenience I shall outline from paragraph 2.1 to 3.4 of the Heads of Arguments of Mr. M. Twala for the Applicant:

“2. Background

2.1 The Applicant is Diesel Swaziland (Pty) Ltd, a company incorporated with limited liability in terms of the company laws of the Kingdom of Swaziland, and is a “tax payer” as more fully described under section 2 of the Income Tax Order, 1975 as amended, which describes a tax payer as:

‘Any person chargeable with any tax or duty leveable under this Order and, for the purposes of any provision relating to any return, includes every person required by this Order to furnish such return.’

2.2 And again a “person” is defined as:

‘Any company, a body of person whether incorporated or not, an insolvent estate, the estate of a deceased person and any trust.’

2.3 The Respondent is the Swaziland Revenue Authority, a body corporate established under section 3 of the Revenue Authority Act, 2008, with perpetual succession and a common seal, capable of suing and of being sued in its corporate name, and with power to do all such acts and

things as a body corporate may by law do or perform, herein represented by the Commissioner General.

3. Cause of Action

3.1 On or about the 25th August, 2011, the Respondent's officers came to Applicant's business premises in Manzini, and demanded to conduct an inspection of the Applicant's books in respect of the 2008 financial year. Applicant duly complied with the request and afforded the officers all the company's financial records, which they took time to analyse.

3.2 Upon completion of the exercise, Respondent found that there was additional tax payable in the total sum of E35 316.00 (thirty five thousand three hundred and sixteen Emalangeni) for that financial year, which Applicant then proceeded to pay.

3.3 On or about October 2013, the Respondent returned to Applicant's business premises and demanded to conduct another audit, this time for the 2009, 2010, 2011 and 2012 tax years. Before finalizing its audit, Respondent came to the conclusion that Applicant had failed to furnish them with sufficient books and/or records as were necessary to verify the company's entries as envisaged under section 35 bis of the order.

3.4 Having arrived at this conclusion, Respondent then invoked the powers vested in him by section 39(1) of the Order, which provides:

'In every case in which any taxpayer makes default in furnishing any return or information, or if the

Commissioner is not satisfied with the return or information furnished by any taxpayer, the Commissioner may make an assessment in such sum as in the Commissioner's judgment ought to be charged in accordance with this Order, and thereupon shall give notice to the taxpayer to be charged, and such taxpayer shall be liable to pay the tax upon such sum.'"

The arguments

[7] The attorneys of the parties advanced their arguments and filed comprehensive Heads of Arguments for which I am grateful for the high professionalism displayed.

(i) The Applicant's arguments

[8] The attorneys for the Applicant advanced arguments for his client and filed detailed Heads of Arguments covering a number of topics namely, the background of the matter in paragraph 2, 2.1, 2.3. The cause of action in paragraphs 3.1, 3.2, 3.3 and 3.4; Applicant's constitutional right to fair administrative procedure in paragraphs 4.00 to 4.4.

[9] Further on in paragraph 5.00 dealt with the Applicant's case up to paragraph 5.1.5 at paragraph 6 dealt with the topic of the principle of "pay now and argue later" in paragraphs 6.00 to 6.8.

[10] At paragraph 5 thereof the attorney for the Applicant has outlined the Applicant's case and the question to be determined by this court being whether the Applicant was not entitled to the hearing of its objection before the Respondent could declare the assessment to be "due" or "payable" and stated the following arguments:

"5.1 An answer to this question can best be provided by an overview of the procedure, as prescribed by the Order that must be undertaken by the Commissioner General before demanding payment from a taxpayer. The provisions that set out such steps are summarized below:

5.1.1 Every registered taxpayer must, at a certain date, furnish the Respondent with a Return of Income for a year for the purpose of assessment (section 33);

5.1.2 Where a taxpayer has furnished a Return of Income, the Respondent may accept the taxpayer's self-assessment or may raise another assessment which it deems proper under the circumstances (section 38bis);

5.1.3 Where the Respondent is satisfied with the taxpayer's return when the taxpayer becomes liable to pay such sum and that then would mark the end of the matter.

5.1.4 Where the taxpayer is dissatisfied with an assessment, he may lodge an objection thereto with the Respondent within 21 days after the date on which the Notice of Assessment was given.

5.1.5 The Respondent must consider the objection and if it is disallowed, give Notice thereof to the taxpayer and such decision (or amended assessments) shall, in terms of section 52(4), and subject to the right of appeal as contained under section 54(1), be final and conclusive. Cf Anil Singh case at paragraph 15.”

[11] Various topics are addressed in the subsequent paragraphs being the paragraphs on “pay now and argue later” in paragraphs 6.08 to 6.6; relief sought in paragraph 7.00 to 9; Applicant’s right to object in paragraph 10.00 to 11.13 and in the subsequent paragraphs to the requirements of an interim interdict.

[12] The Applicant’s attorney cited a **plethora** of decided cases and legal authorities by learned authors and I shall revert to pertinent cases and legal authorities as I proceed with my analysis and conclusion in this matter.

[13] Finally, the attorney for the Applicant prays for the court to dismiss the point **in limine** and grant an order in terms of the Notice of Application that the matter be remitted back to the Commissioner General to be dealt with as an objection with a grant of 21 days from the grant of the order.

The Respondent's arguments

[14] The attorney for the Respondent Mr. Fakudze advanced arguments for the Respondent and also filed comprehensive Heads of Arguments.

[15] In the said Heads of Arguments the attorney for the Respondent dealt with a number of topics in support of his client case namely, the background of the matter in paragraph 1; the Applicant's case in paragraph 1 thereof. The Respondent's case in paragraph 3 and then dealt with a number of topics including the applicable law where the attorney for the Respondent framed the issues for determination to be the following:

- “(a) The Respondent acted wrongfully, unfairly and ultra vires its powers by levying taxes on the Applicant for the tax years between 2009 to 2012?”**

- “(b) There is a valid objection by the Applicant that has not been heard and considered by the Respondent?”**

(c) **The Applicant has satisfied the requirements of an interdict for the prayer sought?”**

[16] The attorney for the Respondent then answered the above questions in the subsequent paragraphs being the assessment by Respondent, hearing of objection and finally a decision on the requirements of an interdict citing the case of **Wiseman vs Borman [1971] AC** at page 297 (per Lord Reid) quoted by Professor H.W.R. Ward at page 504.

[17] The Respondent finally contended that the Applicant’s application be dismissed with costs.

The court’s analysis and conclusion thereon

[18] Having considered the arguments of the parties in court and in the Heads of Arguments, I am first of all in agreement with the Respondent’s attorney formulation of the issues for decision to be what is outline above in paragraph [15] of this judgment.

[19] Firstly, in my assessment of the parties arguments of the Respondent’s Heads of Arguments as outlined in paragraph [15] above it is my consideration that the Respondent acted fairly and reasonably and within the scope of his legislative powers as endowed upon by the Income Tax

Order of 1975. It appears on the papers that the Respondent has followed all the guidelines laid down by the Income Tax Order, and for each step diligently and faithfully advised the Applicant of its obligations in terms of the Order. These steps can be traced from the notification of the upcoming tax audit in August 2013 wherein Applicant was advised of its obligations and requirements in terms of section 35 bis of the Order.

[20] Secondly, it appears to me on the facts between the parties that the Respondent is correct where it relies on the evidence that after an assessment was made in terms of section 39(1) and same brought to the attention of the Applicant. The Applicant “firstly required further particulars” by a letter dated the 13 February, 2014 (annexure FX3 at page 75 of the Book of Pleadings to enable it to commit on the findings of the Tax Audit Report from tax years 2009 to 2012.

[21] It is evident on the affidavits filed that Respondent went to pains and “duly furnished a detailed response” to request further particulars dated 18th February 2014 found in paragraph 20 of page 95 of the Book of Pleadings, marked annexure “SRA13” at pages 137-138.

[22] Thirdly, I also agree with the arguments of the Respondent concerning the issue of the objection and I find the submissions at page 6 of the Respondent's Heads of Arguments to the following effect to answer this controversy:

“On the question of the objection, it is Respondent’s case that in fact the Applicant through a letter lodged its purported objection on the 17th February 2014, a letter which reads in part as follows:

‘We hereby lodge an objection against the imposition of additional taxes levied on the company for the above years.’

A copy of the letter is attached and marked “SRA 14” at page 140 of the Book of Pleadings.

The said letter from the Applicant additionally made a request for an extension of time to allow it to collate documents to support its objection. Herein quoted,

‘It would be appreciated if you could kindly give us some time to collate the documentation in support of our objection.’

The Respondent submits that again it went to pains to explain itself in detail in response to the Applicant, through correspondence to its purported objection and request for extension of time by letter dated the 7th March 2014. A copy of the letter is attached and marked “SRA 15” at pages 141 – 142 of the Book of Pleadings.

The Respondent’s response thereto clearly and unambiguously explained to the Applicant that wherein a taxpayer, such as the Applicant sought to make an objection to an assessment levied, such objection was to be in line and in terms of the provisions of section 52(1) and (2) of the **Income Tax Order of 1975** which provides for objections.”

[23] It would appear on the papers that the Respondent in the same response further advised the Applicant that its “purported objection fell short of the provision of section 52 as read together with section 53” was not an objection.

[24] All in all, I am in agreement with the Respondent’s argument as outlined at page 8 to 9 of the Heads of Arguments of the Respondent.

[25] In my assessment of the evidence drawn from the pleadings before this court there is no pending objection of the Applicant, which the Respondent has neglected to consider. The Applicant failed to lodge an objection in terms of section 52 of the Order. Besides numerous opportunities calling on the Applicant to comply with the provisions of the Order. In this regard I agree with the legal authority in the textbook by **Professor H.W.R. Wade, Administrative Law, 5th Edition** at page 347 of the documents used by courts to check the attitude of possible abuse of discretion to the following legal proposition:

“But arbitrary power and unfettered discretion are what the courts refuse to countenance. They have woven a network of restrictive principles which require statutory powers to be exercised reasonably and in good

faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering Act.”

[26] On the issue of the requirements of an interdict in my assessment of the pleadings before this court, I find that the Applicant has failed to show that it has a clear right herein. The Applicant contends that its right is to be heard, which the Respondent as no matter remains pending before the Respondent and I agree **in toto** with the Respondent’s arguments in this regard.

[27] In this regard I refer to the Supreme Court case of **Eagles Nest (Pty) Ltd and Others vs Swaziland Competition Commission and Another Appeal Case No.1/2014** where the actions of the Applicant in that case were referred to by the learned Judge of Appeal **Dr. Twum** to be a **quia timet** application. In the present case the Applicant has done exactly that making a baseless cause of action.

[28] Furthermore, I agree with the Respondent’s arguments that Applicant cannot attribute any apprehension of harm to the application of the provisions of the **Income Tax Order** by the Respondent. Respondent is legally bound to ensure compliance with the provisions of the Order. I must also mention that the attorneys of the parties did not address the

court on the two points **in limine** and therefore only the merits of the case were before the court.

[29] Lastly, I agree with the Respondent's contentions that Applicant has an alternative remedy in terms of the **Income Tax Order** to appeal the decision of the Respondent.

[30] In the result, for the foregoing reasons the Application is dismissed with costs.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE