IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 785/15

In the matter between

MICHAEL RAMODIBEDI **APPELLANT**

And

COMMISSIONER GENERAL,
SWAZILAND REVENUE AUTHORITY **1ST RESPONDENT**
SWAZILAND REVENUE AUTHORITY **2ND RESPONDENT**

Neutral citation: *Michael Ramodibedi v Commissioner General, Swaziland Revenue Authority and Another (785/13*) [2015] SZHC 20 (26 February 2015)

Coram: **M. S. SIMELANE, J**

Heard: **13 February 2015**

Delivered: **26 February 2015**

Summary: **Civil Appeal – Appellant claiming under a contract of Employment – Recusal application – application for a postponement – taxation of gratuity – Section 141 (6) of the Constitution – Appeal upheld.**

Judgment

SIMELANE J

[1] This is an appeal against the decision of the Respondents dated 14 May 2013.

RECUSAL APPLICATION

[2] May I state from the onset that at the commencement of the matter Mr. Manzini made oral submissions for this Judge to recuse himself from the matter. The argument raised was that the Judge was involved in the matter in his capacity then as High Court Registrar. It was further submitted that some meetings were convened by the High Court Registrar then between the Appellant and the Respondent in the Appellant's Chambers.

[3] It was further contended that some letters were written by the then High Court Registrar to the Respondents seeking clarity on why the Appellant's gratuity was taxed.

[4] I find that this argument is clearly flowed for the following reasons:-

The Judge presiding in this matter is not a party in the instant matter. The Judge has no direct and substantial interest in the matter. The Judge was merely executing his duties in his capacity as High Court Registrar just as he did with every matter that appeared before the High Court. He was not involved in either the discussions or the merits of the matter. The High Court Registrar as an administrator is involved in one way or the other in every matter that appears before the High Court. It would therefore be absurd to say since he has been appointed a Judge he should recuse himself in every matter wherein he was involved. A lot of civil matters like this one as well as criminal matters are allocated to me by the Registrar and I accordingly dispense justice. There is nothing special with this matter. Furthermore, this matter does not turn on facts but simply on the law. It is not a matter where I am called upon to exercise my discretion. It must be remembered that I have taken an oath to dispense justice without fear or favour.

[5] It was also Mr. Manzini's contention that I should recuse myself due to the sensitivity of the matter. When I asked Mr. Manzini what sensitivity he was talking about he failed to come out clear. It was the view of this Court that there is nothing sensitive about this case, but it is a case like any other case. I further made it clear that when I deal with matters I do so without looking at the faces or parties before me. As I repeat, I simply dispense justice in line with the oath of office

that I took on appointment and I do so without fear or favour. It cannot therefore be said that this Judge will not be impartial.

[6] Mr. Manzini was aware as of 10 February 2015 that this Judge is seized with this matter. He did not say anything about a recusal application until the trial date. He did not even bother preparing papers on a full blown recusal application since 10 February 2015 to 13 February 2015 when the matter was heard.

[7] The argument that this Judge should recuse himself from this matter just because he was involved in the matter as High Court Registrar is not substantiated by way of evidence under oath. No affidavit has been filed, to me no cogent and convincing evidence has been adduced.

[8] The Respondents merely made oral submission through their attorney that there is a "reasonable apprehension" that the Judge would be biased against them, and that they might not get a fair trial. These allegations were completely unsubstantiated. The Respondents' attorneys improperly gave evidence from the bar.

[9] The question of "reasonable apprehension of bias" was eruditely pronounced by **Moore JA, in African Echo (Pty) Ltd and 2 Others Vs Inkhosatana Gelane Simelane Civil Case 48/2013, wherein His Lordship** makes reference to the writings of **Professor Okpalupa** in his paper entitled **THE PROBLEMS OF PROVING ACTUAL OR**

APPARENT BIAS: AN ANALYSIS OF CONTEMPORARY DEVELOPMENTS IN SOUTH AFRICA where he says:

> **"[49] The courts…. approach an allegation of apprehension of bias against superior Court Judges with the presumption of impartiality. This is the first hurdle to surmount in an attempt to show that a Judge had conducted the proceedings in a way that raises an apprehension of bias. The Courts take the view that given the nature of the judicial office and the oath of office of Superior Court Judges, there is no presumption that such a highly dignified public functionary would discharge his/her important judicial office with favour, prejudice or partiality. On the other hand, the rationale for the presumption is founded on: (a) public confidence in the common law system, which is rooted in the fundamental belief that those who engage in adjudication must always do so without bias or prejudice and must be perceived to do so; (b) impartiality is the fundamental qualification of a Judge and the core attribute of the judiciary: it is the key to the common law judicial process and must be presumed on the part of a Judge; See e.g R v S (RD) 1997 3 SCR 484 para. 106 Wewaykum para. 58 and 59. See also Canadian Judicial Council Ethical Principals 30 (c) in view of the training and experience; the fact that they are persons of conscience and intellectual discipline; and capable of judging a particular controversy fairly on the basis of its own circumstances – US v Morgan 313 US 409 (1941) 421- appellate courts inquiring about apprehension of bias grant considerable deference to Judges by the presumption of impartiality on the part of Judges; and (d) this presumption carries "considerable weight"- Per L' Heureux_Dube and Mclachlin JJ, R v S (RD) 1997 3 SCR 484 para. 32 – Since the**

law "will not suppose possibility of bias in a Judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." See Blackstone Commentaries on the Laws of England III 361. Restating this ancient rule in R v S, Cory J said:

"Courts have rightly recognized that there is a presumption that Judges will carry out their oath of office…. This is one of the reasons why the threshold for a successful allegation of peceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrate that something the Judge has done gives rise to a reasonable apprehension of bias."

The persistence of this presumption in Canadian law was recently reiterated by the Supreme Court in these words: "the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. "The effect of this presumption is that "while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the Judge must be disqualified."

South African Courts also apply the presumption that judicial officers are impartial in adjudicating disputes. Thus, in adopting the opinion expressed in R v S (RD) as "entirely consistent with the approach of South Africa Courts to applications for the recusal of a judicial officer," the Constitutional Court held in SARFU 2 that a presumption in

favour of Judges' impartiality must be taken into account in deciding whether or not a reasonable litigant would have entertained a reasonable apprehension that the judicial officer was or might be biased. The Court emphasized the effect of the presumption to be that the person alleging must go further to prove. It must be recalled that the applicant in this case requested that about half of the Constitutional Court bench should be rescued from sitting in appeal on his matter. It would appear, therefore, that the higher in the judicial hierarchy, the higher is the burden of proof of the apprehension of bias against the Judge, especially in a multi-judge panel.

In considering the numerous allegations based on the apprehension of bias in S v Basson 2, the Constitutional Court held that the presumption in favour of the trial Judge must apply. This means, first, that the Court considering a claim of bias must take into account the presumption of impartiality. Secondly, in order to establish bias, a complainant would have to show that the remarks made by the trial Judge were of such a number and quality as to go beyond any suggestion of mere irritation by the judge caused by a long trial. It had to be shown that the trial judge's was a pattern of conduct sufficient to "dislodge the presumption of impartiality and replace it with reasonable apprehension of bias." In Bernett, the Court stressed that both the person who apprehends bias and the apprehension itself must be reasonable. Thus, the two-fold emphasis serves to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. This double-requirement of reasonableness also "highlights the fact that mere apprehensiveness on the part of a litigant that a

> **Judge will be biased – even a strongly and honestly felt anxiety-is not enough." The Court must carefully scrutinise the apprehension to determine if it is, in all the circumstances, a reasonable one." (Emphasis added.)**

[10] I find that the Respondents have resorted to this strategy to obstruct the hearing of this appeal. I consequently find that the recusal application is devoid of merit and is accordingly refused.

[11] **<u>APPLICATION FOR A POSTPONEMENT</u>**

Before the hearing of the matter on 13 February 2015 Mr. Manzini moved an application for the postponement of this matter. He argued that the matter was not ripe for argument regard being had to Section 52 (1) and (2) of the Income Tax Order, 1975.

[12] He further argued that he had instructed counsel Advocate Sonner to deal with the matter who is based in the Republic of South Africa and not available to argue the matter.

[13] The application for a postponement was vigorously contested by the Appellant's Counsel.

[14] Having heard the submissions by both Counsel I dismissed the application for a postponement on the reasons stated below.

[15] The first reason for the dismissal of the application for a postponement was that when the matter was called for setting of the

trial date on 10 February 2015, Mr. Manzini did not raise any objection whatsoever, rather he stated and made a commitment before Court that he was ready to proceed with the arguments on 13 February 2015 at 0830Hrs.

[16] I reject the contention by the Respondents that the matter is prematurely before Court. This matter was filed with the Registrar of the High Court on 23 May 2013. Mr. Manzini argued that the matter should be postponed for them to have the 21 day's notice in terms of Section 52 (1) and (2). This is absurd in the circumstances of the case.

[17] I find that the 21 day's notice only applies when the Commissioner has applied for a trial date within 30 days after the appeal has been lodged in terms of Section 56 of the Income Tax Order of 1975. *In casu* despite the lapse of two (2) years the Respondent never applied for a trial date nor forwarded a case for determination. Consequently I find that the said 21 day's notice does not apply.

[18] I refused the application for the postponement because Mr. Manzini was personally in attendance in Court on 10 February 2015 for the setting of the trial date. This was pursuant to being called by the Court for this purpose regard being had to the fact that this is an old matter that had been pending before the High Court for almost two years.

[19] As stated above the Respondents' Counsel argued that they have since instructed an Advocate who is based in the Republic of South Africa.

[20] On a perusal of the papers filed by the Respondents there is no reflection of the papers having been prepared by Advocate Sonner. The papers were rather prepared by Mr. Manzini himself, which is evident enough that he is the one seized with the matter and nobody else.

[21] Furthermore, Mr. Manzini did not even notify Appellant's Counsel after the setting of the hearing date that he had since instructed Counsel in the matter. He was in slumber for over two days and for him to then on the trial date come up saying he has instructed Counsel and seeking a postponement of the matter simply amounts to delaying tactics.

[22] Consequently I find that Mr. Manzini failed to adhere to ethics and his conduct is wanting on professionalism.

[23] It is paramount for me to state that it appeared to me that Mr. Manzini was merely involved in some gimmicks and did not display any commitment in dealing with the matter. He was merely in an endeavor to devise some delaying tactics and or trying to control the Court and tell the Court when the matter should be heard. This Court in particular will never allow any counsel to behave in this fashion as this has the negative repurcussions of undermining the dignity,

authority and reputation of the Courts. It was for the aforegoing reasons that the application for a postponement was declined.

[24] **BACKGROUND**

The Appellant was employed by the Government of the Kingdom of Swaziland as the Chief Justice of Swaziland. The said engagement was for the period between 26 February 2010 and 30 December 2012. In the said contract of engagement the Government of Swaziland was represented by the then Principal Secretary in the Ministry of Justice and Constitutional Affairs Nomathemba Hlophe. The contract of employment is annexed in the Record of Appeal and is marked Annexure C.

[25] In terms of the contract of employment, the Chief Justice was entitled to the following benefits and for the avoidance of doubt, I recite the said contract of employment:-

"AGREEMENT OF SERVICE

AGREEMENT entered into between

THE GOVERNMENT OF SWAZILAND
(Hereinafter called "The Government")

Duly represented by

NOMATHEMBA L. HLOPHE
PRINCIPAL SECRETARY

OF THE MINISTRY OF JUSTICE & CONSTITUTIONAL AFFAIRS

And

MICHAEL M. RAMODIBEDI

“The Chief Justice”/ “The Officer”)

PREAMBLE

WHEREAS the officer has been appointed as CHIEF JUSTICE OF SWAZILAND. Now therefore the officer agrees to perform faithfully the duties of CHIEF JUSTICE of Swaziland for the period of this agreement and to act in all respects according to Law and the Constitution.

PERIOD OF ENGAGEMENT AS CHIEF JUSTICE

1. The Officer is engaged from the 26th February 2010 which is the Date of Assumption of Duty to 31st December 2012. The terms of the engagement of the officer shall be deemed to be completed on the last day of such service.

SALARY AND OTHR BENEFITS

2. The Basic salary of the Officer shall be fixed rate of E370 000 per annum. Any change in the salary of the Officer will be in line with changes in the remuneration of the public servants subject to contract engagements.

3. Salary increments if any shall be calculated as from the first day of Aprils in each year.

4. The Officer shall be eligible for such allowances and other benefits as are applicable to him under the laws regulation and General Orders for the time being in force.

5. **Without limiting the generality of Clause 4 above the Officer during his period of service shall also be entitled to:-**

5.1 **a gratuity at the rate of twenty-five percent (25%) as provided in Clause 8.2 below;**

5.2 **He shall be entitled to a chauffer driven government vehicle.**

5.3 **Entertainment Allowance of 5% of basic monthly salary.**

5.4 **An inducement allowance at the rate of ten percent (10%) of his annual basic salary.**

5.5 **A Government house commensurate with his status at the prevailing Government rates, alternatively a housing allowance equivalent to fifteen percent (15%) of his annual basic salary in the event the costs of water, electricity and refuse removal shall be borne by Government.**

5.6 **Adequate security services of his choice or in lieu thereof an allowance to hire security services at competitive commercial rates to protect his person and his immediate family.**

5.7 **Use of Government cellphone and house telephone subject to the prevailing limits as set by Government from time to time at Government expense for official calls.**

5.8 **Contributory medical and dental cover (50/50) for the officer and six (6) of his immediate family members (below the age of twenty one in the case of children) as laid down in the laws,**

regulations and General Orders. The contributions referred to herein shall be to Swazi Med.

5.9 The officer shall be provided with a domestic helper and gardener who shall be paid by the government.

<u>LEAVE</u>

6. The Officer shall be entitled to 2 ½ (two and a half) working days leave per month worked.

<u>DUTIES</u>

7. The duties of the Officer shall include the usual duties of the office in which he is engaged including the training of subordinate staff, which he maybe called upon to perform. The officer shall continue with his current engagements as Court President in the Court of Appeal of Lesotho and Judge in the Court of Appeal of Botswana and the cost of travel to these countries shall be borne by the respective governments.

7.1 The Officer shall reside in such a place and occupy himself in such manner as the Government through its authorized officers, shall direct.

7.2 The Officer shall conform and be subject to all laws, regulations and General Orders for the time being in force in so far as same are applicable and not in conflict with the provisions of this Agreement.

<u>TERMINATION OF AGREEMENT</u>

8. The appointment of the officer may be terminated by His Majesty the King as provided for in terms of section 158 of the Constitution Act of Swaziland.

8.1 The officer may at any time after the expiration of 3 (three) months from the commencement of this Agreement, terminate this Agreement by giving to the Government 3 (three) months notice in writing.

8.2 Except where the officer has terminated this Agreement under Clause 8.1 on the completion of his service or termination of this Agreement the officer shall be entitled to a gratuity at the rate of 25% (twenty-five percent) of the total salary and inducement allowance. The amount due shall be paid to the Officer notwithstanding any renewal of this Agreement.

THUS SIGNED AT MBABANE ON THIS ....DAY OF MARCH 2010

THE GOVERNMENT OF SWAZILAND
(duly represented by NOMATHEMBA L. HLOPHE)
PRINCIPAL SECRETARY, MINISTRY OF JUSTICE & CONSTITUTIONAL AFFAIRS

MICHAEL M. RAMODIBEDI
(CHIEF JUSTICE OF SWAZILAND)

WITNESS

1. NAME…………………….Signature

2. NAME…………………….Signature".

[26] At the expiry of his contract of employment, it is evident that the Appellant was entitled to receive his gratuity calculated at E390 305-32 (Three Hundred and Ninety Thousand Three Hundred and Five Emalangeni and Thirty Two Cents). From this amount the Respondents deducted a sum of E128 800-75 (One Hundred and Twenty Eight Thousand Eight Hundred Emalangeni and Seventy Five Cents) as Tax which is equivalent to 33% of his income.

[27] Pursuant to the taxation the Appellant lodged a complaint with the Respondents as to why his gratuity was taxed.

[28] The Respondents then issued a ruling attached to the record of appeal as Annexure B at page 6 which is reflected as follows:-

"Our ref: SRA/CG/CUS/00 **Date: 14th May 2013**

The Honourable Chief Justice Michael M. Ramodibedi
The High Court of Swaziland
Hospital Hill
MBABANE

Dear Chief Justice,

<u>RULING ON THE RATE OF TAXATION OF GRATUITY INCOME EARNED IN SWAZILAND</u>

The above matter refers.

1. BACKGROUND

On the 22nd of February, the Legislative and Large Taxpayer Unit personnel of the Swaziland Revenue Authority (SRA) had audience with you sir at your chambers at the High Court of Swaziland where you wanted a justification, based on the Income Tax Order, for taxing income earned as Gratuity from the Government of Swaziland in respect of services rendered as Chief Justice of the High Court of Swaziland at the rate of 33%. It was indicated that precedence showed that you had been taxed at the rate of 15% in terms of section 59A of the Income Tax Order and thus wanted the reasons for the sudden change. Subsequent to this meeting the SRA received correspondence enquiring if this taxation of your gratuity is not tantamount to double taxation.

2. THE ISSUES

The following are the two issues under consideration:-

- **Defining the scope of "non-resident person" for the purposes of taxing income at 15% on gross payment in terms of section 59A of the Income Tax Order, 1975 as amended.**

- **What constitutes double taxation?**

3 LEGISLATION

a. Section 7 – Definition of "Gross Income"

Section 7 of the Income Tax Order defines 'Gross income' in paragraph (1) (b) as including 'any amount, including any voluntary award, so received or accrued in respect of services rendered or to be rendered'.

The income may be received in respect of a contract of employment or service

b. **Section 59A-this section provides for the withholding of tax in respect of payments made to non-resident persons. This non-resident withholding tax is in respect of 'Swaziland Source Service Contracts' which are defined as excluding 'employment contract' (for rendering services).**

In this section 'non-resident person' is defined as having the same meaning of the definition in section 59 of the Income Tax Order.

c. **Section 59 of the Income Tax Order defines 'non-resident person' as any person whose principal place of business is outside Swaziland.**

d. **2ND SCHEDULE – 'EMPLOYEE', 'EMPLOYER' and REMUNERATION'**

Employee:-
The 2nd Schedule of the Income Tax Order defines 'employee' to mean any person (other than a company) whom, in respect of employment, receives remuneration from an employer or to whom remuneration accrues.

Section 2 of the Industrial Relations Act, 2000 defines 'employee' to mean a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other

arrangement involving control by, or sustained dependence for the provision or work upon, another person.

Employer:

This Schedule further defines 'employer to mean any authority or person who pays or who is liable to pay to any person other than a company any amount by way of remuneration.

Remuneration:

The term 'remuneration' is also defined to mean any amount of income which is paid or is payable to any person by way of salary, leave pay, allowance, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered.

4. THE CONTRACT OF SERVICE

Your terms of service are outlined in a "contract of service" signed by the Government of Swaziland (as represented by Nomathemba L. Hlophe, being the Principal Secretary of the Ministry of Justice & Constitutional Affairs) and yourself, Michael M. Ramodibedi. The pertinent terms of the contract are:-

- **i. The salary is E370 000 per annum excluding benefits.**
- **ii. Benefits include, but not limited to, gratuity at the rate of 25% of salary, entertainment allowance, inducement allowance, medical aid contribution.**
- **iii. The place of residence shall be as the Government directs.**
- **iv. There is 30 days leave entitlement per annum.**

v. **The laws, regulations and General Orders shall be adhered to by the officer so engaged.**

vi. **Termination may be at the instance of either party, the Government being in the form of His Majesty the King, in terms of the Constitution of the Kingdom of Swaziland.**

5. APPLICATION OF THE LAW TO THE FACTS

Clearly the gratuity payment forms part of income so received in terms of the agreement of service, being income that is voluntarily awarded for the rendering of service and therefore constitutes 'gross income' as envisaged in Section 7 of the income Tax Order. A gratuity payout is made in line with the contract of employment and any payment made as such may not be divorced from the main contract of employment.

As a result of the foregoing, it is clear therefore that Section 59 and 59A of the Income Tax Order do not apply to your gratuity as these provisions are meant to spell out different taxation rates on income received or accrued to non-resident persons from Swazi Source Service Contracts, that is non-resident persons to whom has accrued income for construction services, excluding non-resident employment income that is sourced in Swaziland. For these provisions to be applicable, such taxpayer MUST fall within the scope of 'non-resident' as defined in Section 59.

From the definition of a 'non-resident' in section 59, a definition of 'resident' by default can be imputed to mean any person whose principal place of business is in Swaziland.

Section 2 of the Industrial Relations Act, 2000 defines employee to mean a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provision or work upon, another person. From the terms of your contract it therefore follows that you qualify as an employee of the Government of Swaziland.

6. DOUBLE TAXATION

The term "Double Taxation" is either used in the juridical or the economic context. For the purposes of International Taxation, states are to look and ensure that juridical double taxation is eliminated.

Juridical double taxation refers to the same income being taxed in the hands of the same taxpayer in two different states. Nothing in your case points to these circumstances. Where such happens, the prerogative to tax is given to the country where the income is sourced, which in this case would be Swaziland.

Economic Double Taxation on the other hand would consist of the same income being taxed more than once in different hands, for example in the hands of a company as company profits and in the hands of the shareholders once dividends are declared. Economic double taxation is not contrary to the spirit of taxation and has no hearing to this case, but fully falls within the ambit of taxation. There is no evidence that the gratuity income is being taxed more than once in the hands of one person neither by the SRA nor by two or more states.

Where such is evident, the SRA is always committed to ensuring that such is eliminated using the credit method provided under international taxation.

7. CONCLUSION

The facts in your case present sufficient evidence of your employment relationship being one of master and servant. This is clearly outlined in your contract of service.

Section 59 and 59A of the income Tax Order as amended do not apply in the case at hand as you do not fall within the definition of non-resident person, in that, although suggested to the affirmative, nothing in the facts presented suggest that you indeed have a place of business that is outside Swaziland. In any event, Section 59A proceeds to expressly exclude employment contracts from the definition of Swazi source service contract.

The gratuity payout is accordingly taxable in terms of the income Tax Order section 7 and the 2nd Schedule of the Income Tax Order, 1975 as amended. You are considered as a resident taxpayer for purposes of taxation. The facts at hand do not in any way suggest and/or present that residence is elsewhere, but in Swaziland, the country in which income is sourced and in which the daily responsibilities in terms of the service contract of employment are personally carried out.

The fact that you were previously taxed on the basis of section 59A cannot be seen to prevent the Commissioner General from correctly applying the provisions of the legislation, the SRA's mandate being to correctly administer the law for the fair and effective collection of Government taxes.

When applying the facts at hand, the legislation and all surrounding circumstances, particularly that you reside in Swaziland, have formal employment in Swaziland report in Swaziland in terms of the contract of Service, have spelt out leave days in terms of the contract of service, have a residence permit, are accommodated in official housing in Swaziland, suggests that your principal place of business is in Swaziland. The decision to tax the gratuity income at 33% as a resident taxpayer is herein confirmed.

As outlined above, when I strictly apply the technical meaning of double taxation for tax purposes, there is no evidence that double taxation has been applied to the income at hand.

Your contract of employment spells out a percentage of your annual gross income that forms the gratuity package for that tax year. Cumulatively these amounts constitute the gratuity payment at the end of the contract. Where one accrues a portion of the aforesaid on a monthly basis, it is worth noting that no tax is deducted on a monthly basis, but rather at the end of the contract, being the point of receipt of the income.

It follows therefore that you qualify as a resident employee of the Government of Swaziland and so cannot be considered as a non-resident person for the purposes of section 59 or section 59A of the Income Tax Order. The gratuity is therefore part of the "remuneration" paid in terms of your contract of service as an employee, and so taxable at the rate of 33%, being the highest rate applicable to your earned income.

I hope this clarifies this matter. For further information kindly contact our Domestic Taxes Department – Legislative team, Income Tax Building, Corner Mhlambanyatsi and Lusutfu Road Mbabane or on telephone number 2404 1401.

DUMISANI E. MASILELA
COMMISSIONER GENERAL".

[29] Not content with the ruling of the Respondents the Chief Justice then lodged an appeal against the ruling. It is this ruling that gave birth to the present appeal.

[30] THE APPEAL

The first ground of appeal was that the 1st Respondent applied a wrong interpretation to Section 7 of the Income Tax Order by concluding that the gratuity payment forms part of the income received because such gratuity is "voluntarily awarded." The contention by the Appellant is that the gratuity was not "voluntarily awarded." It was an obligation under the contract.

[31] Secondly the Appellant argued that the 1st Respondent erred in not finding that the taxation of the gratuity payment in question amounted to double taxation by virtue of the fact that the Appellant's decision in this regard is at odds with the following paragraph of the Respondents' ruling dated 14 May 2013.

> **"Your contract of employment spells out a percentage of your annual gross income that forms the gratuity package for that tax year.**

Cumulatively these amounts constitute the gratuity payment at the end of the contract. Where one accrues a portion of the aforesaid on a monthly basis, it is worth noting that no tax is deducted on a monthly basis, but rather at the end of the contract, being the point of receipt of the income."

[32] Lastly, the Appellant argued that the 1st Respondent erred in its decision that the Appellant is liable for taxation on the gratuity payment at the rate of 33%. The argument being that the 1st Respondent wrongly overlooked the fact that the Appellant has always been taxed 15% monthly on his salary. Appellant's argument in this regard is that this has always been a benefit he enjoyed over the years. It was argued that the said deduction infringes on Section 141 (6) of the Constitution and is unconstitutional.

[33] The Appellant further argued that the Respondents should be ordered to pay interest on the amount of gratuity claimed at the rate of 9% effective from 12 February 2013 to the date of finalization of the Court process in the matter.

[34] The Respondents raised the following points of law. They argued that the Appellant did not file an objection in line with Section 52 (1) and (2) of the Income Tax Order 1975. They argued that the Appellant was legally obliged to file an objection within 21 days after the assessment and that such an objection should be in writing and shall specify in detail the grounds of the objection. The section reads as follows:-

"52.(1) Any objection to any assessment made under this Order shall be made within twenty-one days after the date of the assessment notice or within such further time as the Commissioner may for good cause allow in the prescribed manner and under the prescribed terms by any tax payer who is aggrieved by any assessment in which he is interest.

(2) Every objection shall be in writing and shall specify in detail the grounds upon which such objection is made.

Provided that the taxpayer, for the purpose of the objection, shall not be entitled to rely on any evidence whether oral or documentary, other than the evidence produced by him during the course of the assessment except in the following circumstances:

(a) where the Commissioner has refused to admit evidence which ought to have been admitted;

(b) where the taxpayer was prevented by sufficient cause from producing the evidence which he was called upon to produce; and

(c) where the assessment was made without giving sufficient opportunity to the taxpayer to adduce evidence relevant to any ground of objection."

[35] It is the Respondents' contention that the Appellant did not lodge an objection to the ruling within the specified period and cannot therefore invoke Section 54 of the Income Tax Order, 1975, that is to note an

appeal to the High Court. Section 54 of the Income Tax Order of 1975 reads as follows:-

> **"54.(1) Any taxpayer who is dissatisfied with any decision of the Commissioner as notified in the notice of alteration or reduction of an assessment or disallowance of an objection may appeal therefrom to the court;**
>
> **Provided that no such notice of appeal shall be of any force and effect, unless it is lodged with the Commissioner within the period prescribed in subsection (2).**
>
> **(2) Notice of such appeal shall be in writing and shall be lodged with the Commissioner within twenty-one days after the date of any notice of alteration, reduction or disallowance referred to in section 52(3), or within such further time as the Commissioner or the Court may for good cause allow.**
>
> **(3) On the hearing of any such appeal the taxpayer shall be limited to the grounds stated in his notice of objection."**

[36] The Respondents submit that the letter seeking clarity on the taxation was written by the High Court Registrar not the Tax payer himself. It is contended that the said letter was not even an objection but rather it was merely seeking clarity on the taxation of the Appellant's gratuity.

[37] The Respondents further submit that the matter is prematurely before the Court for arguments as Section 54 (6) of the Income Tax Order provide that the Respondent should within 21 days before the date

fixed for hearing of the appeal the Registrar of the High Court shall send to the Respondents a written notice of the time and place appointed for the hearing of the appeal. Section 54 (6) of the Income Tax Order, 1975 reads as follows:-

> **"54. (6)At least twenty-one days before the date fixed for the hearing of the appeal the Registrar of the High Court shall send the Commissioner, the Attorney General and the taxpayer or his duly authorized attorney or representative a written notice of the time and place appointed for the hearing of such appeal".**

[38] It is the Respondents' submission that in the present case they were called to Court on Tuesday 10 February 2015 and were advised by the presiding Judge that the matter was to be heard on Friday 13 February 2015. They argued that this was only a two day's notice which was too short of the peremptory period of 21 days stipulated in the Act.

[39] I find it pertinent to state that the Respondents' Counsel Mr. Manzini told the Court that he had only filed papers on points of law and not on the merits. He stated that his papers would be availed before the end of the hearing as they were still being processed in his offices. May I state *en passant* that Mr. Manzini did not file the requisite papers. It is regrettable and highly disrespectful of the Court for Mr Manzini to make such an undertaking as an officer of the Court and fail to live up to that undertaking. I find that his conduct is highly unprofessional and the Court frowns upon such.

[40] Having carefully considered the oral and written submissions I am inclined to agree with the Appellant that a proper interpretation of the contract of employment does not mean that gratuity is a "voluntary award" as contended by the Respondents. It is without any semblance of doubt that the gratuity was an obligation to pay in terms of the contract. The plain interpretation of the words "shall be entitled" means that it is mandatory that the gratuity be paid.

[41] Clauses 5.1 and 8.2 of the contract of employment read as follows:-

> **"5.1 a gratuity at the rate of twenty-five percent (25) as provided in Clause 8.2 below;**
>
> **8.2 Except where the officer has terminated this Agreement under Clause 8.1 on the completion of his service or termination of this Agreement the officer shall be entitled to a gratuity at the rate of 25% (twenty-five percent) of the total salary and inducement allowance. The amount due shall be paid to the Officer notwithstanding any renewal of this Agreement." Emphasis added.**

[42] I find that the Respondents are merely clutching at straws and distorting the law by placing reliance on Section 7 as the basis that the gratuity in issue was a voluntary award when it is evident on the contract that the gratuity is a mandatory entitlement to the Appellant.

[43] I find that the payment of the gratuity is indeed a contractual obligation. This position of the law was succintly encapsulated by our

own Court of Appeal in the case of **The Trustees of Swaziland Transport and Allied Workers Union, Appeal Case No. 1442/13** states as follows:-

> **"I agree with Sapire ACJ who said that the payment of the gratuity is 'an unequivocal contractual obligation undertaken by the (appellant) which is unaffected by the provisions of Section 34 of the Employment Act'. The one has nothing to do with the other; allowance is statutorily imposed, the gratuity is a contractual condition of employment."**

[44] Further to the above I find that the taxation of the gratuity and at the rate of 33% is unconstitutional. It is apparent from the annexures which are the Income Tax certificate and the sitting allowances in respect of the Appellant at page 27-29 of the record of appeal that the Appellant has always been taxed at 15%. This taxation was effected by the very same Respondent. It is not understable how the very same taxing master would then decide over night to tax the Appellant at the rate of 33%.

[45] It is clear to me that the said taxation at 33% is unconstitutional. Section 141 (6) of Constitution of Swaziland Act 2005 states as follows:-

> **"[6] The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Judge or superior court or any judicial officer or other**

person exercising judicial power, shall not be varied to the disadvantage of that Judge or judicial officer or other person."

[46] The variance on the taxation is clearly to the disadvantage of the Appellant and no Court can endorse such as it is contrary to the spirit of the Constitution.

[47] Finally, I discern the need as guidance in future to respectfully adopt the principle laid down in the **Court of Appeal of Botswana in The Commissioner General of Taxes v Tati Company Limited and Another, Court of Appeal Civil No. CACLB-002-10 at para [20]**

"[20] In interpreting Section 42 (1) (b) it is of fundamental importance to recognize that, unlike income tax, the Act itself is based on self-assessment. This, in turn depends on mutual trust and utmost good faith between the registered person and the Revenue Service. Viewed in this way, it could never have been the intention of the Legislature, in my judgment, to unduly lock out legitimate claims as the present case shows. Similarly, it could never have been its intention to accumulate VAT to the Revenue Service by allowing the latter to take advantage of innocent miscalculations by registered persons, as has happened here. I am satisfied, therefore, that Section 42 (1) (b) provides a mechanism for a refund in circumstances where Section 19 does not do so. The time-bar of three years prescribed in the section is sufficient, and indeed reasonable, to protect the interests of both the registered person and the Revenue Service respectively. It is indeed the unique nature of the Act that both the registered person and the Revenue

Service are the intended beneficiaries under the Act, the former earning input tax deduction and the latter earning output tax, minus input tax. It follows that, unlike the principle applicable to ordinary tax statutes, Section 42 (1) (b) must receive a unique liberal and generous construction in favour of the respondents in order to protect their vested property rights by way of a refund as envisaged by the Act itself. This, I say, is of course subject to a limitation of three years prescribed in the section."

[48] Consequently I find that it could never have been the intention of the Legislature to accumulate tax to the Revenue Authority by either over charging tax payers or simply making illegal claims against them such as demanding tax on gratuity where it is not due.

[49] In the light of the foregoing I hereby make the following orders:-

[50] **COURT ORDERS**

(1) The Appellant's appeal be and is hereby upheld.

(2) That the Appellants' gratuity is hereby declared not to be taxable.

(3) That gratuity aside, it is hereby declared that the Appellant is liable for taxation at 15% and not 33% for salary and sitting allowances as has always been the case from 2006 to date.

(4) That the Respondents must pay interest on the amount of gratuity being E128, 800-75 (One Hundred and Twenty Eight Thousand Eight Hundred Emalangeni and Seventy Five Cents) claimed at the rate of 9% with effect from 12 February 2013 to the date of the finalization of the Court process in the matter, in effect meaning to the date of payment.

(5) That the Respondents must pay the costs of this appeal at attorney and own client scale as a mark of the Court's displeasure at their harassment of the Appellant, including their abuse of Court process as well as their inordinate delay in keeping the Appellant out of his money.

M. S. SIMELANE J
JUDGE OF THE HIGH COURT

For the Appellant: **Mr. M. E. Simelane**
For the Respondents: **Mr. N. Manzini**