



IN THE HIGH COURT OF THE KINGDOM OF ESWATINI
JUDGMENT

HELD AT MBABANE

Civil Case No. 465/2017

TAX PAYER

APPELLANT/TAX PAYER

and

**COMMISSIONER GENERAL - SWAZILAND
REVENUE AUTHORITY
RESPONDENT**

Neutral citation: *Tax payer v Commissioner General - Revenue Authority (465/2017) [2018] SZHC 195 (30 August 2018)*

CORAM

MASEKO J

FOR APPELLANT:

**ADVOCATE P. FLYNN (Instructed by Mr. E.J.
Henwood)**

FOR RESPONDENT:

MR S.V. MDLADLA

DATE OF HEARING: 07TH FEBRUARY 2018

DATE OF DELIVERY: 30TH AUGUST 2018

PREAMBLE: *Civil Law – Rule 30 – Whether filing of Affidavits in Appeal Proceedings in terms of The Income Tax Order No. 22 of 1975 is an irregular step – Whether the Rules of Court in particular Rule 30 applies to Appeal proceedings before this Court brought in terms of Section 54 of the Income Tax Order.*

Held: That filing of Affidavits in appeal proceedings brought in terms of the Income Tax Order is an irregular step and should be set aside.

Held Further: That the Rules of Court apply to any proceedings before this Court including appeal proceedings brought in terms of Section 54 (5) of the Income Tax Order No. 22 of 1975.

[1] On the 29th March 2017, the Appellant/Tax Payer lodged an appeal in terms of Section 54 of the Income Tax Order No. 22 of 1975 (hereinafter referred to as the Order) against the decision of the Respondent delivered on the 9th March 2017. The Notice of Appeal comprised of fifteen (15) grounds of appeal and was filed with documentary attachments.

[2] The Notice of Appeal was filed with the Registrar of this Court on the 29th March 2017 and also served on the Respondent on the same date. This was in compliance with Section 54 (2) which provides as follows:

(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] It appears that on the 5th June 2017, the Appellant/Tax Payer was granted leave by this Court, per Hlophe J, to file a Supplementary Affidavit to their Notice of Appeal filed on the 29th March 2017. On the 5th July 2017, the Respondent filed with the Registrar an Answering Affidavit in response to the grounds of appeal filed through the Notice of Appeal in terms of Section 54 of the Order, and same was served on the Appellant/Tax Payer on the same date.

[4] I must mention that the Answering Affidavit deals with the grounds of appeal as contained in the Notice of Appeal and as if it is answering allegations contained in a Founding Affidavit yet there is no Founding Affidavit in these proceedings.

[5] I must state that Section 54 (5) of the Order provides for the manner in which documents in such appeals are to be filed and the eventual prosecution thereof as follows:

‘(5) The Commissioner shall as soon as practicable apply to the Registrar of the High Court in accordance with the High Court Rules for the appeal to be set down for hearing by the Court:

Provided that such application shall be accompanied by a summary of the facts and questions of law, if any, in issue, a copy of the notice of assessment objected against, a copy of the tax payer's objection thereto, a copy of the Commissioner's reply to such objection and a copy of the notice of appeal: (my emphasis)

Provided further that if the Commissioner has failed to make such application within three months of the date upon which the taxpayer has lodged the notice of appeal in terms of subsection (2) the taxpayer may apply to the Registrar of the High Court for the appeal to be set down for such hearing and the Registrar shall immediately thereupon call upon the Commissioner to lodge with him a summary of the facts and questions of law, if any, in issue, a copy of the notice of assessment objected against, a copy of the taxpayer's objection thereto, a copy of the Commissioner's reply to such objection and a copy of the notice of appeal within ten days from the date of such request.

- [6] Upon receipt of the Answering Affidavit from the Respondent, the Attorneys for the Appellant/Tax Payer addressed correspondence to the Respondent on the 6th July 2017 objecting to the filing of the Answering Affidavit, in response to the grounds of appeal, and arguing that the Affidavit does not comply with the requirements and obligations upon the Respondent as provided for in terms of Section 54 (5) of the Order. In other words that the Respondent is not to file an Answering Affidavit in response to the grounds of appeal but is compelled by the aforesaid Section 54 (5) to file a summary of facts and questions of law, if any, in issue, a copy of the

notice of assessment objected against, a copy of the tax payer's objection thereto, a copy of the Commissioner's reply to such objection and a copy of the notice of appeal.

[7] The aforesaid correspondence further advised the Respondent to comply with its obligations as imposed by Section 54 (5) of the Order and further that as matters stand the Respondent was improperly before Court.

[8] The Respondent's Attorneys responded on the 18th July 2017 advising the Appellant's Attorney that they have dealt with numerous matters in this fashion and that any further issues were going to be dealt with in Court.

APPLICATION IN TERMS OF RULE 30 - IRREGULAR PROCEEDINGS

[9] The Appellant/Tax Payer not being content with the manner in which the Respondent has dealt with this matter i.e. the filing of an Answering Affidavit where there is no Founding Affidavit, decided to launch these proceedings in terms of Rule 30 and it is these proceedings which this Court has to make a ruling on.

[10] Rule 30 of the High Court Rules provides as follows:

“30 (1) A party to a cause in which an irregular step or proceeding has been taken by any other party may, within fourteen days after becoming aware of the irregularity, apply to Court to set aside the step or proceeding

Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application.

- (2) Application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity alleged.**
- (3) If at the hearing of such application the Court is of opinion that the proceeding or step is irregular, it may set it aside in whole or in part either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems fit.**
- (4) Until a party has complied with any order of Court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.**
- (5) Where a party fails to comply timeously with a request made or notice given pursuant to these Rules the party making the request or giving the notice may notify the defaulting party that he intends, after the lapse of seven days to apply for an order that such notice or request be complied with, or that the claim or defence be struck out. Failing compliance within seven days, application may be made to Court and the Court may make such order thereon as to it seems fit.**

[11] I have no doubt in my mind that Rule 30 applies to these proceedings instituted in terms of the Order. This is because the Rules of Court were enacted to regulate on how proceedings before this Court are to be conducted. As long as the Income Tax Order recognises and sanctions its matters to be heard before this Court then the Rules will surely apply to ensure that procedures laid down by the Order itself are duly complied with by parties who have brought matters before this Court.

[12] I am of the considered view that it is an irregular step to file affidavits where the Order specifically directs what type of documents or process are to be filed. Rule 30 is there to provide the mechanism by which irregular steps are to be dealt with and the conduct of the parties in these proceedings fall squarely within the ambit of Rule 30 and thus justifying this Court to order compliance with the provisions of the Order by the parties. Owing to the stage at which these proceedings are, I will not concern myself with the other technicalities raised herein which I believe would further delay this matter.

[13] I must mention further that after the Appellant/Tax Payer filed the Notice of Appeal on the 29th March 2017, they obtained a Court Order on the 2nd June 2017 for leave to file a further affidavit

containing *inter alia*, the letter from the Respondent dated the 27th March 2017. This order was served on the Respondent on the 15th June 2017.

[14] On the 18th May 2017, the Appellant/Tax Payer filed with the Registrar Appellant's Supplementary Affidavit and same was served on Respondent on the same date. This Affidavit was deposed to by Peter Ryan, the Financial Manager of the Appellant/Tax Payer.

[15] I will not address the issues raised in the Appellant's Supplementary Affidavit except to state that these issues relate to and or supplement the Appeal which was filed by the Appellant/Tax Payer on the 29th March 2017. It must be noted that the said Notice of Appeal and the grounds thereof are not in affidavit form, the question then becomes - why did the Appellant/Tax Payer resort to supplement its grounds of appeal (or explain whatever issue) by means of an affidavit when Section 54 of the Order does not prescribe so?

[16] On the 2nd June 2017 the Appellant/Tax Payer obtained the following Court Order from this Court:

“The Appellant/Tax Payer is hereby granted leave to file the further affidavit containing inter alia, the letter from the Respondent dated 27th of March 2017”.

This Order was obtained as a result of a Notice of Set Down dated the 19th May 2017 which set down the matter for hearing on the 2nd June 2017.

[17] There is confusion herein as regards the Appellant's Supplementary Affidavit and the Court Order obtained on the 2nd June 2017, in that the Supplementary Affidavit was filed on the 18th May 2017 and attached to it is the letter of the Respondent dated the 27th March 2017 together with three other documents namely Annexures SPL 6, SPL 7 and SPL 8. On the other hand the Court Order granting leave to the Appellant/Taxpayer to file such affidavit was granted on the 2nd June 2018 when the Supplementary Affidavit had long been filed and served on the Respondent (on 18th May 2017).

[18] Further, the question becomes, which legislation or legal provision enabled the Appellant/Tax Payer to file the Supplementary Affidavit supporting issues that are in the grounds of appeal properly filed in terms of Section 54 of the Order? The Order does not make any provision for the filing of any affidavit. If the Appellant wanted to supplement its grounds of appeal or explain any issue, it should have consulted the other side for consent to supplement its papers. It would only be upon refusal of such request by the Respondent that the Appellant would then have to file an application in terms of

Rule 27 (1) for extension of time to file the supplementary documents but not in affidavit form.

[19] These Rule 30 proceedings by Appellant are fully appreciated because there is no provision for filing of the Answering Affidavit by the Respondent in these proceedings, however, that argument is disturbed by the fact that it is the very same Appellant/Tax Payer that introduced the issue of affidavits by filing the Supplementary Affidavit first. It would therefore be unfair and problematic to put the blame squarely on the shoulders of the Respondent only when the Appellant itself decided to supplement its papers by filing a Supplementary Affidavit.

[20] The fact that the Respondent has alleged that they normally deal with these tax matters by filing Answering Affidavit is not supported by the Income Tax Order and the matter becomes more complicated because it was the Appellant who filed the Supplementary Affidavit first and thereby causing the Respondent to respond in affidavit form. This matter has to be decided on its own circumstances and merits and I therefore cannot overlook the irregular procedure adopted by the Appellant first and to the extent of obtaining a Court Order to file the Supplementary Affidavit which had already been filed before Court, whilst on the other hand complaining that it was irregular for the Respondent to file the Answering Affidavit.

[21] The filing of affidavits in these proceedings brought in terms of Rule 54 of the Order is therefore irregular and problematic because it derails the procedure as prescribed in Section 54 (5) of the Order and substitute it with the procedure as prescribed by Rule 6 of the Rules of this Court. This cannot and should not be condoned by this Court.

[22] I must point out that it is advisable to comply with the procedures as laid down in Section 54 (5) of the Order for purposes of prosecuting those appeals and objections as opposed to converting these proceedings into motion proceedings necessitating the filing of Affidavits. In this scenario, *in casu*, does it mean that the Appellant is supposed to file a Replying Affidavit should it wish to respond to the Respondent's Answering Affidavit? This is the confusion that exist in this matter which calls for strict adherence to the procedures laid down by Section 54 (5) of the Order.

[23] In order to demonstrate the unique nature of these proceedings you only have to refer to Section 54 (7) and (10) which provides as follows:

(7) *The sittings of the Court for the hearing of any appeal under this Section shall not be public and the Court shall at any time on the application of the Appellant exclude any person whose attendance is not necessary*

for the hearing of the appeal under consideration from such sitting or require him to withdraw therefrom;

Provided that the Court may authorise the publication of the whole or any part of its judgment in any law report or legal journal without mention of the name of the tax payer concerned;

Provided further that this subsection shall apply to an appeal to the Court of Appeal, except to such extent as the Court of Appeal may direct.

(10) The Chief Justice may make rules of the High Court prescribing the procedure to be observed in the conduct of appeals under this Order before it.

[24] As stated and observed herein these appeal proceedings in terms of the Order are special proceedings which are to be held in camera and also even the judgments of these Court must not contain the name of the tax payer and further the Order empowers the Chief Justice to make special rules prescribing the procedures to be observed in the conduct of the appeals under this Order wherever and whenever the need arises and or if he deems it necessary.

[25] Further, in compliance with the *proviso* in Section 54 (7) of the Order, I have deliberately omitted the name of the tax payer in this judgment. This is also in line with the precedent set by Nathan CJ and Ogilve Thompson P, Milne JA and Smit JA in the case referred to in the following paragraph.

LEGAL PRECEDENCE

[26] In the case of **TAXPAYER v THE COMMISSIONER OF TAXES (HIGH COURT) 1977-1978 SLR at p. 169**, Nathan CJ stated as follows:

'This is an appeal against the Respondent's disallowance of an objection made by the Appellant to the Respondent's assessment of income tax payable by the Appellant in respect of the year ended 30th June 1975.

An agreed summary of the facts and questions of law arising has been put in the parties. As appears therefrom, the Appellant is a company incorporated and registered in Swaziland which carries on the business of sugar cane and citrus farming at Maphiveni Swaziland---' my emphasis)

[27] Nathan CJ allowed the appeal in part and the Respondent (Commissioner of Taxes) appealed to Court of Appeal before Ogilve Thompson P, Milne JA and Smith JA.

[28] It is important to mention that before the Court of Appeal the parties were: **The Commissioner of Taxes v Taxpayer 1977-1978 SLR 174 at 175** where OGILVE THOMPSON P stated the following:

'In terms of Section 54 (5) of the Income Tax (Consolidation) Order 21 of 1975 (which repealed Act 84 of 1959) there was submitted to the High Court a "Summary of facts and Questions of Law in issue as agreed to by the Parties". This Summary recorded that during the relevant period there was a tight labour market, and that the taxpayer has

***experienced difficulty in obtaining a fair share of suitable workers, and the following further agreed facts -----
(my emphasis)***

The "Summary of Facts and questions of Law in Issue as agreed by the parties concluded by defining the issues for decision thus: ----" (my emphasis)

[29] I have quoted the above judgments to demonstrate that appeals before the Courts in terms of the Section 54 of the Order must be prosecuted as per the dictates of Section 54. There are no affidavits to be filed by either party. The matter can end up in the highest Court in the land, (the Supreme Court) on the papers as prepared in conformity and with the spirit of Section 54. His Lordship Ogilvie Thomson P, Milne JA and Smith JA dealt with the matter before the Court of Appeal on the same format and procedure as prescribed by Section 54 (5) of the Order and there was no deviation and or precedent established to deal with these matters by affidavit. The Learned Justices were at pains to emphasize that the issues they dealt with were contained in the ***'Summary of Facts and Questions of Law in Issue as agreed by the Parties'***. I have no doubt in my mind that they appreciated this procedure as prescribed in terms of Section 54 (5) of the Order and in fact created precedent for this Court and Counsel alike to follow. If any party departs from this procedure and start filing affidavits in these proceedings, there is bound to be all sorts of objections which would

otherwise not be there if there has been strict compliance with the provisions of the Order in particular Section 54 (5).

[30] During arguments of this matter I was not referred to any authority or precedent by either Counsel which prescribe for the filing of Affidavits in these matters. This matter itself was argued without any Heads of Arguments and Bundle of Authorities having been filed by either side. I must state that it is frustrating to deal with a matter of this magnitude in this fashion. On the 25th January 2018, the Appellant/Tax Payer set the matter down for hearing for the 7th February 2018 before this Court. It was the Appellant's duty therefore to file Heads and Bundle of Authorities shortly thereafter to indicate to the Court and to the Respondent that the matter was indeed set down for arguments. I say this because when the matter came before me on the 20th November 2017 in chambers, I postponed it, with the consent of the parties, to the 7th February 2018 for allocation of hearing date for the Rule 30 Application (which is these proceedings) or the main matter. I was therefore taken aback when Counsel for Appellant indicated that they were ready to argue the matter. I cannot fault Counsel for the Respondent on this because he too was not aware that the matter was to be argued. I reluctantly allowed arguments to continue because the issues were brief although very important in so far as proceedings in terms of Section 54 of the Order are concerned.

[31] I am of the considered view that it would be wrong for me to condone the filing of affidavits in this matter by the parties. The Appellant filed the Notice of Appeal and the Grounds thereof in a proper manner in accordance with Section 54 of the Order. The problem started when Appellant filed a Supplementary Affidavit which resulted in the Respondent responding to the otherwise properly filed Notice of Appeal by filing an Answering Affidavit. I cannot allow that to continue. It has to stop and parties must be encouraged to comply with Section 54 (5) of the Order.

[32] In the premises I am compelled to issue an order that would be corrective of the current state of affairs of the matter and also to prescribe compliance with Section 54 of the Order. I must state that the Order herein handed down does not affect the content or merits of the affidavits but the format only. The same information on the affidavits must be presented in the format as prescribed by Section 54 of the Order.

[33] I therefore order as follows:

1. The Notice of Appeal in terms of Section 54 of the Income Tax Order No. 22 of 1975 filed by the

Appellant/Tax Payer on the 29th March 2017 is properly before Court.

2. The filing of the Appellant's Supplementary Affidavit is declared an irregular step and not in compliance with Section 54 of the Order and thus cannot form part of these proceedings and is set aside.
3. The Appellant/Tax Payer is granted leave to file additional or Supplementary grounds of appeal through a statement and not in affidavit format within seven (7) days from date of this Order.
4. The Respondent's Answering Affidavit is declared an irregular step and not in compliance with Section 54 (5) of the Order and is set aside and is therefore to be substituted with the following documents in compliance with the aforesaid Section 54 (5) of the Order -
 - (i) Summary of the facts and questions of law, if any, in issue
 - (ii) a copy of the Notice of Assessment objected against,
 - (iii) a copy of the taxpayer's objection thereto,
 - (iv) a copy of the Commissioner's reply to such objection, and
 - (v) a copy of the Notice of Appeal.

5. The documentation referred to in paragraph 4 above is to be filed within ten (10) days from date of receipt of the Appellant's Supplementary and or additional ground of Appeal.
6. Each party to pay its own costs.

It is so ordered.



NKOSINATHI MASEKO
JUDGE OF THE HIGH COURT