



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 2338/20

In the matter between:

SHANDEZ INVESTMENTS (PTY) LTD APPLICANT

And

THE COMMISSIONER GENERAL

1ST RESPONDENT

ESWATINI REVENUE AUTHORITY

2ND RESPONDENT

Neutral Citation: *Shandez Investments (Pty) Ltd vs The Commissioner General and Another (2338/20) [2022] SZHC (60) 6th April 2022*

Coram: **MLANGENI J.**

Heard: **23/03/22**

Delivered: **6/04/22**

Summary

Respondents conducted a VAT desk audit upon applicant's business and made adverse findings whose effect was that applicant owed tax in excess of E9 million, inclusive of penalties. Applicant raised an objection to the findings of the audit but the objection was dismissed by the respondents.

Applicant made a further appeal to the respondents and there being no positive response it then took the matter up at the High Court.

Before this court respondents argued that the applicant should not be given a hearing because they ought to but did not seek and obtain condonation.

Held: Applicant's further appeal to the Commissioner General was irregular.

Held, further: In the absence of the Sections 36 & 37 procedures in the VAT Act the applicant was entitled to approach the High Court.

Held, further: Respondents are estopped from raising non-condonation.

Held, further: As applicant's prayer is for an order that would amount to brutum fulmen, the application stands to be dismissed and is hereby dismissed.

No order for costs.

JUDGMENT

[1] The applicant is SHANDEZ INVESTMENTS (PTY) LTD, a company incorporated with limited liability whose further particulars are not disclosed in the founding affidavit. I infer

from the pleadings that the applicant's business involves the importation of vatable goods into the country, which makes it liable to pay tax in terms of Section 4 of the Value Added Tax Act, 2011.

[2] The first respondent is described as **“the Commissioner General N.O. cited herein in his official capacity as the Chief Executive Officer of Eswatini Revenue Authority Service, a legal body charged with the responsibility of revenue collection on behalf of the Government of Eswatini.”** I mention, needlessly, that in the manner that the first respondent has been cited the caption **“N.O.”** is surplusage. This is because Commissioner General is an official capacity.

[3] The second respondent is ESWATINI REVENUE AUTHORITY (ERA), a legal entity entrusted with the sole responsibility of collecting revenue on behalf of the state, created with *locus standi* to sue and be sued, whose principal place of business is at Portion 419 of Farm No.50 in the Hhohho Region.

[4] In respect of jurisdiction of this court to hear the matter the applicant's deponent avers that it is based, in part, upon the fact that there is no functional Revenue Appeal Tribunal, and

therefore the applicant is entitled to approach this court to exercise its inherent common law powers. I note, however, that Section 36 (1) of the Value Added Tax (VAT) Act 2011 refers to a Tax Tribunal as opposed to Revenue Appeal Tribunal. But whatever the correct appellation might be, it is of no significance to the outcome of this matter.

- [5] The facts of the matter are largely common cause. The respondents, apparently dissatisfied with the applicant's returns on Value Added Tax in respect of a specified period, instituted a VAT desk audit upon the applicant's business operations. None of the parties has specified the legal clause in the VAT Act that sanctions such an audit, but there being no issue regarding the legality of such audit, I proceed on the basis that the audit is in order. The audit, which it is apparent was extensive, made adverse findings against the applicant. By letter dated 28th November 2019¹ the respondents rendered a detailed breakdown of the irregularities that they found, the net result of which was that the applicant owed an amount of E9,608,015.37 in VAT, inclusive of penalties. The last paragraph of the letter informs the applicant that if it is not satisfied with the determination it **“may submit an objection in writing to the Commissioner General within thirty days after the**

¹ At page 20 of Book of Pleadings (BoP).

service of the notice of decision,” per Section 35(1) of the VAT Act.

[6] The applicant raised an objection to the findings and outcome of the desk audit. The objection letter is dated 4th March 2020.² The applicant has not stated when it received or became aware of the audit findings. What is obvious is that the period between the letter of outcome (28th November 2019) and the letter of objection (4th March 2020) is above ninety days, which is far above the period of limitation per Section 35(1).

[7] Despite the unmistakable delay in raising an objection, the respondents entertained it on the merits and dismissed it by letter dated 12th June 2020³. The last paragraph of the said letter is in the following words: -

“...We regret that your application to re-valuate the audit outcome has been declined, the assessment stands. We urge you to settle your debt soon...”

² At page 22 of BoP.

³ At page 28 of BoP.

[8] About sixty days later, on the 12th August 2020, the applicant wrote a letter of appeal to the first respondent in which it sought to rekindle its objections to the audit outcome. It is not clear on what basis the applicant appealed to the same entity that had on the 12th June 2020 dismissed the objection. I can only surmise that the most probable reason is that at that point in time there was no Tax Tribunal in place. In terms of Section 36 (1) of the VAT Act the applicant was entitled to appeal to the Tax Tribunal, within thirty (30) days. When the VAT Act was operationalized through Legal Notice No.12 of 2012, Sections 36 and 37 were excluded. The relevant portion of the legal notice is clause 2 which I reproduce below: -

“2. The Value Added Tax Act, 2011, shall excluding Section 36 and 37 come into operation on the 1st April 2012.”

[9] The obvious effect of this is that the procedures in terms of Sections 36 and 37 were not available to the applicant. In the 2020 case of CHOWDHURRY INVESTMENT t/a PLAZA TANDOORI RESTAURANT v THE COMMISSIONER GENERAL FOR ESWATINI REVENUE AUTHORITY⁴ His Lordship Maphanga J. found as a fact that the Tax Tribunal was not established since promulgation of the Act. So there was no Tax Tribunal

⁴ (567/2020) [2020] SZHC 137 (16th July 2020).

to appeal to. It is in that context that the applicant's deponent avers that **“In effect the applicant is left with no recourse but to approach the above honourable court under its inherent common law jurisdiction to provide the applicant with redress...”**⁵. In the CHOWDHURRY case, supra, the court held that this direct access to the High Court was justifiable in such circumstances, otherwise a party in the position of the applicant would be denied administrative justice in breach of the Constitution.

[10] In this court the applicant prays for orders in the following terms: -

- “1) Dispersing with the Appeal Rules in terms of Section 36 of the Value Added Tax Act of 2011, that this matter be heard before the above honourable court in terms of Section 37 of the said VAT Act of 2011, and the appeal of the applicant against the decision of the Commissioner General dated the 28th November 2020 be and is accordingly granted.**
- 2) That the objection decision of the Commissioner General's Tax Audit of the 28th November 2020,**

⁵ At para 23, page 14 of BoP.

**be and is hereby reviewed and/or asset (*sic*)
aside forthwith.**

- 3) That the imposition of all or any further additional taxes, penalties and interest in terms said (*sic*) Tax Audit be and is hereby suspended pending finalization of these proceedings herein.**
- 4) That in the interim that (*sic*) the respondents be and are hereby ordered and directed to issue applicant with Tax Compliance Certificates as and when necessary pending the determination of the appeal herein.**
- 5) Granting costs...**
- 6) Granting further and/or alternative relief.”**

[11] At the beginning of legal arguments the court was informed that the applicant was abandoning prayer 2 and pursuing prayer 1 only. It is apparent that prayers 3 and 4 were considered to have been overtaken by events in that the matter was now before court for legal arguments and expected to be finalized in the near future. I now focus my attention to prayer 1.

[12] This prayer is quite convoluted. Lengthy and elaborate prayers are by their nature problematic. This one is no exception. It has at least three distinct features or parts, and I break them down below: -

12.1 The applicant wants the court to dispense with the **“Appeal Rules in terms of Section 36...”**. I am left groping as to what appeal rules are being referred to in view of the fact that there is no Tax Tribunal and therefore no rules of appeal. The closest that the applicant may have had in mind is the thirty day limitation, the notice of appeal and the need to serve a copy thereof. These are so scanty and bare that they cannot be described as appeal rules.

12.2 But assuming that the above is what is referred to as **‘appeal rules’** why would this court dispense with procedure that does not exist in practice, procedure that was deliberately suspended from operation when the VAT Act was operationalized by Gazette in February 2012? To this extent the order sought, if granted, would be inconsequential and therefore incompetent.

12.3 The next portion of the prayer seeks the court to hear the matter **“in terms of Section 37 of the said VAT Act ...”**. I do not see how I can hear the matter in terms of a statutory provision that was consciously suspended from operation, as stated above.

13] It appears to me that although the applicant had in mind to invoke the court's inherent common law powers, what it has prayed for is implementation of the sections 36 and 37 procedures which, on the applicant's showing, is not operational. The court is familiar with what is sometimes described as inelegant pleadings or expressions, and in such cases it may look for the essence. This is not one such case; it is a case where the prayer presents a fundamental problem.

[14] The last part of the prayer seeks the court to grant **“the appeal of the applicant against the decision of the Commissioner General dated the 28th November 2020...”** (my underlining).

Mr. Mdladla for the respondents repeatedly said in open court that there is no decision of the Commissioner General's office which is dated 28th November 2020. He even alluded that if it is an error of dates, then may be it could be corrected. No attempt was made to correct this date, and I can state categorically that the Commissioner's decision that dealt with the merits of the objection is dated 12th June 2020⁶. It ends with the words **“...we regret that your application to re-evaluate the audit outcome has been**

⁶ At pages 28 -30 of BoP.

declined.” The dates are two worlds apart, and to issue an order as prayed would be absolutely futile. The order would be *brutum fulmen*.

[15] It appears to me that the applicant ought to have disabused itself of the inoperative Sections 36 and 37 of the VAT Act and focussed in formulating process that would present to the court an appeal for determination. I understood Mr. Mdladla to be making the same point in his submissions that in the event there is no tribunal **“you go straight to the High Court.”**

[16] The appeal to the Commissioner General was, in any event, irregular in my view. To then declare it as granted I would be condoning an irregularity. I say it was irregular for the reason that it does not make sense to appeal to the same forum that has dismissed your case. This point bears no elaboration.

[17] So, what’s left of the applicant’s application? In my view not much, if anything. I do, nonetheless, consider some salient arguments that were made by the parties.

17.1 Mr. Mdladla, who opened the arguments, threw all caution to the wind and based his client's case solely on the applicant's alleged failure to seek condonation before this court, having approached the court out of time. The submission by Ms. Louw, for the applicant, was that if condonation was not sought in form it was in substance. That much is also canvassed in the applicant's replying affidavit.⁷ It appears to me that this is a case of scraping the barrel. Condonation is a stand-alone remedy that must be prayed for and motivated through appropriate averments. The court is not permitted to search in the pleadings for averments that could possibly be relevant to condonation. The applicant has made no prayer for condonation, and it is trite that the court cannot grant an order that has not been sought, with the exception of very limited instances where the order is ancillary to the main issues being canvassed. This one is not such a case.

17.2 If the condonation debate is based solely on the time lag between the Commissioner General's letter dated 11th September 2020⁸ and the inception of this application, which was the 25th November 2020, a difference of about seventy-four (74) days, the respondent's case is watered down by paragraph (4) of the Commissioner General's letter of the 11th

⁷ Para 5 at page 81 of BoP.

⁸ At page 38 of BoP.

September 2020. This letter was in acknowledgment of the applicant's second **'objection'**, styled appeal, dated 20th August 2020. I quote the said paragraph below: -

“A decision on this case will be made within ninety (90) days from the date of this acknowledgment and communicated to you accordingly.”

17.3 The preceding paragraph was to the effect that the matter was being handled in the Legislative Division of ERA. The clear impression that was created in the mind of the applicant is that the matter was being dealt with on the merits, and the outcome would be communicated within ninety days. The applicant was in this court before the lapse of ninety days. For the respondents Mr. Mdladla submitted that there is a difference between a mere acknowledgement and actually dealing with the matter. I cannot agree more, but the fact of the matter is that the contents of this particular letter went far beyond merely acknowledging receipt. In the conspectus of the matter I find that the respondents are estopped from raising non-condonation.

[18] In my view the case turns on the applicant's failure to formulate its case and prayers in a manner that enables the court to effectively exercise its common law jurisdiction. This has not been done. Instead the applicant has sought in prayer 1 an order that would, if granted, be inconsequential. The application therefore stands to be dismissed.

[19] I am persuaded, however, that this is not a case where the costs must follow the event. The unclear appeal path is no fault of the applicant. If the Tax Tribunal was in place this uncertainty would have been obviated. Further, my findings on the issue of condonation must count for partial success in favour of the applicant.

[20] The matter has taken long to finalise, hence it would be imprudent to leave it hanging. A pragmatic order would be one that ensures that the matter moves forward without delay.

[21] In the circumstances I make the following orders:-

21.1 The application is dismissed.

21.2 No order for costs

