



**THE SUPREME COURT OF SWAZILAND**

**APPEAL CASE NO. 14/2007**

**In the matter between:**

**THE COMMISSIONER OF TAXES            1<sup>ST</sup> APPELLANT**

**THE ATTORNEY GENERAL            2<sup>ND</sup> RESPONDENT**

**AND**

**PROCESS AUTOMATED (PTY) LTD    1<sup>ST</sup> RESPONDENT**

**LASISHOBANE (PTY) LTD            2<sup>ND</sup> RESPONDENT**

**MTHUNZI CONSTRUCTION  
PHANGOTHI INVESTMENTS**

**(PTY) LTD                                4<sup>TH</sup> RESPONDENT**

**INSIKA HOLDINGS (PTY) LTD        5<sup>TH</sup> RESPONDENT**

**MUSA MAGONGO                        6<sup>TH</sup> RESPONDENT**

**CORAM**

**BANDA CJ**

**STEYN JA**

**ZIETSMAN JA**

**FOR THE APPELLANT**

**FOR THE RESPONDENT**

HEARD ON THE 6<sup>TH</sup> NOVEMBER 2007

DELIVERED ON THE 15<sup>th</sup> NOVEMBER 2007

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**JUDGMENT**

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**SUMMARY**

**Appeal against an order granting an application for the refund of withholding tax allegedly unlawfully deducted by Commissioner – On appeal held that:**

- (1) Section 59B did not authorize the Commissioner to issue the “blanket” decree he did as per Legal Notice 150.**
- (2) Such decree is unlawful also as an attempt to reverse the *onus* which in the enabling statute is on the Commissioner and placing it on the taxpayer.**
- (3) The relief granted was that sought by the respondents as per the amendment applied for at the hearing.**

**Accordingly order granted that all monies deducted as withholding tax from four of the respondents had to be repaid to them – Appeal**

**dismissed.**

**STEYN JA**

1. The Commissioner of Taxes (the Commissioner) is the principal appellant in this matter. He challenges the decision of the High Court granting the respondents (the taxpayers) certain relief. Originally the taxpayers sought the following orders:

- (a) The 1<sup>st</sup> respondent be ordered to grant 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> applicants an exemption from the deduction of 10% against settlement fees by their clients and or parastatals.

- (b) Alternatively reviewing 1<sup>st</sup> Respondents decision not to grant 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> applicants with exemption on the basis that 6<sup>th</sup> applicant was in arrears with payment of his tax.

- (c) Costs.

2. However because of the lapse of time occasioned by the legal process, the matter only came before the Court in a subsequent tax year. In the event, if the decision challenged was tainted by

illegality, the relief claimed as set out above would no longer remedy the alleged wrong. Such relief related to entitlements (exemptions) from withholding tax arising during a tax year already past. In these circumstances the taxpayers sought an amendment to the relief claimed before the High Court. Under alternative relief it sought from such court an amendment of its claims. This amendment was to include an order for the payment of all the monies unlawfully deducted in the 2006 tax year by the Commissioner. I will deal below with this aspect of the matter. (see paras 11 and 12).

3. The facts of the matter are the following: In October 2005 the Commissioner issued what is described as Legal Notice 150. This notice was issued pursuant to Section 59B of the Income Tax Order 1975; Order No. 21 of 1975; (the order). This Legal Notice 150 is attached to this judgment. It will be seen that the Notice is headed as follows: “INCOME TAX: A DIRECTIVE TO ALL PERSONS MAKING PAYMENTS TO RESIDENT CONTRACTORS AND TO PERSONS SUPPLYING GOODS OR SERVICES TO THE

GOVERNMENT OR PARASTATALS. It provides *inter alia* as follows:

“Take notice that **every person** who-

- (i) contracts with a resident contractor or sub-contractor; or
- (ii) contracts with a resident person for the performance of services in relation to construction operations performed in Swaziland,

**is required to deduct or withhold** tax at the rate 10% of the gross amount payable to the resident contractor or sub-contractor during the 2005/2006 year of assessment, and each succeeding year of assessment thereafter ....(not relevant).

- (iii) when the Government or a parastatal contracts with a resident person for the provision of goods or services the Government or parastatal **shall deduct withholding tax** at rate of 10% of the gross amount payable to such persons” (emphasis added).

As can be seen from the terms of the annexed Legal Notice, it also provides for the exemption from the directive to withhold tax if a taxpayer produces an exemption certificate from the Commissioner

that he/she has complied with certain statutory or regulatory requirements of the tax authorities.

“The object” (sic) of the directive is defined as follows:

1. Encourage voluntary compliance.
2. Detect and correct non-compliance.
3. **Bring to charge all taxpayers having an income;** and
4. Enforce the collection of all outstanding taxes.”

An explanatory note to the Notice in para. 2 thereof records that the obligation to withhold tax is imposed **on every person who makes a payment to** a resident contractor. (emphasis added)

4. When the matter was called we raised the following issue with the legal representative of the Commissioner. Did the empowering Order authorize the legal Notice 150? The only section of the Order relied on is section 59B. It reads as follows:

“59B. (1) If in any case the Commissioner has reason to believe that any tax payable may not be recovered, the Commissioner may issue a directive to any person to withhold tax from

any money which-

**(a) is due or may become due to the person  
liable to taxation;**

**(b) the person holds or may subsequently hold for or on account of  
the person liable to taxation;**

**(c) the person has authority from some other person to pay to the  
person liable to taxation;**

**At the rate specified under subsection (2).**

**(2) The amount of tax to be withheld in respect of a directive  
issued under subsection (1) shall be at the rate of ten per  
cent on the amount due as contemplated in subsection (1).**

**(3) Every person who has deducted any tax under subsection (2) shall**  
—

**(a) furnish to such person a certificate showing the  
amount of the tax deducted;**

**(b) remit to the Commissioner the amount of tax  
deducted within fifteen days of the date of  
service of the directive or, if on such date no  
money is due from him to, or is held by him for  
or on account of, that person, within fifteen  
days of the date on which such money becomes  
due to, or available for or on account of that**

**person.**

- (4) No deduction of tax under this section shall relieve the person liable to taxation from the obligation to furnish any return for the assessment of the tax under section 33 or from any other obligation imposed by this Order.**
- (5) Any person who fails to deduct tax in accordance with subsection (1), shall, in addition to any penalty for which may be liable under section 66, be personally liable to pay the Commissioner the tax which he should have deducted as if it were tax due and payable by him under Part VII of this Order.**

5. It seems clear to me that the statute empowers the Commissioner when he “has reason to believe that any tax payable may not be recovered ....he may issue a directive to any person to withhold tax”. *Prima facie* the Order appears to authorize the Commissioner only to issue such a directive where he has reason to believe that he might not be able to recover the tax due. He may then issue such directive to



“any person”. The “blanket” legal notice applies to all persons with whom they contract and appears *prima facie* not to be authorized by the enabling statute. It has the legal consequence of reversing the *onus*. Under the statute the Commissioner has to apply his mind, and only if he has “reason to believe that the tax payable might not be recovered”, is he authorized to issue a directive to withhold tax. Under the terms of the Legal Notice, he places the *onus* on the taxpayer to establish that the tax will be recoverable. He is not empowered to do this.

6. We raised these concerns with counsel for the Commissioner and gave her some time to consider this issue. We also gave her an opportunity to file heads of argument to address the question as to whether the Legal Notice issued was or was not *intra vires* the empowering Order. She has referred us to a number of decisions which deal with the meaning to be ascribed to the word “any”, and the words “any person”. These decisions, so she submitted, make it clear that these words should not be given a “restricted interpretation” unless the context in which it is used so restricts it. She relied in this

regard on the decisions in **REX V HUGO 1926 A.D. 269 AT 271;**  
**THOMSON V KAMA; STILLWELL V KAMA 1917 A.D. 209 AT**  
**217 AND FEDERATION OF MASTER PRINTERS OF S.A V**  
**MINISTER OF LABOUR AND SOCIAL WELFARE 1937**  
**T.P.D. 201 AT 203.**

7. The passages relied on in **HUGO** do not support the argument advanced in the present case; that we are not *in casu* dealing with an extended meaning of the word “any”. Contextually the “dipping of any sheep” clearly means all sheep. Similarly in **THOMPSON** the context in which the word “any” was to be given the meaning of “every” was consonant with the legislature’s clear intention. The court found that there were two ways of making the legislation *in casu* effective. One was by exempting “a whole Province from the operation of the restrictions or by relieving each purchaser of land ... either presently or in future” (of the restrictions). It was indeed a justifiable liberal interpretation to preserve the rights of Blacks to acquire land and was contextually justified.

Similarly in **FEDERATION OF MASTER PRINTERS** the court gave an extended meaning to the words “any person”. *In casu* the court was concerned with a right of appeal and who had such a right. (The remarks that such a right accrued also to a third party appears to have been *obiter*.)

8. In the present case the context dictates otherwise. Here in terms of section 59B the taxpayer whom the Order wished to expose to the withholding of tax is one in respect of whom the Commissioner “has reason to believe” that “tax payable may not be recovered”. It is difficult to accept that the Commissioner could reasonably have believed that in respect of **each and every taxpayer** he had reason so to believe. Indeed, *prima facie* this would be absurd. The words “any person” can not in the context of this statutory instrument be construed as meaning every person. Subsection (3) of section 59B makes it clear that the intention of the legislator was to individualise the power conferred upon the Commissioner to act in terms of the section. Therefore a “blanket” directive was not legally permissible; neither was the reversal of the *onus*. Such Legal Notice is *ultra vires*

the authorization of the enabling statute.

9. I have not set out the facts of the matter. However, these demonstrate also that the Commissioner's refusal to grant an exemption to the respondent was motivationally flawed. Counsel conceded that the probabilities indicate that the Commissioner refused the exemption for an irregular consideration. The evidence adduced in these proceedings have, on a balance of probability, established that the Commissioner, certainly initially, in declining to grant an exemption did so, not because the respondent companies were in default of fulfilling their statutory obligations, but because their Managing Director, the 6<sup>th</sup> respondent, was in respect of his personal tax obligation in default. No reasons were advanced why in the applications for exemption the respondent companies were asked when applying for exemption whether "all Directors are up to date with all their tax requirements". In the absence of any legitimate reason being advanced for including such a question, the probable inference is that this was why all the applications, including that of the 1<sup>st</sup> respondent were refused (1<sup>st</sup> respondent was up to date with its tax

- requirements and was subsequently granted exemption).
10. In a contemporaneous letter written by the respondents' attorneys they record that it was noted that the major reason why none of the respondents was refused an exemption was that its director had an outstanding liability for tax. The averment in this letter would have had to be fabricated and untruthful. No grounds exist for such a finding. On this ground alone therefore the appeal must fail.
  11. There is one outstanding matter. The respondents had for the reasons reflected above realized that if they should succeed in their application, the relief claimed would be a *brutum fulmen*. The new tax year having arrived, meant that the order as sought would no longer afford them redress. In these circumstances the respondents sought an amendment to the prayers for relief in the notice of motion.
  12. The transcript of the proceedings filed of record reflects that the respondent sought under prayer (d) – the claim for alternative relief – for an order “that all the monies deducted in the 2006 financial year

be returned to the applicants” (respondents before us). There is no response from the appellant’s counsel to this application recorded. According to the transcript of the proceedings, the correctness of which was not challenged, there was no opposition to the application for the amendment sought. In his judgment the Judge *a quo* granted the relief “in terms of the notice of motion”. This, it must be assumed, was intended to grant the effective relief sought as per the amendment. In view of the fact that the order originally sought would not have given the respondents any real relief, the court would not have given an order that it knew was a *brutum fulmen*. The order the court granted was that **all the monies deducted as withholding tax in respect of four of the companies cited in the notice of motion be returned by the Commissioner, to the respondents 2, 3, 4 and 5.**

13. For these reasons the appeal is dismissed with costs. Such costs are to include the certified costs of counsel.

J.H. STEYN

Judge of Appeal

I agree

R. A. BANDA

Chief Justice

I agree

N. W. ZIETSMAN

Judge of Appeal