IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No.36/2012

In the matter between:

PHILANI CLINIC SERVICES (PTY) LTD **APPELLANT**

AND

SWAZILAND REVENUE AUTHORITY **1ST RESPONDENT**

MINISTER OF FINANCE **2ND RESPONDENT**

Neutral citation: *Philani Clinic Services (Pty) Ltd v Swaziland Revenue Authority and Another (36/2012) [2012] SZSC 74 (30 November 2012)*

Coram: **DR S. TWUM J.A., M.C.B. MAPHALALA J.A. , E.A. OTA J.A.**

Heard: **13 NOVEMBER 2012**

Delivered: **30 NOVEMBER 2012**

Summary: **Appeal against the decision of two cases *a quo:* Case No. 691/2012 was dismissed *a quo* on grounds of urgency: Held the decision was interlocutory in nature since the merits of the**

case were not disposed off. Leave required to appeal pursuant to Section 14 (1) of the Court of Appeal Act. No leave sought: Appellant perempted right to appeal by conduct: Appeal dismissed: appeal against Case No. 805 tantamounts to an exercise in futility since the order of the Court *a quo* shows that the Medical equipment sought to be imported by appellant is exempt from tax levy by the VAT Act No. 12 of 2011: appeal dismissed: order of punitive costs *a quo* upheld.

OTA J.A.

[1] This Appeal emanates from two High Court decisions namely Case No. 691/12 and Case No. 805/12 respectively.

[2] The Appellant launched a Notice of Appeal which encompassed these two High Court cases. It is important to note at this juncture that the appeals are opposed only by the 1st Respondent. For ease of convenience, it is imperative for me to first deal with the appeal relating to the judgment of **Maphalala PJ** rendered on the 17th of April 2012, in Case No. 691/12. The grounds of that appeal appear in paragraphs [1] to [3] of the Notice of Appeal and are as follows:-

"1. The Court *a quo* erred in law and in fact in not enrolling the matter as one of urgency and more specifically erred in the following respects:-

1.1 That there was no single fact stated of harm suffered by the Appellant

1.2 That urgency could not be established in circumstances where harm suffered by the Appellant occurred in other hospitals.

1.3 That the Appellant relied on indebtedness to found urgency.

1.4 That the Appellant had dismally failed to meet the requirement of urgency, particularly of Rule 6 (25) (b).

1.5 That the judgment of the High Court in **Yonge Nawe Environment Action Group vs Nedbank (Swaziland) Limited Case No. 4165/2007 and that of Phila Dlamini vs Sakhile Nndzimandze and Others Civil Case No. 4158/2008,** were apposite in the particular circumstances of the proceedings in the Court *a quo.*

1.6 In not assuming that all the allegations by the Appellant in its founding affidavit are true.

2. The Court *a quo* erred in law in dismissing the Appellant's application in its entirety instead of merely not enrolling it as one of urgency.

3. The Court *a quo* erred in law and in fact in dismissing the Appellant's application with costs."

[3] Counsel for both parties filed comprehensive heads of argument in support of their respective stance on the issues raised *in casu*.

[4] In the 1st Respondents heads of argument, learned Counsel for the 1st Respondent **Mr Ndlovu,** raised two points of law seeking to defeat this appeal *in limine*, namely (1) Peremption and (2) Non appealability of the decision pursuant to Section 14 (1) of The Court of Appeal Act. (The Act)

[5] It is apposite for me to deal with these points *in limine* before dabbling into the merits of this case if necessary.

[6] In this regard, **Mr Ndlovu** contended that the facts of this case would show that the Appellant accepted the judgment under Case Number 691/12, and further directives by the Judge in chambers that the point

taken *in limine* on urgency resulted in the dismissal of the case. That due to this fact, the Appellant modified its papers and launched Civil Case No. 805/12, still seeking the same reliefs. That it was only upon its defeat in Case No. 805 that the Appellant took steps to appeal both Case No. 691 and Case No. 805. Therefore, the Appellant by its conduct demonstrated an intention to acquiesce in the judgment and therefore cannot appeal it.

[7] **Mr Ndlovu** further contended, that quite apart from the point on peremption, the decision in Case No. 691 is clearly unappealable without the leave of Court by virtue of Section 14 (1) of the Court of Appeal Act, since it is interlocutory in nature.

[8] In reply **Mr S K Dlamini** who appeared for the Appellant contended, that the Appellant cannot validly be said to have relinquished its right to appeal Case No. 691 by the institution of Case No. 805. This, he said is because the reliefs sought in the two cases were completely different. He also contended, that since the application under Case No. 691 was dismissed by the Court *a quo*, the rights of the parties

were determined on the merits, therefore, the decision in Case No. 691 was not interlocutory in nature but final.

[9] Now, for a proper determination of the matters arising *in casu*, a recitation of the history of the two cases 691 and 805 is imperative at this juncture.

[10] What appears to be the facts of this case is that by urgent application dated the 10th April 2012, the Appellant as Applicant launched proceedings under Case No.691/12 for the following reliefs:-

"1. Dispensing with the Rules of this Honourable Court as relates to form or procedures, service and time limits, condoning the Applicant's non-compliance with the Rules of this Honourble Court and enrolling this matter as one of urgency.

2. Reviewing and correcting and / or setting aside the following decisions:

2.1 The Decision of the 1st Respondent of 16 March 2012 in terms of which the Applicant was declined exemption from sales tax in respect of medical or surgical equipment the Applicant was importing from the Republic of South Africa.

2.2 The decision of the 2nd Respondent to decline exemption of sales tax on the medical or surgical equipment the Applicant was importing from the Republic of South Africa.

2.3 The decision of the 1st Respondent of 5 April 2012 in terms of which the 1st Respondent declined exemption of a tax levy on any of the medical or surgical instruments and equipment being imported by the Applicant from the Republic of South Africa.

3. Directing the !st Respondent to permit the Applicant to import the medical equipment listed in annexure **"P1"** to the founding affidavit in one consignment without making any payment pending determination by this Honourable Court as to whether the Applicant is liable for any import levy.

4. Pending determination of these proceedings, directing the 1st Respondent to permit the Applicant to import the medical equipment in annexure **"P1"** to the founding affidavit in one consignment against furnishing a bank guarantee for the sales tax levy on the following equipment.

4.1 3 Vela comprehensive ventilators;
4.2 3 Avea standard ventilators;
4.3 The Oscilliator complete with accessories;
4.4 The Hilrom trauma stretcher;
4.5 Affinity 4 maternity bed;
4.6 4 transport incubators;
4.7 4 Hiport pendants;

4.8 10 Bassinette-Panda

5. That prayers 3 and 4 operate as a *Rule Nisi* with immediate and interim effect returnable on a day to be determined by this Honourable Court.

6. In the event of this Honourable Court finding that there is no basis for the review correction and setting aside of the decisions of the Respondents as set out above, compelling the 1st Respondent to permit the Applicant to import, without a sales tax levy, the equipment that the 1st Respondent initially acknowledged to be exempted from sales tax and agreed to be so imported.

7. Directing the 1st Respondent to pay the Applicant's costs of the application at attorney-and-client scale and the 2nd Respondent at ordinary scale.

8. Granting the Applicant any further or alternative relief."

[11] On the 17th of April 2012, the Court *a quo* per **Maphalala PJ** dismissed the application *inter alia* on grounds of lack of urgency.

[12] It is common cause that after the dismissal, by notice of set down dated the 24th of April 2012, the Appellant still under the same Case No. 691/12, filed a supplementary affidavit seeking to remedy the defects in the previous application on the point taken on urgency. The

matter was placed before another Judicial Officer who referred it back to **Maphalala PJ** for directions on whether the previous application had been dismissed in its entirely or whether it was still open to the Appellant to attempt to cure its inefficiencies by way of supplementary affidavit under the same case number.

[13] It is not in dispute that **Maphalala PJ** advised the parties that the effect of his order was a dismissal of the entire application and the Appellant was at liberty to re-institute same.

[14] In the wake of these events, the Appellant again modified its papers and re-launched the application under Case No. 805/12 before **Annandale J** on 3rd May 2012. For avoidance of doubts the reliefs sought under Case No. 805/2012 are as follows:-

> "1. Dispensing with the Rules of this Honourable Court as relate to form or procedures, service and time limits, condoning the Applicant's non-compliance with the Rules of this Honourable Court and enrolling this matter as one of urgency.
>
> 2. Reviewing, correcting and/or setting aside the decision of the Respondent of 5 April 2012 in terms of which the Respondent

declined exemption of a tax levy on any of the medical equipment being imported by the Applicant from the Republic of South Africa.

3. Pending determination by this Honourable Court as to whether the Applicant is liable for any import levy in these proceedings, directing the Respondent to permit the Applicant to import the medical equipment listed in annexure **"P1"** to the founding affidavit in one consignment without making any payment.

4. Alternatively to prayer 3 above and pending determination of these proceedings, directing the Respondent to permit the Applicant to import the medical equipment listed in annexure **"P1"** to the founding affidavit in one consignment against furnishing a bank guarantee for the sales tax levy on the following equipment.

4.1 3 Vela comprehensive ventilators;
4.2 3 Avea standard ventilators;
4.3 The Oscillator complete with accessories;
4.4 The Hilrom trauma stretcher;
4.5 Affinity 4 maternity bed;
4.6 4 transport incubators;
4.7 4 Hiport pendants;
4.8 10 Bassinette-Panda

5. That prayers 3 and 4 operate as a Rule Nisi with immediate and interim effect returnable on a day to be determined by this Honourable Court.

6. In the event of this Honourable Court finding that there is no basis for the review, correction and setting aside of the decisions of the Respondent as set out above, compelling the Respondent to permit the Applicant to import, without any tax levy, the medical equipment reflected in annexure "**P1**" to the Applicant's founding affidavit.

7. Directing the Respondent to pay the Applicant's costs of the application at attorney-and client scale.

8. Granting the Applicant any further or alternative relief."

[15] It is on record that on the same 3rd May 2012, the 1st Respondent made an interlocutory application for stay of the proceedings under Case No. 805 pending payment of the previous costs under Case No. 691/12. **Annandale J** consequently ordered the parties to taxation of a bill under the previous Case No. 691/12. The order was reduced into writing and served by 1st Respondent upon the Appellant on the 4th May 2012. The Appellant thereafter prepared its own similar written

representation of the order and also served it on the 1st Respondent. Thereafter, a bill of taxation was presented before the taxing master.

[16] It is on record that the proceedings under Case No. 805 ran its full course and terminated with judgment against the Appellant. It was in the wake of the judgment in Case No.805 that the Appellant proceeded to launch this appeal against the decision in both Case No. 691 and Case No.805, thus eliciting the cries of the 1st Respondent via the points taken *in limine.*

[17] Having carefully considered the totality of the facts and circumstances of this case, I agree with **Mr Ndlovu** that the Appeal pursuant to Case No. 691 is defeated by the provisions of Section 14 (1) of the Act which state as follows:-

> "14 (1) An Appeal shall lie to the Court of Appeal
>
> (a) From all final judgments of the High Court; and
>
> (b) By leave of the Court of Appeal from an interlocutory order, an order made exparte or an order as to costs only."

[18] I agree in toto with **Mr Ndlovu,** that the decision dismissing Case No. 691 on the premises of lack of urgency was purely interlocutory in nature and did not define the rights of the parties. In this regard **Mr Ndlovu** contended as follows in paragraph 7 of the 1st Respondents Amended Heads of Argument:-

> "7 The 1st Respondent states that the decision of the Court a quo, and based on the principles enunciated above, was a Ruling and further interlocutory in nature for one or more of the following reasons.
>
> (a) The application was dismissed, not on the merits, but on a procedural technicality.
>
> (b) The Court a quo did not define the rights of the parties, the merits were not decided upon
>
> (c) The Appellant's rights to seek the same prayers, within the very same Court and / or Court of Co-ordinate jurisdiction (at the High Court) was simply not eroded. The Appellants prayers were not disposed off,
>
> (d) The ruling was simply one of procedural house keeping and in which the Court simply disallowed the applicant use of a certain procedure, being denial of the sought circumvention of the rules governing time limits and

services; The same was certainly not definitive of any of the rights of the parties nor was the relief sought in the main decided upon; The Court simply closed the slim door entitling admission by way of urgency.

(e) Appellant, re-launched the same application seeking substantially the same relief and at the very same High Court although under a different case number (805/12) and as such even then (under 805/12) the plea of Res judicata was never made an issue, not even by the Court *mero motu*,

(f) The ruling therefore under the case 691/12 (which did not dispose even in the slightest sense or deal with the rights of the parties) would, and before a different Judicial Officer within the same Court of first instance (High Court) be susceptible to change and such Judicial Officer hearing the merits, viz a determination of the definitive rights of the parties, would have come to any decision (perhaps even granting the application) different from that issued under 619/12. Such ruling under Case 691/12 was therefore not a judgment appealable as of right but was simply a ruling on a procedural aspect viz on urgency".

[19] I respectfully subscribe to the foregoing propositions. I adopt them as mine. **Mr Dlamini's** contention that just because the Court *a quo*

dismissed the application in Case No. 691/12, entitled it to appeal as of right against same has no merits. For such a dismissal to be appealable as of right, it must be a final and definitive judgment or order of the Court that determined the rights of the parties on the merits based on the substantive reliefs sought in the Court *a quo*, not an interlocutory order premised on procedural or technical grounds with no bearing on the merits of the case.

[20] As the Court stated in **Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd, 1948 (1) SA 870.**

> "It is also well established that every ruling of a Court during the progress of a suit does not amount to an order. The Court must be duly asked to grant some definitive and distinct relief before the matter which raised preparatory or procedural question can properly be called an order.
>
> Stated somewhat differently, a decision is a ruling if it is one which does not affect the relief sought in the main action.
>
> A ruling is the antithesis of a judgment or order. It is a decision which is not definite of the rights of the parties nor does it have effect of disposing of at least a substantial portion of the relief

claimed in the main proceedings. Rulings are not appealable unless permitted by statute.

[21] Similarly, in **Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (A) SA 569 (A) t**he Court held as follows:-

> "A dispute between litigants has a final and definitive effect on the main action that it is as such judgment or order
>
> A mere preparatory or procedural order would not be such a decision. It would be an interlocutory order."

[22] Furthermore, **Blacks Law Dictionary** says the following about interlocutory orders:-

> "An order that relates to some intermediate matter in the case, any order other than a final order. Most interlocutory orders are not appealable until the case is fully resolved. But by rule or statute, most jurisdictions allow some types of interlocutory order (such as preliminary injunctions and class-certification orders) to be immediately appealed."

[23] The dismissal of Case No. 691 on the point on urgency was only a procedural issue which dealt with whether or not the Appellants should be allowed to jump the queue and be heard on merits on the premises of urgency. It did not dispose of the merits of the case thus giving the Appellant the right to re-launch same under Case No. 805/12.

[24] **Mr Dlamini's** contention that Case No. 691 and Case No. 805 dealt with different issues is clearly misconceived. I have hereinbefore detailed the reliefs in those two cases in paragraphs [10] and [14] above. A close reading of the reliefs sought in those paragraphs will show clearly that they are substantially the same. Therefore, not being a final order, the decision in Case No. 691 did not preclude the Appellant from re-launching under Case No. 805.

[25] In the light of the totality of the foregoing, it follows that the Appellant was required to seek the leave of this Court before launching the appeal in Case No. 691/12 in compliance with Section 14 (1) of the Act. This provision is a mandatory command. It is not

discretionary. No such leave is sought which renders this appeal incompetent. We cannot go against such clear words of statute.

[26] A similar scenario like *in casu* presented in the case of **Minister of Housing and Urban Development v Sikhatsi Dlamini and Others Supreme Court Case 31/2008.** The Court found that the decision of the Court *a quo* was not final but interlocutory therefore the appeal was premature. Leave was required to appeal but was not sought. The appeal was therefore struck off with costs.

[27] The words of **Ramodibedi JA** (as he then was) in paragraphs [32] and [33] of the decision referred above, are germaine in these circumstances. His Lordship stated as follows:-

> "[32] The position then is that the appellants have sought to appeal against an interlocutory order of **Maphalala J** without leave of this Court. In terms of Section 14 (1) of the Court of Appeal Act, it is not competent to do so.
>
> [33] It is an indisputable fact that the High Court has not yet dealt with the merits of the main application. It follows that the appeals in Case Number CA 31/08 and CA 32/08 have been

brought prematurely. As such they fall to be struck from the roll."

[28] See also **Melusi Qwabe N.O. and Another v Sabelo Masuki N.O. Appeal Case No. 34/2007.**

[29] More to the foregoing, is that I agree with the 1st Respondent that by its conduct, the Appellant clearly acquiesced to the decision in Case No. 691 and thus perempted its right of appeal.

[30] I say this because it is an established principle of the Civil Law that a person who has acquiesced in a judgment cannot thereafter appeal from it. The right of appeal is said to be perempted.

[31] In the case of **Samancor Group Pension Fund v Samancor Chrome and Others 2010 (4) SA 540 (SCA) at paragraph [25],** the Court stated this position of the law in the following terms.

Doctrine of Peremption

[25] In **Genticuro AG v Firestone SA (Pty) Ltd, Trollip J** said:-

> The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order."

> See also **Natal Rugby Union v Gould. In Standard Bank v Estate Van Rhyn Innes CJ, said:**
> "if a man has clearly and unconditionally acquiesced in and decided to abide by the judgment he cannot thereafter challenge it"

[32] Furthermore, **Solomon JA stated as follows in Hlatshwayo v Mare and Deas 1912 AD 242 at 253**

> "---when once a party to an action has done an act from which the only reasonable inference that can be drawn by the other party is that he accepts and abides by the judgment, and so intimates that he has no intention of challenging it, he is taken to have acquiesced in it."

See **Dabner v SA Railways and Harbours 1020 AD 583 at 594.**

[33] It is worthy of note that the foregoing principles were acknowledged as applicable in this jurisdiction by the erstwhile Court of Appeal in

the case of **Bhekiwe Vumile Hlophe v The Standard Bank of Swaziland Limited Appeal Case No. 13/2005.** In that case **Tebbutt JA** said the following:-

> "The doctrine of peremption of an appeal was discussed in a detailed and well researched judgment by the **Zimbabwe Appellate Division in Cohen v Cohen 1980 (4) SA 435 (Z.A.D**). In it **Fieldsend CJ** who wrote the judgment referred to early South African cases in which the doctrine had been considered viz **Bongers v Ekstein 1908 TS 910, Clarke v Bethal Co-operative Society 1911 TPD and Hlatshwayo v Mare and Deas---** in which both the Bongers and Clarke cases were referred to. In Hlatshwayo the South African Appellate Division accepted that the doctrine derived from the Civil Law adopted into the Roman Dutch Law, that a person who had acquiesced in a judgment cannot thereafter appeal from it, the rule having been laid down in a passage in the Code.--- Thus, as it is, a principle of Roman-Dutch Law, it would also apply in Swaziland where Roman-Dutch Law is the Common Law of this country---. It is my view from the aforegoing that the correct approach which should be adopted in this country to the doctrine of peremption is that any party seeking to bar an appellant from pursuing an appeal on the basis of peremption must satisfy the onus of establishing that the appellant's conduct is such that the only reasonable inference that can be drawn from it is that the appellant with full knowledge of his or her right of appeal has abandoned that right---. It requires an unequivocal abandonment by the appellant of his or her right of appeal, with full knowledge of that right."

[34] *In casu,* the Appellant who has all through been represented by Counsel was fully aware of its right to appeal the decision of **Maphalala PJ** dismissing Case No. 691/12 on grounds of lack of urgency. Rather than launch such an appeal with the leave of the Supreme Court, the Appellant not only acknowledged **Annandale J's** decision that ordered the parties to Taxation of bill pursuant to the said dismissal, by preparing its own order thereto and serving it on the Appellant, but it modified its papers and effectively re-launched the reliefs sought in Case No. 691 under two application. The first one being under the same Case No. 691 which was placed before a different Judicial Officer from **Maphalala PJ** and then subsequently Case No. 805, as I have already abundantly demonstrated in this judgment. Appellant appeared to be quite content with the state of things until it was defeated in Case No. 805. That was when it suddenly woke up and launched this appeal against both decisions.

[35] I agree with **Mr Ndlovu** that the conduct of the Appellant in this regard clearly shows that it intended to abide by the orders of

Maphalala PJ and thus deprived it of its right of appeal against the decision in Case No. 691.

[36] In the result from the totality of the foregoing, the appeal against Case No. 691/2012 therefore fails and is dismissed accordingly with costs.

[37] I now turn to Case No. 805/2012.

[38] The grounds upon which the appeal against that decision is predicated are as follows:-

> "4. The learned Judge erred in fact and in law in ordering the Appellant to pay the 1st Respondent's costs of the application in the Court *a quo*.
>
> 5. The learned Judge erred in law and in fact in not finding that there were necessary requisite formalities that had to be settled between the Appellant and the 1st Respondent's before the Appellant could transport the medical equipment that is the subject matter of these proceedings
>
> 6. The learned Judge erred in his failure, whether meaningfully or at all, in dealing with the Appellant's genuine apprehension about compromising the functionality of the

medical equipment if import formalities were not settled prior to transporting the said equipment.

7. The learned Judge erred in law and in fact in admitting as evidence or being influenced by, a letter addressed to the Appellant's attorneys by the Respondent handed up from the bar by the 1st Respondent's Counsel.

8. The learned Judge erred in law and in fact in not finding that the 1st Respondent was bound by the agreement it had voluntarily entered into with the Appellant in terms of which the Appellant was to import the medical equipment in one consignment against furnishing a guarantee for tax levies on the medical equipment the 1st Respondent had maintained was not exempt from tax.

9. The learned Judge erred in law and in fact in not finding that the 1st Respondent's actions were arbitrary and inexplicabe except on the assumption of *mala fides* or ulterior motive.

10. The learned Judge erred in fact and in law in ordering the Appellant to pay the 1st Respondent's costs of the application in the Court *a quo*.

11. The learned Judge erred in not granting the relief sought by the Appellant in the Notice of Motion in the Court *a quo.*

[39] This appeal is launched against the decision of **M Dlamini J** rendered on the 11th of May 2012 in Case No. 805/2012. The written judgment of the Court which was handed down on the 4th of June 2012, appears on pages 163 to 169 of the book. In paragraph [17] of that decision the Judge *a quo* held as follows:-

> "It is on the aforegoing that I dismissed Appellants application of the 11th of May, 2012 and ordered Applicant to pay costs on attorney-client-scale.''

[40] The record also demonstrates an abbreviated Court order of the same judgment of the Court *a quo*, which was drawn up on the 14th day of May 2012 and states as follows:-

> " 1. No order as to the Applicants Application.
>
> 2. That the Applicant is entitled to exemption as per the Regulation Under VAT Act 12 of 2011.
>
> 3. That the Applicant pays the costs of this Application at the scale of attorney and own client."

[41] When this appeal was heard, we interrogated **Mr S K Dlamini** who appeared for the Appellant on the need for the appeal against the merits of the judgment *a quo*, in view of the fact that paragraph 2 of the drawn up order was clearly in favour of the Appellant. **Mr Dlamini's** response was that the written judgment of the Court *a quo* contradicted the drawn up order, therefore the need for clarity by this Court.

[42] I do not think I can subscribe to **Mr Dlamini's** proposition. In my view what the Appellant embarked upon in the appeal against the merits of the judgment *a quo* is an academic exercise in futility and it is hoping to drag this Court along with it.

[43] In coming to the above conclusion, I have taken cognizance of the chronology of the resume of Case No. 805/12 which is aptly captured in paragraphs [1] to [6] of the impugned decision. It is apposite for me at this juncture to regurgitate same hereunder:

> "1. The event leading to the application before Court unfold in the following fashion.

The Applicant obtained a bank loan to purchase a number of equipments for its child and adult care unit sometime in November 2011. From the onset, the Applicant approached the Minister of Finance, requesting exemption from sales tax on importation of the equipment under the repealed Tax Act. The Minister responded by advising that some of the equipment listed in Applicant's schedule were not entitled to tax exemption. He further advised the Applicant to approach Respondent for details of the items which were liable and non-liable to tax. It would seem that Applicant by correspondence dated 3rd February, 2012 applied to the Respondent for tax exemption of the entire consignment. This is clear from a correspondence marked annexure **P4** where Respondent advises the Applicant that its request for tax exemption had been declined. Respondent also advised the Applicant of the levy due as it states at its paragraph 3.

"*Please make arrangements for the payment of the sales tax due (14% on the costs, insurance and freight value of the goods) upon importation.*"

2. Respondent further states:

"You are free to revert to this office should you require further assistance or clarifications."

3. This correspondence was dated 24th February 2012. It would appear that Respondent did not accept the advice as outlined in both correspondents. It instead engaged its attorney who in turn took up the Respondent on the same issue. Nothing much turned out on Applicant's attorneys endeavor to have their client's goods exempted from tax levy.

4. While Applicants attorneys were making frantic effort to obtain exemption from the respondent, the Sales Tax Act which obliged Applicant to pay tax was replaced by the VAT Act which came into force on 1st April 2012.

5. It is common cause between the parties that under the VAT Act applicant's goods were not taxable. It could be noted that at all material times Applicant had not brought the goods to the point of entry. It was Applicant's contention that it could not proceed to have the goods at the border without Respondent explicitly indicating that Applicant was exempt from tax. In fact, Applicant demanded Respondent to issue a "tax exemption" certificate. Even during the advent of the VAT Act, Applicant continued with its demand. It would seem that Respondent ignored Applicant. It was upon this that Applicant moved an urgent application on 30th April 2012 seeking for an order compelling Respondent to issue a "tax exemption certificate". Respondent raised a point of law and my

brother **Maphalala P.J.** held in favour of Respondent. The matter was enrolled before me on the pending merits.

6. Respondent did not file any answering affidavit but raised a point of law to the effect that in terms of the recently promulgated VAT Act, medical equipment were exempt from tax levy and that the document demanded by Applicant is not provided for under any law and therefore does not exist.

[44] It is clear on the record that the whole decision before **M**. **Dlamini J** was predicated on the point taken *in limine* by the Respondents as to whether the Appellant could validly approach the Court for the redress it sought *a quo*, in view of the advent of the newly promulgated Value Added Tax (VAT) which by Section 13 thereof expressly exempt the Appellant from taxes on importation of its medical equipment. **M Dlamini J** held as follows in clear and unambiguous language in paragraph [10] of the assailed decision.

> "It would seem to me therefore in the light of the proceeding averments by Applicant, that Applicant was fully aware that the new legislation exempted its goods from such tax levy and therefore was not justified in coming to Court in the absence of specific allegation

> that the Respondent had blocked or threatened an embargo over its goods when passing through. With due respect to Counsel for Applicant, Applicant had no basis for lodging the present application. If anything at all, Applicant's application was premature. I say this because Applicant ought to have known as it has in fact demonstrated such knowledge that the law was in its favour"

[45] It was premised on the foregoing findings, that the Court *a quo* dismissed the Appellants case. **M. Dlamini J** in her written judgment and prior to dismissing the application, therefore clearly recognized the fact that the Appellant was entitled to exemption from tax for importation of its medical equipment as per the Regulation Under VAT Act 12 of 2011. This state of affairs clearly aligns the written judgment with the abbreviated orders contrary to **Mr Dlamini's** contention.

[46] The Appellant criticized the Court *a quo* for failing to advert its mind to the fact that prior to raising the points *in limine*, the 1st Respondents position was that the Appellants goods were not exempt from tax as is extant from several letters between the parties. That the matter was not heard until 11 May 2012 and there was still neither

communication that the Appellant's goods were exempt nor withdrawal of 1st Respondent's opposition to the Appellant's application. Therefore, the Court *a quo* was wrong in paragraph [10] of its decision to find fault with the Appellant coming to Court when the VAT Act unambiguously exempted the goods Appellant sought to import. The Court a quo was in the same vein also criticized for its findings in paragraph [5] of the assailed decision, that it is common cause between the parties that the Appellant's goods are exempt from tax levy under the VAT Act.

[47] In my view, it is immaterial what transpired between the parties before the matter got to Court. The paramount factor to my mind is that the VAT Act came into effect on the 1st of April 2012. The Appellant launched its application on the 30th of April 2012. The application was clearly caught up by law.

[48] On the facts, I cannot therefore fault the Court *a quo* for refusing to engage in an academic exercise by proceeding to deal with the merits of the case in the face of the VAT Act that clearly granted the Appellant right to the reliefs sought. The issues which the Appellant

raises regarding the alleged *mala fides* of the 1st Respondent can only go to the question of the scale of costs to be awarded and not to the merits of the case.

[49] Similarly, the question of the import formalities of transporting the said medical equipment is one that will be regulated by the VAT Act itself and not by an order of the Court. It will only come to fore when the actual importation of the goods takes place and will be resolved between the parties.

[50] Furthermore, the contention that the Court *a quo* erred in not ordering the 1st Respondent in the alternative to enforce an agreement it allegedly concluded with the Appellant on 30 March 2012, in terms of which the Appellant's medical supplies would be imported in one consignment (including both exempt and non-exempt items as classified by 1st Respondent) without paying cash against furnishing a guarantee for the payment of non-exempt items, cannot stand. I say this because that relief was overtaken by events and therefore naturally fell away when the Court *a quo* dismissed the application based on the fact that it was caught up by the VAT Act which in any

event exempt the Appellant from tax in respect of the medical equipment sought to be imported. This is also clear from the fact that in this appeal the Appellant only sought that prayers 2,3 and 7 of the Appellants claim in Case No. 805 be granted.

[51] I now turn to the issue of costs which the Court *a quo* ordered on the punitive scale of attorney-and-client costs.

[52] It is the Appellant's position that the Court *a quo* erred when it mulcted it with punitive costs based on the alleged erroneous findings that it was common cause between the parties that the goods were exempt by the VAT Act and that the Appellant was therefore at fault in coming to Court when the VAT Act unambiguously exempted the goods it sought to import. **Mr Dlamini** contended, that in coming to the foregoing conclusions the Court *a quo* failed to advert its mind to the unchallenged evidence before it, that the 1st Respondent prior to launching its Notice of points of Law *a quo*, insisted all through the negotiations between the parties, and even in the face of the Vat Act, that the medical equipment which the Appellant sought to import were not exempt. **Mr Dlamini** submitted that since the 1st Respondent

failed to file an answering affidavit controverting the facts alleged by the Appellant in his affidavit, the Court *a quo* thus misdirected itself in finding that the Appellant was not entitled to approach it for redress and thus mulcted it with the punitive costs.

[53] Let me say it straight away here that I do not agree with the argument that the mere fact that a party did not file an affidavit in opposition to an affidavit in support of motion served on him should be taken to mean that he has conceded the application. I say this because in a trial by affidavit evidence, a party on whom an affidavit is served, need not file an affidavit in opposition or in reply thereto:-

1) If he or she intends to rely on the facts in the affidavit served on him as true and other facts in the other records of the Court in the substantive case as a whole or

2) If the affidavit served on him contains facts that are self contradictory or unreliable or

3) If he or she intends to oppose the application only on grounds of law.

[54] It follows therefore that though the unopposed averments are taken as established, the Respondent was still entitled to oppose the application on the facts in the affidavit in support as well as facts in the other records of the proceedings before the Court.

[55] The Court *a quo* was also entitled to consider the totality of the facts serving before it, in order to come to a just decision.

[56] Now, the question here is, did the Court *a quo* err in awarding costs on the scale of attorney-and-client costs against the Appellant?

[57] Generally, the question of costs lies in the discretionary bossom of the trial Court. This is however not an arbitrary or capricious discretion. It is one which the Court is required by law to exercise judicially and judiciously.

[58] A judicious exercise of discretion takes into consideration the peculiar facts and circumstances of the particular case and a judicial exercise of discretion takes cognizance of the law. Whether the discretion was exercised judicially and judiciously would thus be determined from the reasons for awarding costs. Once the discretion is properly exercised, an appellate Court will be disinclined to interfere with it except where there has been a miscarriage of justice.

[59] It is also the jurisprudential accord that attorney-and-client costs is one which the Court views with disfavor as it is loath to penalize a party who has lawfully exercised his right to obtain a judicial decision in any complaint he might have. The law therefore cautions that this scale of costs should be awarded only where there are compelling factors justifying it. What will constitute compelling factors justifying it will depend on the peculiar facts and circumstances of each case.

[60] Case law has however identified some of the factors that would qualify as follows:-

- abuse of process of Court,

- vexatious or unscrupulous conduct on the part of the unsuccessful litigant,
- absence of *bana fides* in conducting litigation,
- unworthy, reprehensive and blameworthy conduct,
- an attitude towards the Court that is deplorable and highly contemptuous of the Court,
- conduct that smarks of petulance,
- the existing of a great defect relating to proceedings,
- as a mark of the Courts disapproval of some conduct that should be frowned on ,
- where the conduct of the attorney acting for a party is open to censure.

See **Jomas Construction (Pty) Ltd v Kukhanya (Pty) Ltd Civil Appeal No. 48/2011 para 16 Silence Gamedze and Others v Thabiso Fakudze Civil Appeal No. 14/2012.**

[61] In the light of the aforegoing principles, I do not see how **M Dlamini J** could be remotely faulted for awarding costs on the punitive scale *a quo*. I say this because her Ladyship was well versed

with the guiding principles in awarding this scale of punitive costs. She recited these principles in extenso in paragraphs [11] to [14] of the impugned decision. Thereafter, she took cognisiance of the dictum of **Innes CJ in Geldenhuys v Neethling v Geuthin 1918 AD 426 at 44 1**, where the learned Chief Justice declared as follow:-

> "After all Courts of law exist for the settlement of concrete constroversies and actual infringement of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

[62] It was after canvassing the principles that **M. Dlamini J** applied them to the facts of the case before her and concluded as follows in paragraph [15]

> "it is clear that there was no "*concrete controversy*" *or actual infrignment of rights*" to justify applicant's application herein. Its *"reprehension"* as alleged in its founding affidavit at paragraph 57.2 is baseless in the absence of clear avernments that the respondent has frustrated its passage"

[63] On the facts of this case, I cannot see any misdirection by the Court

a quo on the question of costs.

[64] I say this because it is obvious that the Appellant was well aware of the existence of its rights of exemption pursuant to Section 13 of the Regulation to the VAT Act. This is clear from paragraph [6] of its affidavit *a quo*, where it stated as follows:-

> "This is an application to compel the Respondent to permit the Applicant to import medical equipment from the Republic of South Africa without any tax levy as envisaged by the Value Added Tax Act (VAT Act) in particular Section 13 of the Regulations promulgated there under. This application also seeks to compel the Respondent to process the formalities that will enable passage of the aforesaid medical equipment into the Kingdom of Swaziland and finally into the Applicants Clinic in Manzini without impediment"

[65] In the light of the clear knowledge of its rights via the VAT Act, I agree entirely with the Court *a quo*, that there was thus no controversy that required resolution between the parties that would justify the

proceedings which the Appellant launched before that Court. The question of the alleged *mala fides* of the 1st Respondent in insisting

that the Appellant was not exempt would hold water if the Appellant had taken steps to bring the said medical equipment into Swaziland as it was entitled to do and the 1st Respondent constituted an impediment in its path. This is however not such case.

[66] The established facts are that the Appellant approached the 1st Respondent for tax exemption, under the old sales tax. The 1st Respondent agreed to grant the exemption for some of the goods. Appellant instead of complying began to insist on exemption of all the goods, which resulted in it launching three applications on urgency basis in 3 different Courts *a quo*. Even in the face of the VAT Act which exempted it from the controversial tax, it still persisted in litigation. Appellants conduct was thus worthy of the Court *a quo's* mark of disapproval.

[67] Having correctly applied the guiding principles in ordering the punitive scale of costs, I find no misdirection in the decision of the Court a quo that would justify an interference by this Court.

[68] In the light of the totality of the foregoing the Appeal against Case No. 805/2012 fails in its entirety.

Conclusion

[69] On these premises I make the following order.

[70] That the appeals against Case No. 691/2012 and Case No. 805/2012 are hereby dismissed with costs.

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E. A. OTA
JUSTICE OF APPEAL

_____

I agree

DR S. TWUM
JUSTICE OF APPEAL

_____

I agree

M. C. B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant : Mr S K Dlamini

For the Respondent : Mr T M Ndlovu