IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Appeal Case No. 16/2015

In the matter between:

THE COMMISSIONER GENERAL: SWAZILAND REVENUE AUTHORITY **1st Appellant**

SWAZILAND REVENUE AUTHORITY **2nd Appellant**

and

MICHAEL M. RAMODIBEDI **Respondent**

Neutral citation	:	THE COMMISSIONER GENERAL S.R.A. AND MICHAEL M. RAMODIBEDI (16/15) [2016] SZSC 01 [30 JUNE 2016]
Coram	:	CLOETE AJA, MAGAGULA AJA and MAPHANGA AJA
For the Appellants	:	MR S. MDLADLA
For the Respondent	:	NO APPEARANCE
Heard	:	04 MAY 2016
Delivered	:	30 JUNE 2016

Summary **:** ***Income Tax: rate at which a resident taxpayer is liable to pay tax: the meaning of "gross income" means total amount received by taxpayer including from contract of employment.***

JUDGMENT

CLOETE -AJA

PRELIMINARY

[1] 1. There was no appearance for the Respondent in the matter.

2. On file was a Notice of Withdrawal as attorneys of record of Mbuso E. Simelane and Associates with proof that it had been served on the attorneys for the Appellants by hand delivery and upon the Respondent by registered mail on 21 April 2015 to, presumably, the last known address of the Respondent.

3. At the hearing of the matter in the November 2015 session, this Court ordered the Registrar to arrange to effect service on the Respondent.

4. The Registrar handed up an Affidavit from Sifiso Gamedze, who on the instructions of the Registrar travelled to the home of the Respondent in Ladybrand, South Africa together with Sergeant Zakhele Eric Lokotfwako on 29 April, 2016 where they attempted to serve Notice on the Respondent of the hearing of this matter on 04 May 2016 by advising the Respondent's wife accordingly but the Respondent instructed his wife not to accept service and that the document should be served on his Attorney, Mr Mnisi at the Gables.

5. The said Mnisi refused to accept service stating that he was not acting for the Respondent.

6. In the interim the Attorney for the Appellant obtained an Order to serve notice on the Respondent by way of *edictal citation* and handed proof of publication on 23 March 2016 of notice to the Respondent in the Sowetan

Newspaper circulating in South Africa advising that the matter would be heard in the May 2016 session.

7. In the absence of any representations and without any further appointment of attorneys or any communication from the Respondent, the Court proceeded to hear the matter before it.

BACKGROUND IN BRIEF

[2] 1. All the facts of the matter appear in the Record of Appeal and the Judgement Court a quo dated 26 February 2015.

2. The Respondent was employed by the Government of Swaziland as the Chief Justice of Swaziland, and based in Swaziland, in terms of a written Contract of Employment which took effect on 26 February 2010 and terminated on 31 December 2012.

3. The salary and benefits of the Respondent were set out in the said Contract and included a provision at clause 2.4 that he would be entitled to:

"5.1 ***a gratuity at the rate of twenty-five percent (25%) as provided in clause 8.2 below"*** **and the provisions of 8.2 provided that**

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

4. The total salary drawn by the Respondent for the period 26 February 2010 to 31 December 2012 amounted to E 1 561,221-27 and as such the 25% gratuity he was entitled to amounted to E 390,305-32.

5. On 8 February 2013 the First Appellant issued a Tax Deduction Directive to the Respondent in terms of which he was, inter alia, to comply with the Directive by deducting employees tax at the rate of 33% from the said gratuity and was subsequently followed by a letter from

the Second Appellant on 14 May 2013 providing full and comprehensive reasons for the ruling made in the following terms:

> ***"6.1 Sections 59 and 59A of the Income Tax Order, 1975 (as amended) do not apply in this case as the Chief Justice (Respondent) does not fall within the definition of a "non-resident" person;***
>
> ***6.2 The gratuity pay-out is accordingly taxable in terms of Section 7 of the Income Tax Order and the Second Schedule of the Income Tax Order;***
>
> ***6.3 The decision to tax the gratuity income at 33% as a resident taxpayer, is therefore confirmed".***

6. The Respondent then noted an appeal against the decision of the First Appellant.

7. In addition to dealing with the merits at the hearing of the matter, the Appellants, in that Court raised various points *in limine* including that:

7.1 In terms of Section 52 (1) of the Income Tax Order any objection to an assessment has to be made within 21 (twenty one) days of the date of assessment or within such further time as the Commissioner may for good cause allow and such objection shall be in writing and specify in detail the grounds on which the objection is made. According to the facts the Respondent failed to comply with those provisions and failed to exhaust internal remedies as provided for in the Order.

7.2 That due to non-compliance of Section 54 (6) of the Income Tax Order which provides for at least 21 (twenty one) days notice for the hearing of an Appeal, the Appellants received only 2 (two) days notice.

7.3 That Simelane J should have recused himself due to his direct or indirect involvement in the matter in his capacity as the High Court Registrar.

8. The Court *a quo* handed down its Judgement on 26 February 2015 and inter alia found that:

8.1 He refused to recuse himself for a variety of reasons;

8.2 The argument that the matter had been enrolled on short notice had no substance and that his refusal to postpone the matter was reasonable;

8.3 The payment of gratuity is a contractual obligation and not a voluntary award and declared that the gratuity of the Respondent was not taxable at all;

8.4 The Court also found that the taxation of the gratuity as well as the tax rate of 33% in general is unconstitutional and accordingly declared that the Respondent was only liable for taxation at 15% and not 33%.

THE GROUNDS OF APPEAL

[3] 1. Whether Simelane J ought to have recused himself.

2. Whether the matter ought to have been postponed by the Court *a quo* in the light of short notice of the Appeal.

3. Whether the Appeal lodged in the Court *a quo* by the Respondent should have been dismissed due to the failure to exhaust internal remedies.

4. Whether the gratuity received by the Respondent was taxable and if so at what rate?

5. Whether the Court *a quo* was entitled to declare, *mero motu* that the tax payable by the Respondent in general should be limited to 15%.

6. Whether the Court correctly held that the Appellants should pay interest on the gratuity as ordered by the Court.

ARGUMENT BY COUNSEL FOR THE APPELLANTS

[4] 1. As regards the recusal application, Counsel referred the Court to various authorities, but for the reasons which will appear in the findings of this Court below, are not deemed to be relevant in the circumstances.

2. Similarly the Court was directed to various authorities relating to the issue of postponement and again with respect, these are not deemed to be relevant in the circumstances.

3. The same in our view applies to the third ground relating to the failure to exhaust internal remedies.

4. One of the real issues was whether the gratuity paid to the Respondent attracted taxation and if so at what rate and in that regard the following issues were correctly raised:

4.1 The relevant provisions of Section 7 of the Income Tax Order provide as follows:

"Meaning of gross income.

7. "Gross Income" means the total amount whether in cash or otherwise received by or accrued to or in favour of any person, excluding such receipts or accruals of a capital nature as arc not receipts or accruals referred to in paragraphs (a) to (r) herein in any

***year or period assessable under this Part from any source within Swaziland or deemed to be within Swaziland, and includes the following*-(Amended a. 9/1979, A. 22/2011).**

(a) ***any amount so received or accrued by way of annuity;***

(aa) ***the full value of any debt (other than debt of a capital nature) which accrues in the year of assessment but becomes payable after the end of that year of assessment; (Added A. 10/1991; Amended A. 7/1992.)***

(b) ***any amount, including any voluntary award, so received or accrued in respect of such services rendered or to be rendered; (Amended A. 6/2000)***

(c) ***any amount, including any voluntary award, so received or accrued:***

(i) ***in commutation of amounts due under any contract of employment or service;***

(ii) in respect of the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or of any appointment (or right or claim to be appointed) to any office or employment; (Replaced K.O.I.C. 2/2003);"

4.2 From the wording of Section 7 it is clear that "gross income" means the total amount received by any person and in fact goes further to say that it includes any amount received in respect of services rendered or due under any Contract of Employment.

4.3 The Court was referred to the Case of **S v Commissioner of Taxes 1959 (3) SA 455 (SR)** relating to what is understood under the words "*In respect of Service"* and quoted the following "*In the light of the definition of gross income in Section …… , tax is leviable on receipts "in respect of services rendered" whether or not due and payable under a Contract of Employment for Service"*.

4.4 Accordingly the salary and other benefits received by the Respondent are clearly in terms of services rendered in terms of an Employment Contract.

4.5 The Appellants accordingly correctly determined that the Respondent is liable for tax on the gratuity at the normal rate which applied at the time namely 33%.

4.6 This Court agrees with this argument and the Court *a quo* erred in finding that the gratuity of the Respondent was not taxable.

5. As regards the rate of tax payable by the Respondent:

5.1 The Court, seemingly relying on pages 27 to 29 of the Record before it, held that the Respondent had always been taxed at 15% and questioned why the Appellants were now seeking to tax him at 33%.

5.2 However it is clear that the documentation concerned relates to duties performed by the Respondent during 2006 and no details were furnished by the Respondent regarding his employment in 2006 and it is quite possible that during that period he had been appointed

on a temporary basis which would have had an effect on the rate of taxation deducted.

5.3 Although the Respondent may earlier have been recognised as a non-resident person as contemplated by Sections 59 and 59(A) of the Income Tax Order, which prescribed different rates, the situation changed when the Respondent was appointed to full-time employment as the Chief Justice of Swaziland based in Swaziland. As such he was clearly no longer a non-resident person in the eyes of the Income Tax Order.

5.4 The Notice of Appeal of the Respondent had no basis at law and was based on a bald statement that the Appellant wrongly overlooked the fact that he had for several years been charged at 15% without giving any specific details of the periods concerned or the basis on which he was employed.

5.5 The reliance of the Court *a quo* on the provisions of 141 (6) of the Constitution at paragraph [45] of the Judgement are clearly misplaced. The Directive of the First Appellant did not have the effect of varying the Respondent's condition of service.

5.6 The Court *a quo* accordingly erred in finding that the Respondent was not liable to be taxed at the rate of 33% of the gratuity sum.

5.7 This Court fully agrees with this proposition.

6. As regards the *mero motu* finding of the Court *a quo* relating to the Respondent only being liable for taxation at the rate of 15% in general:

6.1 was not based on any legal authority, was not pleaded by the Respondent in that Appeal and was a gross irregularity perpetrated by the Court *a quo*.

6.2 Ignored the decision of this Court in **The Prime Minister of Swaziland and Others v Christopher Vilakati and Others** which simply provides that a litigant cannot be granted any relief which he has not prayed for.

6.3 We fully agree with this argument.

7. For the same reasons as set out in the first and second grounds of appeal dealt with above, the issue of the order for payment of interest is of no consequence in this matter in the light of the Judgement granted by this Court.

ORDER OF THIS COURT

[5] 1. The Judgement of the Court *a quo* is overturned in its entirety and the Appeal of the Appellants is upheld with costs.

2. The Order of the Court *a quo* is substituted with the following Order:

"The Appellant's appeal against the First Respondent's decision on behalf of the Second Respondent dated 14 May 2014 is dismissed with costs".

R. J. CLOETE
ACTING JUSTICE OF APPEAL

I agree

J. S. MAGAGULA
ACTING JUSTICE OF APPEAL

I agree

C. MAPHANGA
ACTING JUSTICE OF APPEAL