



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.400/15

In the matter between:

DIESEL ELECTRIC SWAZILAND (PTY) LTD

Applicant

and

SWAZILAND REVENUE AUTHORITY

Respondent

Neutral citation: *Diesel Electric Swaziland (Pty) Ltd Vs Swaziland Revenue Authority (400/15) [2015] SZH 130 (17th July2015)*

Coram: Hlophe J

For Plaintiff: Mr. M. Thwala

For Defendants: Mr. N. Fakudze

Date Heard: 26 March 2015

Date Handed Down: Extempore on 26 March 2015

In writing on 17 July 2015

Summary

Application Proceedings – Review of respondent’s decision refusing to grant Applicant a Tax clearance Certificate allegedly on the grounds that he had some outstanding tax liability – Whether decision reviewable – Whether any irregularity committed by Respondent – Correspondence reveals that internal remedies not exhausted due to Applicant’s failure to meet Respondent to discuss matter – Application prematurely instituted – Application dismissed – Each party to bear its costs.

JUDGMENT

- [1] It is common cause that on the 24th October 2014 this court per Justice S. B. Maphalala PJ, handed down a judgment in which it dismissed the application under Case No. 574/2014. In the said application the current Applicant had in the main sought an order of this court interdicting the current Respondent from levying, demanding and or making an estimated tax assessment for the tax years, 2009, 2010, 2012 and 2013.
- [2] In its aforesaid Judgment this court had, in dismissing the application, found inter alia that the requirements of an interdict had not been met, and had dismissed the application with costs.

[3] The Applicant who was dissatisfied with the aforesaid judgment noted an appeal which is to this date still pending in court. It was while this appeal was still outstanding that the current Applicant noted a tender invitation application in one of the newspapers issued by the Government Garage commonly known as the CTA calling for the supply of Willard and Bosch Motor Vehicle Batteries. This being in the Applicant's main line of business, it decided to respond thereto. For such a decision to be put into effect however, Applicant needed to file a Tax Clearance Certificate, which it could obtain only from the Respondent with whom it was still involved in the incomplete litigation namely the appeal referred to above. The Applicant's desire to obtain a Tax Clearance Certificate was complicated by the fact that the matter pending before the Supreme Court related to a dispute over the payment of a tax liability found by the Respondent to be owing when the Applicant was of the view same had not been properly computed as certain payments made by it had allegedly been ignored in the said computation. These according to the Applicant would have immensely reduced the amount demanded as outstanding if implemented in the computation.

[4] Applicant made a written request to the Respondent by means of a letter dated the 5th March 2015 asking for a Tax Clearance Certificate to enable it file a Tender Application as the said certificate was one of the

mandatory documents to be filed together with the tender documents for the Applicant's tender application to be taken to be complete. It also revealed that the supply of the batteries sought in the tender invitation formed about 40% of its business and alleged it would be prejudicially affected if it lost the business opportunity concerned.

- [5] It is not in dispute that Section 69 (3) of the Income tax Order provides as follows with regards to the provision of a Tax Clearance by the Commissioner of Taxes:-

“A person requiring a Tax Clearance Certificate shall apply for such certificate either by himself or through his representative or agent to the Commissioner and a certificate granted under this Section shall state that no tax is outstanding against the person or that satisfactory arrangements have been made by such person with the Commissioner for the payment of outstanding tax:

Provided that, in addition to any other reasons, the Commissioner may refuse to issue the certificate if the tax payer has not rendered returns of income in respect of any year of assessment or part thereof”
(underlining mine).

[6] In its response to the Applicant's letter requesting the Tax Clearance Certificate concerned, the Respondent stated as follows in its letter dated the 12th March 2015.

Re: Application For A Tax Clearance Certificate

1. *The above subject matter refers, (sic) to your correspondence dated the 5th March 2015.*
2. *You (sic) request is hereby denied, after due consideration, for the reason that our records show that there is a tax liability of E4, 753, 536.25.*
3. *You are advised that you make arrangements to settle your liability in instalments, the terms of which may be discussed and agreed with our Debt Management Section's, Manager - Bheki Dlamini at bmdlamini@sra.org.sz, cell 76063169. Once an agreement has been concluded, Tax Compliance Certificate may be issued.*
4. *We trust you find the above to be in order.*

Kind Regards

Bongani Ntshangase

Director Domestic Taxes Field Operations

For: Commissioner General

- [7] It was as a result of this letter that the Applicant instituted these current proceedings under a Certificate of Urgency seeking *inter alia* an order of this court Reviewing Respondent's refusal to issue it with a Tax Clearance Certificate and another order directing the Respondent to forth with issue Applicant with a Tax Clearance Certificate. There was sought as well a costs order in the event of this application being unsuccessfully opposed.
- [8] In the Founding Affidavit deposed to on behalf of the Applicant by one Franco Colasuonno, it was contended that the amount said to be for the outstanding tax liability is not accurate because it allegedly ignored certain amounts transferred to certain suppliers which amounted to millions of Emalangi on their own. Certain documents said to be proving this fact were annexed to the application.
- [9] The Applicant contended further that the decision merited a review because the Applicant had failed to exercise its discretion fairly by refusing the Applicant's aforesaid request contrary to the provisions of the constitution as regards the right to fair administrative justice as well as in terms of the Principles of Common Law applicable against a person who exercised administrative power.

[10] It was submitted that the Applicant's application aforesaid had not received the Commissioner General's attention because among other considerations, whereas it had been meant for the Commissioner General himself, it had been dealt with by a junior officer, who had allegedly simply considered the records which revealed the alleged short fall of a sum of E4, 753, 536.25 and took it to mean that indeed that much money was owing and went on to advise the Applicant about where he should go to make settlement arrangements of the alleged outstanding amount and ignored the representations made after the appealed court decision which *inter alia* indicated that the amounts owed should be substantially reduced.

[11] In that regard, it was contended the officer who dealt with the application considered irrelevant considerations while ignoring the relevant ones and in that regard had failed to consider the recent evidence about the monies that had already been paid by Applicant which had not been taken care of when the alleged Income Tax Liability was initially computed.

[12] The Respondent therefore had allegedly failed to consider *inter alia* that the initial computation or figure said to be the Tax Liability due was part of the issues pending before the Supreme Court; and the fact that there was fresh documentation on what had been paid to suppliers still awaiting

the Respondent's consideration apparently so as to enable it come with a more realistic figure on what was being owed. Lastly it was argued that the Respondent seemed to have lost sight of and the fact that losing the business opportunity advertised by the Applicant would threaten its own existence as a business.

[13] The application was opposed by the Respondent who raised the points of lack of jurisdiction by this court to hear the matter as well as that of the Applicant having allegedly approached this court with dirty hands. The basis for the alleged lack of jurisdiction by this court was allegedly multifaceted; it being allegedly that jurisdiction had not specifically been pleaded in the Founding Affidavit; this court allegedly had no jurisdiction to issue an order that operated against the provisions of the Income Tax Order; that the evidence and issues the Applicant allegedly sought to introduce were issues that had already been decided by this court which was now *functus officio* and lastly that the issues being raised were allegedly *lis pendens* given that the Applicant had itself noted an appeal before the Supreme Court which was, still pending.

[14] On the contention that the Applicant was approaching this court with dirty hands, although not succinctly expressed, it is clear that the real contention is that although the latter acknowledged the existence of an order or judgment of this court operating against it, it had in its own words, not complied therewith yet it now expected this court to come to its rescue, which the law does not allow.

[15] In the merits, the essence of the respondent's contention is that, the Applicant is not entitled to the relief claimed because its account as a tax payer is in debt. A Tax Clearance, it is contended, would issue in terms of Section 69 (3) of the Income Tax order of 1975 in instances where no tax is outstanding or where even though some tax is outstanding satisfactory arrangements have been made by the "debtor" with the Commissioner for the payment of the outstanding tax.

[16] Although it could not be disputed that there was some outstanding tax liability against the Applicant, no satisfactory arrangements for the payment of same had been made with the Commissioner by the Applicant. This it was submitted disqualified the Applicant from obtaining a Tax Clearance Certificate. In the same vein there was no basis, it was argued, for the review sought in as much as there was no

irregularity committed by the Respondent resulting in the decision made be it at Common Law or in terms of Section 33 of the Constitution.

[17] It was argued further that quibbling the decision of the Commissioner on what was due by the Applicant did not entitle the latter to a stay the order or decision calling upon it to pay the outstanding tax and it did not matter that the issue was pending before the Supreme Court when considering the provisions of Section 55 of the Income Tax Order which provided that a party to a tax liability dispute should pay first and challenge the payment later, having to be content with a refund later if he was owed just as he may himself have to pay more of it is shown as at that stage that there were certain shortfalls due by him.

[18] Section 55 provides as follows, verbatim:-

“The obligation to pay and the right to receive and recover any tax chargeable under this order shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of the court under Section 56, but if any assessment is altered on appeal or in conformity with any such decision a due adjustment shall be made, for which purpose any amount paid in excess shall be refunded and any amount short paid shall be recoverable”

[19] The argument in this regard was obviously that it was wrong for applicant not to pay what was assessed to be owing by it as it is required by law to pay the amount found to be due by it only for it to argue later, which is when whatever amounts were paid when they should not have been would be refunded including short payments by it if any being paid to the Respondent.

[20] It was contended as well that because of the foregoing legislative provisions, the principles of administrative law on reviews as alluded to by the Applicant were not applicable in this matter.

[21] Lastly, it was argued on behalf of the Respondent that there were no irrelevant considerations by the Respondent's officer who dealt with the matter because whether or not to grant the Tax Clearance Certificate concerned was a matter of law which would be determined by whether or not there was any outstanding tax liability.

[22] It was agreed at the hearing of the matter that the points in limine be argued simultaneously with the merits of the matter for the court to decide whether it should be decided on the points in limine or on the merits themselves.

[23] Whereas it is true that the Applicant's application does not have a paragraph specifically dedicated to the allegations why this court does not have jurisdiction, I cannot agree that same should signal the end of this matter in Respondent's favour. It is proper pleading and very important that such a paragraph be included in the founding affidavit to avoid a possible unfavourable result in a befitting matter. In a matter like the present I however, have no doubt upholding this point would be tantamount to this court avoiding to grapple with the real issues as was observed in such cases as *Shell Oil Swaziland vs Motor World (PTY) LTD T/A as Sir Motors Appeal Case No....* I say this because it is clear from the allegations made that this court is the one having jurisdiction to deal with this matter considering that it is the one having original and inherent jurisdiction in such matters. Furthermore it is clear from all the facts pleaded that the cause of action arose within this court's jurisdiction. Consequently even though the Applicant's allegations may not realistically be meeting the perfect standard on pleading jurisdiction, it is not of such a nature in the circumstances of this matter as would warrant the dismissal of the application. Furtherstill, there is no prejudice suffered by the Applicant in these circumstances as a result of the failure to plead perfectly the requirements of jurisdiction.

[24] On the contention that this court lacks jurisdiction to issue an order violating the provisions of the income Tax Act, I cannot agree this court was being asked to grant an order violating such provisions. Firstly it is not specifically pleaded how the order sought would violate the statute concerned. It cannot be disputed that Section 69 (6) of the Statute concerned provides for the making of satisfactory arrangements with the Commissioner by the defaulting party for the payment of outstanding tax. To this end the law gives the Respondent a discretion on whether or not to grant the relief sought in the present circumstances.

[25] I therefore do not see why a determination by this court on whether the discretion concerned was exercised fairly or properly by the Respondent would then amount to a violation of the Income tax Order of 1975. It may be that if the legislation concerned refused the issuing of a Tax Clearance Certificate in instances where there was an outstanding tax liability and ending there, there would clearly be no discretion on the part of the Respondent. It simply cannot issue a Tax Clearance Certificate in such circumstances. This however is not what Section 69 (2) provides for. It provides the Respondent with a discretion. This being the case this point by Respondent cannot succeed as well and it should also be dismissed.

[26] It cannot be disputed in the matter before this court that the relief sought is a review of the decision of the Respondent refusing to grant Applicant a Tax Clearance Certificate and that compelling the Respondent to issue such a Tax Clearance Certificate to the Applicant. In the papers serving before me these issues are being dealt with herein for the first time and were not part of the initial application. I cannot see how this court is said to be functus officio in such circumstances. It may well be that there is an issue pending before the Supreme Court involving the same parties as those in this matter, but I cannot agree such an issue renders this court functus officio. I have already found that the Commissioner General or his officers did have a discretion to exercise. That being the case, it therefore lies with this court to determine whether or not the said discretion was properly exercised. It follows that the lack of jurisdiction by this court from the angle of this court being functus officio is also ill-conceived and cannot succeed and should be dismissed as well.

[27] I have already spelt out in the foregoing paragraph what this matter is about that is, a review of the decision refusing the Applicant a Tax Clearance Certificate as well as a mandatory interdict compelling the Respondent to issue Applicant such a certificate. I have also stated therein that these issues on the papers serving before me, are not shown to have at any stage served either before this court or even to be serving

before the Supreme Court. I therefore do not understand the basis for the contention that the issues pending before this court are also pending before the Supreme Court so as to ground or found the defence of *lis pendens* for the Respondent. It follows that there is no basis for the Applicant to have moved an application to the effect that its pending appeal be heard on an urgent basis before the Supreme Court so as to obviate this court dealing with the current matter when the same matter is pending before the Supreme Court as alleged by the Respondent.

[28] In law a matter becomes *lis pendens* if the same issues as are before court involving the same parties are already pending before another court. From the papers before me, it appears that the real issue for determination before the Supreme Court is whether or not the Respondent can be interdicted from levying, demanding or making an estimated assessment for the tax years referred to in the Applicant's application.

[28] The Tax Clearance Certificate issue is one brought about by the tender application's advert which is an issue not arising at all in the initial application whose judgment forms the basis of the appeal pending before the Supreme Court. Consequently the Respondent's point of *lis pendens* cannot succeed as well in my view and has to be dismissed.

[29] The Applicant, it was argued, approached this court with dirty hands or put differently, did not approach this court with clean hands. As indicated this point was not expressed with the elegance and/or clarity as was required of the Respondent. It suffices however, that there was a clear inference to the effect that notwithstanding the Applicant being aware there exists a judgment adverse to him or it, it was allegedly failing and or refusing to comply with same. The papers however do not spell out what the order said and how it was being contended the Applicant was failing to comply with it. The allegation is however that the Applicant is refusing to pay the outstanding Tax Liability, meanwhile it allegedly rushes to this court for it to grant it a remedy.

[30] It seems to me that there are two fundamental problems with this point. The first one is that this court has not been shown an order of this court served on the Applicant calling upon the Applicant to pay a certain amount as an outstanding tax liability. The judgment sought to be appealed against was about this court refusing to grant an interdict *inter alia* preventing the levying of an amount as outstanding tax liability and not about paying a certain specific amount, which would have founded an attack of the Applicant having approached this court with dirty hands. Secondly, I do not think that filing an appeal in exercise of a right by a

party can be taken to be a refusal by that party to honour an order of court.

[31] The executive part of the order of court simply dismissed Applicant's application after having noted that an interdict could not be granted because the requirements of such an interdict were not met. How then can the Applicant be said to be refusing to comply with an order of court in such circumstances? The clean hands doctrine, as this point is often called applies to matters where there is failure by a party to comply with a specific court order. See in this regard ***Photo Agencies (PTY) LTD v The Commissioner of The Swaziland Royal Police And The Government of Swaziland 1970 – 76 SLR 398*** at 407 where this court per Nathan CJ quoted with approval the following extract from the South African case of ***Mulligan vs Mulligan 1925 WLD 164*** at 167 – 168:-

“Before a person seeks to establish his rights in a court of law he must approach the court with clean hands where he himself, through his own conduct makes it impossible for the process of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests...were the court to entertain a suit at the instance of such a litigant, it would be stultifying its own processes and it would,

moreover, be conniving at and condoning the conduct of a person, who through his flight from justice, sets the law and order in defiance”.

[32] The question to ask in this regard is whether it has been shown that the Applicant has, through his own conduct made it impossible for the process of the court to be given effect to, because that is the only time he is forbidden or prohibited from asking this court to set its process in motion to protect his civil rights and interests. The answer to the foregoing question is that it has not been shown how the Applicant has, through his own conduct, made it impossible for the processes of the court to be given effect to. I therefore do not see how he can then be prevented or prohibited from asking this court to protect his civil rights and interests.

[33] The other reason why this point cannot succeed, I clarified above, is because it can never be said, in my view, that by exercising a right afforded it by law and appealing a judgment it rightly or wrongly does not agree with, it is taken to be doing an act, tantamount to making it impossible for the court's process to be given effect to. I have no hesitation in saying the conduct complained of as making it impossible

for the court process to be put into effect should be an illegal one, which the current one by the Applicant is not.

[34] It follows that for the foregoing reasons the Respondent's point of the alleged dirty hands by the Applicant cannot succeed and should also be dismissed.

[35] I indicated above, when summarizing the Respondent's case, that the case in the merits is whether it can be said that the Applicant is not entitled to the relief claimed in this application simply because he has an outstanding Tax Liability and whether it matters that no satisfactory arrangements had been made. It was contended by the Respondent that the Commissioner General had no discretion to exercise and that he was obliged to dismiss the Applicant's request for a Tax Clearance Certificate in the circumstances which was allegedly not reviewable. I do not agree with this statement. I have already found that the Respondent does have a discretion to exercise considering it can decide on the sufficiency of the arrangements to be made.

[36] Although there is now an apparent dispute on what the Tax Liability of the Applicant is, there does not seem to be a dispute that he in his own words acknowledges that some tax liability is due by him. I say there is a

dispute in this regard because the figure shown by the Respondent to be owing as a result of Applicant's failure to file tax returns for certain specified years is being challenged by the Applicant, who has filed with the Respondent certain documents which according to it, would drastically reduce the amounts allegedly owed by it. It is also true the Respondent has not made a decision about the Applicant's aforesaid claim that is whether as a fact the recently filed documents have a bearing on the tax liability outstanding. Were a mere tax Liability by a person in Applicant's position the only consideration on whether or not to grant a Tax Clearance Certificate, I think the Applicant's case would have come to an end upon Applicant's own acknowledgment that there was some outstanding Tax Liability, a fact apparent from the figure claimed by the Respondent and the nature of the dispute to it by the Applicant who alleges that some part of it was paid as proved by the documents recently filed.

[37] This however cannot be the case in my view, firstly because in instances where satisfactory arrangements for the payment of outstanding tax Liability have been made, then the Tax Clearance Certificate ought to be issued. From the papers filed of record this aspect of the matter has not been considered at all. It was argued by the Respondent's counsel at the hearing of the matter that although Respondent had, by means of the

letter dated the 12th March 2015, cited fully in paragraph 6 (six) hereinabove, called the Applicant to a meeting to discuss the said arrangements, the latter had not honoured such an invitation. Instead it had allegedly rushed to court by filing this application. The thrust of the Respondent's case was that the applicant's case should be dismissed on this point alone.

[39] The Applicant on the other hand contended that the letter in question had not realistically called upon it to a meeting to discuss satisfactory arrangements because the figure on the basis of which such arrangements could have been made between the parties was not yet certain and that the Respondent was calling upon it to make arrangements to pay the full amount it was disputing, which according to it left it with no option but to approach this court for the order sought.

[40] It appeared to me that this application was prematurely before this court. There had not been the exhaustion of local remedies in so far as the parties had not met so as to determine from such a meeting whether any satisfactory arrangements could be made. Whether the satisfactory arrangements were to be made on the figure suggested by the Applicant or that by the Respondent is an issue this court cannot know except that same would become crystal clear after the said meeting. From this

meeting this court, like the parties, will be able to know whether as a fact, satisfactory arrangements were being made or not and then be able to decide the crystal issue before it without having to speculate rightly.

[41] I do not want to accept that if the figure insisted upon by the Respondent is shown through credible evidence in their meeting to be inaccurate, the latter would be entitled to insist on the satisfactory arrangements to be made based on it and that it would then be entitled to insist on it. I have no hesitation that would amount to abuse of power which no entity would be allowed to resort to at any given point and would not doubt be reviewable

[42] In view of the fact that I was informed of the deadline for the tender application intended to be applied for by the Applicant as being on the next day from that on which the application was heard before me, taken together with the firm view I had formed as at that point, I dismissed Applicant's application and advised it to consider setting up an urgent meeting to discuss the matter of the satisfactory arrangements or otherwise, and I ordered that each party had to bear its own costs. I had clarified my reasons would follow in due course and this text comprises such reasons.

[43] Having said the foregoing, there was also an issue raised to the effect that the Applicant was required to pay first and ask questions later because that is what Section 55 of the Act required. From my reading of the section, this does not seem to be a correct position. The section gives the Commissioner the right to direct otherwise, which means that where a party complains about the amount assessed to the Commissioner, the latter cannot in my view avoid to apply his mind thereto to determine whether or not to stay the challenged payment, under the guise that the complainant needs to pay first and complain later. I have no doubt fairness is a matter of natural justice with which there should always be compliance.

[44] For the foregoing considerations, I came to the conclusion that the Applicant's application could not succeed and that same be dismissed with each party bearing his own costs.

N. J. HLOPHE
JUDGE - HIGH COURT