C (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE, 15 May 2017 & 15 August 2019

Value Added Tax Appeal-Preliminary Point

T Zhuwarara, for the appellant
T Magwaliba, for the respondent

KUDYA J: The issue for determination in this matter is whether or not this Court should assume jurisdiction in the present appeal. Mr *Magwaliba,* for the respondent submitted that this Court had no jurisdiction to hear the appeal and requested that it be struck off the roll. Mr *Zhuwarara*, for the appellant, made a contrary submission based on the provisions of s 13 of the Fiscal Appeal Court Act *[Chapter 23:05]* as read with s 33 of the Value Added Tax, VAT, Act [*Chapter 23:12]*.

I agree with Mr *Magwaliba* that this Court should not assume jurisdiction in this appeal and will therefore strike it off the roll. These are my reasons.

The facts

On 15 February 2013, the appellant, a company providing transport and immovable property rental services and registered as a VAT operator sold an immovable property situated in Prospect, Harare to the Government of Zimbabwe for US$600 000 and duly paid capital gains tax, CGT, and stamp duty on the transaction.

An investigation conducted into the tax affairs of the appellant revealed the failure to account for VAT on the transaction. On 4 December 2015 the respondent raised a schedule, which it issued to the appellant on 8 December 2015 in respect of VAT in the sum of US$90 000, a penalty of 50% and interest of 10% thereon in the aggregate sum of US$144 000. The schedule was availed to the appellant at the meeting of 8 December 2015. Thereafter, on 23 December 2015 the respondent issued a notice of assessment embodying the appellant's

business partner, BP, number, assessment number 5932, the tax year to December 2014, the due date of 25 May 2013, the date of issue, the penalty and tax charged of US$45 000. In addition, the appellant was advised of the statutory requirement to lodge any objection with the Commissioner within 30 days of the date of notice. It was common ground that while the appellant was requested to collect the notice on 23 December 2015, it only did so on 11 February 2016.

In the interim, in a letter dated 6 January 2016, which the respondent received on 1 February 2016, the appellant's erstwhile legal practitioners "appealed" to the respondent for the reversal of the VAT, penalty and interest in the schedule of 4 December 2015 on the ground that the transaction was zero rated, in terms of s 10 (2) (p) of the VAT Act.

The contents of the letter of 6 January 2016

The letter was entitled: "Appeal on behalf of Appellant and VAT on property disposal, Penalty and Interest raised." It referred to a finding by the case manager that the appellant was eligible for VAT and consequent penalty and interest for the disposal of an immovable property. It further outlined the history of the sale and revealed that capital gains tax, CGT, had been paid. The appellant further averred that in assessing CGT the respondent "did not raise the VAT issue, which it often does in cases of this nature at that stage and impliedly indicated that since CGT was having to be paid, VAT did not have to be charged too." To the appellant's mind "the issue of VAT was never raised because the company's business was not in property development and sale of immovable property (was) not its stock-in-trade". It was intimated in the letter that as the payment of the purchase price to the government constituted a transfer payment it would be zero rated in terms of s 10 (2) (p) of the VAT Act. The appellant concluded the letter by seeking the reversal of the VAT, penalty and interest charged.

The response of 11 February 2016

The response to the letter of 6 January 2016 was made by the Regional Manager (Region 1 Domestic Taxes) on 11 February 2016. She understood it to be an appeal against the audit findings on property disposal and not an objection to the notice of assessment. She explained that the failure to raise the VAT issue during the CGT assessment did not "nullify the due and payable amount" and the distinction between the two taxes. She further provided the statutory basis for raising VAT and disagreed with the appellant's interpretation of s 10 (2) (p) of the VAT Act and the meaning the appellant ascribed to "transfer payment". She wrote that:

> "Transfer payments are amounts paid out by the State for which it does not receive any goods or services in return (like) subsidies for export incentives, drought relief and subsidies for the prevention of soil erosion. Your interpretation to mean that any transfer of funds to a public authority constitutes transfer payment is therefore, incorrect. Therefore the transaction between appellant and the Government of Zimbabwe is not zero rated according to legislation.
>
> A meeting can be organised for me to further explain the obligations of a registered operator as you need to advise your clients correctly since you are in the conveyancing business.
>
> The VAT charged is still due and payable and arrangements to have this paid must be made by 19 February 2016 failure of which other collection methods will be effected in terms of section 48 of the VAT Act."

In the response of 11 February 2016, the Regional Manager provided the statutory basis for raising VAT and imposing penalty and levying interest charges on the outstanding principal amount. Apparently, the Regional Manager disputed the meaning rendered to "transfer payment" by the appellant and suggested meeting the appellant's legal practitioners "to further explain the obligations of a registered operator as you need to advise your clients correctly since you are in the conveyancing business." She however demanded payment by 19 February 2016 and threatened to invoke s 48 collection measures in the event of non-payment.

The notice of appeal

The notice of appeal was specifically directed against "the levying of VAT, penalties and interest on the sale of immovable property concluded with the Government of Zimbabwe but which sale was not carried out in the appellant's ordinary and normal course of business."

The notice of assessment of 23 December 2015 was eventually served on the appellant on 11 February 2016. On 29 March 2016 the appellant filed a notice of appeal purportedly in terms of s 13 of the Fiscal Appeal Court Act as read with the Fiscal Appeal Rules SI 41 of 2002 and s 33 of the VAT Act against "the decision of the Respondent's Regional Manager (Region 1 Domestic Taxes) communicated to the appellant on 11 February 2016" and specifically appealed against the principal VAT, penalty and interest levied in respect of the transaction. In addition thereto, it filed on the same date a separate document containing the allegations of fact and contentions of law. The respondent also filed the Commissioner's case on the same date and *inter alia*, raised the preliminary issue under consideration.

The effect of the preliminary issue on the appeal on the merits

Both counsel were agreed that the success of the preliminary point would dispose of the appeal without going into the merits thereof.

Consideration of the preliminary points

The basis for lodging an appeal to this court lies in s 33 of the VAT Act, which provides:

"**33 Appeals to Fiscal Appeal Court**

(1) An appeal against any decision or assessment of the Commissioner, as notified in terms of subsection (4) of section *thirty-two*, shall lie to the Fiscal Appeal Court in terms of the Fiscal Appeal Court Act [*Chapter 23:05*].

(2) Every appeal shall be by way of a notice in writing and shall be lodged with the Commissioner within thirty days after the date of the notice mentioned in subsection (4) of section *thirty-two* or…

Provided that

(a) the Commissioner may, on good cause shown, condone any delay in the lodging of any such notice of appeal within the said period;

(b) any decision of the Commissioner in the exercise of his discretion under this subsection shall be subject to objection and appeal.

(3) At the hearing by the Fiscal Appeal Court of any appeal to that court—

(*a*) the appellant shall be limited to the grounds of objection stated in the notice of objection referred to in subsection (2) of section *thirty-two* unless the Commissioner agrees to the amendment of such grounds or the appellant, on good cause shown prior to or at such hearing, is given leave by the court to amend such grounds of objection within a reasonable period and on such terms as to any postponement of such hearing and costs which may result from such postponement as the court may order;

(*b*) the Fiscal Appeal Court may inquire into and consider the matter before it and may confirm, cancel or vary any decision of the Commissioner under appeal or make any other decision which the Commissioner was empowered to make at the time the Commissioner made the decision under appeal or, in the case of any assessment, order that assessment to be altered, reduced or confirmed or, if it thinks fit, refer such matter back to the Commissioner for further investigation and reconsideration in the light of principles laid down by the court."

The provisions of the Fiscal Appeal Court Act referred to in s 33 (1) are found in s 13, which states:

"**13 Appeals from decisions of Commissioner**

(1) Any person who is dissatisfied with a decision of a Commissioner given in terms of a tax Act may appeal to the Court against that decision.

(2) Every such appeal shall be noted and prosecuted within the period and in the manner prescribed by rules:

Provided that the Court may, on good cause being shown or by agreement of the parties, extend the said period.

(3) On the hearing of any appeal in terms of this section the Court may confirm, vary or set aside the decision appealed against."

In terms of s 12 of the Fiscal Appeal Court Act, the VAT Act falls into the definition of a tax Act contemplated in s 13(1) of the former Act. However, s 33 (1) as read with s 32 (1) and (4) of the VAT Act prescribes the decisions that may be appealed to the Fiscal Appeal Court. In terms of s 32 (1) a taxpayer is entitled to object to the three types of decisions proscribed in subs (1)(a) (i) to (iii) thereof which relate to the refusal by the Commissioner to

register the taxpayer for VAT in terms of s 23 (7), the cancellation or even the refusal to cancel the registration of a taxpayer in terms of s 24 (6) or (7) and the refusal to make a refund in terms of s 44 (8) of the VAT Act. Additionally, a taxpayer may object to the type of decision indicated in subpara (c) of subs (1) of s 32, which concerns the implementation or interpretation of regulations made under s 78 on fiscalised electronic registers and any assessments of tax payable as a result of using them. It was common ground that the purported decision appealed against did not fall into any one of the four categories outlined in s 33 of the VAT Act.

It is clear to me that the Regional Manager did not make the decision to levy the principal amount, penalty and interest. She merely confirmed that these were due. The decision to levy VAT together with the consequent penalty and interest was made in the notice of assessment issued on 23 December 2015, which was collected by the appellant on 11 February 2016. In my view, the duty to serve the notice of assessment lies on the respondent and it is not discharged by merely informing the taxpayer or by requesting the taxpayer to collect it from the respondent. In these circumstances, it is apparent to me that the notice of assessment was therefore served on the appellant on 11 February 2016. I am unable to discern the decision made by the Regional Manager on which the appellant could base the appeal. It seems to me, which point was readily conceded by Mr *Zhuwarara* in his oral submissions, that the appellant was in substance appealing to the Commissioner against the assessment issued on 23 December 2015, which was first disclosed in the schedule of 4 December 2015 and served on 11 February 2016.

The agreed facts showed that the respondent raised a schedule on 4 December 2015 and issued it to the appellant on 8 December 2015 before raising the s 31 of the VAT Act notice of assessment dated 23 December 2015, which was collected by the appellant on 11 February 2016. In terms of s 32 (3) the objection should be served on the Commissioner within 30 days from the date on which notice of the assessment was given, which date in my view was 11 February 2016. In my computation, the appellant had 30 days to Monday 14 March 2016 to file an objection against the assessment with the Commissioner. Instead of filing an objection it filed an appeal to this Court on 29 March 2016. The procedural impropriety of doing so was brought to the appellant's attention in the Commissioner's case filed in this Court on the same day but was ignored by the appellant who chose to proceed with the appeal. In so doing the appellant lost the opportunity to invoke the closing words of s 33 (2) of the VAT Act and seek condonation from the Commissioner for the late filing of the objection whose refusal, according to the proviso thereto, would have been subject to a separate objection and appeal.

The provisions of s 33 (1) of the VAT Act enjoin the appellant to take on appeal to this Court the s 32 (4) actual or deemed determination made by the Commissioner against the objection lodged to him by the taxpayer. An appeal to this Court is therefore predicated on the notice of objection and the consequent actual or deemed determination made by or ascribed to the Commissioner. In terms of subs (5) of s 32 of the VAT Act, the failure to lodge the objection renders the assessment final and conclusive.

I agree with Mr *Magwaliba* that the appeal against the contents of the letter of 11 February 2016 failed to meet the requirements of s 13 of the Fiscal Appeal Court Act as read with s 33 of the VAT Act. In *Econet Wireless (Pvt) Ltd v Trustco Mobile (Pty) Ltd and Anor* 2013 (2) ZLR 309 (S) at 318B GARWE JA said:

> "The position is now well established that a notice of appeal must comply with the mandatory provisions of the Rules and that if it does not, it is a nullity and cannot be condoned or amended. See *Jensen v Acavalos* 1993 (1) ZLR 216 (S)."

In view of the above restatement of our law the sentiments expressed by SCHREINER JA in *Trans-African Insurance Co. Ltd. v Maluleka*, 1956 (2) SA 273 (A) at 278F and cited with approval by BLIEDEN J in *Standard Bank of South Africa v Roestof* 2004 (2) SA 492 (W) at 496F that "technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice to interfere with the expeditious and if possible inexpensive decision of cases on their real merits", which were relied upon by Mr *Zhuwarara,* find no traction in the present matter. In a bid to save the appeal, Mr *Zhuwarara* made two preposterous submissions. The first was that the proceedings in this Court were informal and the second was that the Commissioner had the power to waive the statutory prescripts that govern appeals to this Court. The restatement of our law by GARWE JA in the *Econet* v *Trustco* case, *supra*, clearly undermined his submissions. The appeal does not comply with the mandatory statutory provisions under which it was launched. Accordingly, it is a nullity and must be struck off the roll.

In the alternative, Mr *Zhuwarara* sought to rely on the principle of subordination in ascribing the decision of a lower level functionary in the Zimbabwe Revenue Authority to the Commissioner-General. It is not necessary to determine this issue in the light of my finding that the purported appeal was a nullity. Again, for the same reason it is unnecessary to decide whether the notice of appeal was filed on time.

Costs

The glaring procedural irregularities in the purported appeal should have been obvious to the appellant and more importantly to both its erstwhile instructing legal practitioners and counsel. Indeed, in argument, Mr *Zhuwarara* was constrained to rely on the Court's sympathy rather than on any legal principle, in his futile attempt to resurrect what was obviously a dead appeal. I am satisfied that this is a proper case for mulcting the appellant with an adverse order of costs.

Disposition

Accordingly, the preliminary point is upheld and the purported appeal is struck off the roll with costs.

Scanlen and Holderness, the appellant's legal practitioners

.

.

.