**REPORTABLE (6)**

**BCM (PRIVATE) LIMITED**
**v**
**ZIMBABWE REVENUE AUTHORITY**

**SUPREME COURT OF ZIMBABWE**
**UCHENA JA, MATHONSI JA & KUDYA JA**
**HARARE: 7 MARCH 2022 & 26 JANUARY 2023**

*M. Tshuma*, for appellant

*S. Bhebhe*, for the respondent

**UCHENA JA:** This is an appeal against part of the judgment of the Special Court for Income Tax Appeals handed down on 28 September 2020, dismissing the appellant's appeal against the decision of the respondent's Commissioner in respect of various objections the appellant had raised against the Commissioner's revised assessments of tax against it.

At the commencement of the hearing of this appeal Mr *Bhebhe* for the respondent raised a point in *limine* that there was no valid appeal before the court because the appeal was noted without leave contrary to the provisions of s 66 (1) (b) of the Income Tax Act [*Chapter 23:06]*

**SUBMISSIONS BY THE PARTIES ON THE PRELIMINARY ISSUE**

Mr *Bhebhe* for the respondent submitted that the appellant's purported appeal, attacks the court *a quo*'s findings of fact and should therefore have been preceded by a grant

of leave by the court *a quo*, and if it had been refused, by a Judge of this Court. He submitted that an appeal noted without leave is a nullity and should be struck off the roll.

Mr *Tshuma* for the appellant submitted that the appellant's appeal is against the court *a quo*'s findings on law and was, in terms of s 66 (1)(a), properly noted without leave.

After hearing the parties on the preliminary issue, with the consent of the parties, we rolled the preliminary issue over to the merits. I should therefore determine the preliminary issue before considering and determining the appeal on the merits. If the respondent succeeds on the preliminary issue the matter will be struck off the roll. A determination on the merits will only be necessary if the preliminary issue is dismissed.

**THE LAW**

The question of whether or not the appellant's appeal should have been noted without leave is governed by s 66 (1) of the Income Tax Act which provides as follows:

> "On the determination by the High Court or the Special Court of an appeal under section sixty five or other proceedings incidental to or connected therewith, the appellant or the Commissioner, if dissatisfied with the determination-
>
> **(a)** May appeal to the Supreme Court **on any ground of appeal which involves a question of law alone;**
>
> **(b)** May, **with the leave of a judge of the High Court or a President of the Special Court, as the case may be, or, if such a judge or President refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court on any ground of appeal which involves a question of fact alone or a question of mixed law and fact."** (emphasis added)

Section 66 (1) provides that an appeal is noted against a determination of the Special Court. The determination of the court is found in its judgment. The judgment of the

court is therefore the determinant factor on whether or not the appeal should be noted with or without leave.

Section 66 (1) (a) establishes that if the appeal is against a question of law alone the appeal can be noted on any ground of appeal without leave. However s 66 (1) (b) provides that an appeal to the Supreme Court on any ground of appeal which involves a question of fact alone or a question of mixed law and fact, can only be noted after obtaining leave to appeal from the President of the Special Court or if leave is refused from a Judge of this Court.

The question of law referred to in s 66 (1) (a) refers to a determination by the court on the basis of what the law provides, or a finding of fact by the court which is grossly unreasonable, while the question of fact referred to in s 66 (1) (b) refers to the court's findings based on the facts placed before it.

**DETERMINATION OF THE PRELIMINARY ISSUE**

The appellant appealed against the court *a quo*'s decision on the following seven grounds:

**GROUNDS OF APPEAL**

1. The court *a quo* erred at law in finding that the amounts taxed by the respondent for the tax years 2011 and 2012 as sundry income were amounts falling into gross income and thus subject to tax in terms of the Income Tax Act [*Chapter 23:06*].
2. The court *a quo* erred at law in finding that the amounts taxed by the respondent as income received from the National Indigenisation Fund for the tax years 2012 and 2013,

were amounts either received or accrued to the appellant and thus subject to tax in terms of the Income Tax Act.

3. The court *a quo* erred at law in finding that staff bonuses paid to the appellant's employees were subject to PAYE in 2015 and not 2016 in terms of the Income Tax Act [*Chapter 23:06*].
4. The court *a quo* erred at law in finding that the amount of $82 348.34 appearing in the appellant's trial balance as 'leave pay expenses' was properly subject to tax in terms of the Income Tax Act [*Chapter 23:06*].
5. The court *a quo* erred at law in finding that the amount of $604 050.00 was of an income nature and thus properly subject to PAYE for the 2015 tax year in terms of the Income Tax Act [*Chapter 23:06*].
6. The court *a quo* erred at law in finding that the amounts totalling $741 392.00, paid to employees were remuneration in the hands of the appellant's employees and thus subject to income tax in terms of s 46 of the Income Tax Act [*Chapter 23:06*].
7. The court *a quo* erred at law in finding that the penalty imposed by the respondent was appropriate."

The determination of whether or not the appeal is a nullity should involve the examination of the grounds of appeal which identify the determination the appellant appeals against. After identifying the determination appealed against the consideration of whether or not leave to appeal should have been sought depends on the basis on which the determination of the Special Court was made. Each ground of appeal should be assessed because s 66 (1) (a) provides that the appeal can be on any ground which involves a question of law, and s 66 (1) (b) provides that an appeal can be noted with leave on any ground. This means where there are

several grounds of appeal the validity of each ground of appeal must be assessed so that the appeal can proceed on the valid grounds while the invalid grounds can be struck out.

A careful reading of the judgment to be appealed against with a correct understanding of what a question of law is and what a question of fact is, can guide a party intending to appeal on whether the determination he or she intends to appeal against was based on, law, a mixture of law and facts or on facts alone.

In the case of *Reserve Bank of Zimbabwe v T Lloyd Mufudza & 3 Others* SC 29/18 this Court commenting on the effect of prefixing grounds of appeal with the words "the court *a quo* erred at law in finding that" and what constitutes a point of law at paras 7 and 8 said:

> "Regarding the first ground of appeal **merely using the words 'erred in law' does not create a point of law. It must clearly appear from the ground of appeal what point of law is sought to be determined.** In that connection it has been held that a serious misdirection on the facts would amount to a question of law. A finding, that, the delay in making an application, is inordinate, and the explanation for the delay unreasonable is a factual finding. Such a finding does not qualify as a point of law unless it is grossly unreasonable, that is, unless it is a finding that no reasonable court faced with the same facts would have made. **No allegation of gross unreasonableness has been made nor is any apparent on the record** -----
> **Simply to allege, a misdirection in law by the court without alleging the nature of the misdirection does not advise this court of the point of law on which its decision is required".** (Emphasis added)

A reading of the 7 grounds of appeal reveals that the appellant's grievance is against the court *a quo's* findings of fact without any allegation of any gross misdirection. The prefixing of grounds 1 to 6 with the words "The court *a quo* erred at law in finding that" does not conceal that the appeal is against findings of fact or a mixture of law and fact as each of the 6 grounds goes on to expose the true nature of the intended appeal.

Ground 1 goes on to state, "the amounts taxed by the respondent for the tax years 2011 and 2012 as sundry income were amounts falling into gross income and thus subject to tax in terms of the Income Tax Act [*Chapter 23:06*]."

This means the court *a quo* determined from the facts placed before it that what the appellant referred to as sundry expenses falls under gross income and was taxable. The court *a quo* determined this issue at para 12 of its judgment where it said:

> "However, no such documents were produced to the respondent despite requests for the production of evidence which would prove the appellant's stance that the amounts were, in fact fair value adjustments. In the end, the documents produced by the appellant did not establish that the amounts described as 'sundry income' were in fact fair value adjustments. I agree with Mr *Bhebhe* that the appellant having included the amounts as income in its financial statements and having failed to show how the amounts were to be treated as anything to the contrary, for income tax purposes, the respondent cannot be faulted for treating the amounts as he did."

This is a finding of fact. Ground No 1 should therefore not have been noted without leave.

Ground 2 thereafter states, "the amounts taxed by the respondent as income received from the National Indigenisation Fund for the tax years 2012 and 2013, were amounts either received or accrued to the appellant and thus subject to tax in terms of the Income Tax Act."

It seems to me that the appellant is attacking a finding of fact to the effect that certain amounts of money were received by it or accrued to it. The court *a quo* at paras 20, 21, 23 and 24 found that the appellant received payments from specified companies and certain amounts accrued to it. At para 24 it summed up on this issue by saying;

> "I once again conclude that the appellant has not discharged the onus on it to prove that the Commissioner was wrong and this issue is decided against the appellant".

A finding by the court that a party has failed to discharge an onus on it is a finding of fact based on the assessment of the evidence placed before it. Ground 2 should not have been noted without leave.

Ground 3 went on to allege that "staff bonuses paid to the appellant's employees were subject to PAYE in 2015 and not 2016 in terms of the Income Tax Act [*Chapter 23:06*].

This ground attacks the court *a quo's* decision that staff bonuses were paid in 2015 and therefore PAYE tax was due and payable in the 2015 tax year. The question before the court *a quo* and its determination was on when staff bonuses were paid to the appellant's employees. That is a finding of fact and cannot be appealed against without leave. At para 27 of its judgment the court *a quo* determined the issue as follows:

> "The appellant produced no evidence to show why the sum in question, recorded as an expenditure in its financial statements for the year ended 2015 ought not properly to have incurred PAYE liability during the same year. The indication on the Form P2 that it relates to the tax period March 2016 does not assist the appellant. Nor does the failure by the appellant to produce proof that the bonus payments were actually made in 2016 and the receipt for $98 262 was in respect of bonus awarded in 2015. It would have been a simple matter to have produced reconciliations of salaries paid during the relevant periods but the appellant did not do so. The Commissioner was, in the circumstances, entitled to rely on the appellant's records as produced to him".

These are findings of fact made on the basis of records placed before the court *a quo*. This ground of appeal should not have been noted without leave.

Ground 4 after the prefix common to grounds 1 to 6 reads:

> "that the amount of $82 348.34 appearing in the appellant's trial balance as 'leave pay expenses' was properly subject to tax in terms of the Income Tax Act [*Chapter 23:06*]".

The attack on the court *a quo*'s findings can at best for the appellant be interpreted as an attack on a finding based on facts and the law. It would therefore be a ground based on a mixture of the law and facts.

This is demonstrated by the court *a quo*'s finding at para 30 of its judgment where, after referring to case law on similar matters, it said:

> "In my view the appellant in the present matter has a similar difficulty. It has not proved that an absolute liability to make payment of the amount in question was incurred in the relevant year of assessment".

This simply means the appellant failed to lead evidence to trigger the operation of law. An appeal against a finding based on a mixture of facts and the law can, in terms of s 66 (1) (b) of the Income Tax Act, only be noted with leave. This ground of appeal should also not have been noted without leave.

Ground 5 goes on to state, "the amount of $604 050.00 was of an income nature and thus properly subject to PAYE for the 2015 tax year in terms of the Income Tax Act [*Chapter 23:06*]."

A finding of whether or not a particular amount is of an income nature is a finding of fact. This is confirmed by the court *a quo*'s finding at para 34 of its judgment where it said:

> "In my judgment the appellant has not proved that the amount in question was a loan. Not only do the figures not add up, but no evidence of the date and terms of the loan, was produced to the Commissioner or to this Court. In the premises, I am unable to find that the decision of the Commissioner was wrong. The issue is decided against the appellant."

The court *a quo* found that the appellant had not proved that the amount in question was a loan and also found that the figures presented before it did not add up. These are findings of fact. Ground 5 should not have been noted without leave.

Ground 6, after the common prefix alleges that "the amounts totalling $741 392.00, paid to employees were remuneration in the hands of the appellant's employees and thus subject to income tax in terms of s 46 of the Income Tax Act [*Chapter 23:06*]".

The challenge is on whether or not the amounts paid to employees were remuneration in the hands of the appellant's employees, which finding determines whether or not it is subject to income tax in terms of s 46 of the Income Tax Act. This, in my view, is a finding of fact which triggers the operation of the law. In determining this issue the court *a quo* at para 36 of its judgment said:

> "It is trite that the appellant bears the burden of proving the said amount was wrongly taxed. In my view this burden has not been discharged. No documentation was produced by the appellant proving the loans or the fact of their alleged repayment by the employees in question. In the absence of any evidence to the contrary, I must agree with Mr *Bhebhe* that the decision of the Commissioner to take the said payments as remuneration which is subject to taxation in accordance with s 8 (1) (b) of the Act, cannot be impugned. This issue is decided against the appellant."

These are findings of fact which disentitle the appellant from noting ground 6 without the leave of court.

Ground 7 reads: "The court *a quo* erred at law in finding that the penalty imposed by the respondent was appropriate." This ground of appeal is against the imposition of a penalty. Penalties by their nature are influenced by findings of fact which make them appropriate or inappropriate. Therefore a finding that a penalty is appropriate is a finding of

fact. The court *a quo* determined the appropriateness of the penalty at para 38 of its judgment where it said:

> **"It goes without saying that the degree of culpability will depend on the particular facts of each case.** In this case, the Commissioner exercised his discretion and imposed a 75% penalty. While this Court is not bound by the exercise of the Commissioner's discretion, the appellant has advanced no valid reason and I find none why this court should interfere with what I consider to be a proper exercise of his discretion by the Commissioner." (Emphasis added)

It is beyond doubt that the degree of culpability and the severity of a penalty is determined on the basis of the facts found proved. The court *a quo* agreed with the facts relied upon by the Commissioner and upheld the penalty purely on a factual basis. Ground 7 should therefore not have been noted without leave.

It is apparent that the appellant's grounds of appeal attack the court *a quo*'s findings of fact. The appeal should not have been noted without leave. The appellant's notice of appeal is therefore fatally defective. It is a nullity which should be struck off the roll.

This being a tax case for which s 65 (12) of the Income Tax Act provides that costs do not arise unless there is proof that the Commissioner's decision is unreasonable or the appellant's appeal is frivolous, the issue of costs does not arise. There will therefore be no order as to costs as no determination has been made on the merits of the appeal.

In the result it is ordered as follows:

The matter be and is hereby struck off the roll with no order as to costs.

**MATHONSI JA:** I agree

**KUDYA JA:** I agree

*Gill, Godlonton & Gerrans*, appellant's legal practitioners

*Kantor & Immerman,* respondent's legal practitioners