HH 278-21
ITC 6/20

C T (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
MAFUSIRE J
HARARE, 26 May 2021

Application for condonation and leave to appeal

Date of written judgment: 8 June 2021

Adv *D. Tivadar*, for the applicant
Adv *T. Magwaliba*, for the respondent

MAFUSIRE J

[1] The applicant seeks condonation for the late filing of leave to appeal to the Supreme Court. It also seeks the leave to appeal. It is a composite application. It is slung on one founding affidavit, one set of supporting documents and one draft order. The respondent opposes the application. It has raised a number of technical objections.

[2] The applicant is a duly registered private company in Zimbabwe. It is a registered taxpayer and a tobacco merchant. It buys tobacco from farmers for blending and export abroad. Its operations are financed by a company based in Germany, Contraf Nocotex-Tobacco GmbH, or "CNT". This is in terms of certain facilitation agreements between the two. In simple terms, CNT arranges and underwrites the credit facilities. In return the applicant pays CNT commitment or arrangement or underwriting fees. The respondent is a creature of the Revenue Authority Act, *Cap 23:11*. It collects revenue for Government through various tax regimes.

[3] The background to the present application is this. From about April 2015 to October 2016 a dispute raged between the applicant and the respondent. It was in regards to the applicant's entitlement, or non-entitlement, to a refund – amounting to US$597 777-71 – being

payments made by the applicant to the respondent in respect of non-resident's tax on fees (NRTFs) for the period of assessment 2012 to 2014.

[4] In paraphrase, the dispute was this. Following self-assessments in regards to the arrangement or commitment fees paid by the applicant to CNT for that period, the applicant had withheld the amounts aforesaid and paid them over to the respondent as NRTFs. Subsequently, the applicant claimed the amounts back on the basis that it had paid them under the mistaken belief that they had been payable, when in fact they were not. It argued that the nature of the agreements between CNT and itself and the services rendered in pursuance of them, coupled with the double taxation agreement between Zimbabwe and Germany, were such that no NRTFs were due and payable by the applicant to the respondent. The respondent did not agree. But it adjusted the assessments by reducing the amounts payable by 7.5% on the basis of its own interpretation of the double taxation agreement (DTA). It would refund the applicant only to the extent of such reduction. The applicant did not agree. There was a stalemate. The respondent advised the applicant that if it was dissatisfied with its decision it was free to appeal to the High Court or to this court. The applicant appealed to this court.

[5] In this court, the dispute had several facets. In its heads of argument, the respondent challenged this court's jurisdiction to hear the appeal. The question before the court, as I have understood the arguments, was whether the refusal by the respondent to refund the applicant the aforesaid amount was such a decision based on an objection to an assessment as would be appealable either to the High Court, or this court, in terms of s 65 of the Income Tax Act [*Chapter 23:06*], or just any such other decision as an aggrieved party could take only to the High Court for determination by that court in the exercise of its inherent jurisdiction. One aspect of that argument centred on expressions like 'assessment' and 'objection'. It was contended that they are creations of statute and that an appeal that is predicated upon them has to fall within the four corners of the statute.

[6] The respondent argued that in spite of its letter advising the applicant of its right of appeal, either to the High Court, or to this court, there was in fact, no such decision on an objection proper as would be appealable in terms of that provision. On the other hand, the applicant not only sought to bind the respondent to its letter, but also argued that the self-assessments by itself and which had led to those payments by it to the respondent, were

'assessments' within the meaning of the Income Tax Act. It argued that the respondent had adopted and amended those assessments but that the applicant had subsequently objected to them and had demanded a refund. Thus, the argument concluded, the respondent's refusal to make the refund was properly appealable in terms of s 65(1) of the Act. There were several other arguments. The details are not immediately important to the issue before me.

[7] In its judgment dated 22 October 2019, this court, *per* KUDYA J, as he then was[1], determined the question of jurisdiction in favour of the respondent. In its findings, the court stated that the respondent's objection did not relate to an assessment but to a decision refusing to refund; that the only decisions of the respondent as would form the basis of an appeal are those set out in para 1 of the Eleventh Schedule to the Income Tax Act; that s 65(1) of the Act did not apply, and that therefore the applicant's purported notice of objection was invalid *ab initio*. In the end, the court held that it had no jurisdiction to determine a purported appeal that was not based on any valid notice of objection. It disposed the matter by striking it off the roll, with each party meeting their own costs. The decision on costs was informed by the position that the respondent, despite its success, had raised the technical objection very late.

[8] However, notwithstanding its decision on jurisdiction as aforesaid, the court went on to decide the rest of the merits. This was on the premise that it might turn out that it could have been wrong on the technical point and that, at any rate, protracted arguments had been made on the merits. So on the merits, the judgment, among other issues, dealt extensively with the rights and obligations of the applicant, CNT and the respondent under the DTA, and the taxability, or non-taxability, of the applicant's financial obligations to CNT under the facilitation agreements. The court found against the applicant on all aspects and held that it would also dismiss the appeal on the merits

[9] Aggrieved by that decision, the applicant appealed to the Supreme Court. However, following a technical objection raised by the respondent on the day of argument, the appeal was struck off the roll with costs. The appellate court decided that the appeal was improperly before it for want of compliance with s 66(1)(b) of the Income Tax Act. There is no judgment by the Supreme Court. But counsel are agreed that the appellate court accepted the respondent's

[1] Now KUDYA JA

argument that the applicant's grounds of appeal were either based on facts or on a mixture of facts and law and that therefore the leave of this court was required in terms of s 66(1)(b) of the Act.

[10] The order of the Supreme Court striking the applicant's appeal off the roll is dated 1 October 2020. On 29 October 2020 the applicant filed the present composite application. In paraphrase, the application seeks condonation for the late noting of the application for leave to appeal. This is on the basis that but for the decision of the Supreme Court aforesaid, it had considered that the grounds of its appeal involved purely questions of law and that therefore it did not require leave to appeal. However, with the Supreme Court ruling otherwise, it has had no choice but to seek the leave. The application deals extensively with the main requirements for condonation, comprising, among others, the reasons for the delay; the prospects of success on the merits; and the importance of the matter to the parties. Among the documents attached in support of the application, are the notice and grounds of appeal that were struck off at the Supreme Court, and the applicant's heads of argument in support of that appeal.

[11] The dominant argument by the applicant on condonation is that the failure to seek the leave of this court timeously was not because of any deliberate abstention or disdain of the Rules of court or gross inadvertence or spite, but was the result of a genuine mistake and earnest belief that the applicant did not require the leave of this court to appeal. The applicant further argues that it has a very strong case on the merits which is sufficiently set out in its heads of argument before the Supreme Court and that it has high prospects of success. It further argues that the matter is of huge importance to the parties in that there is need for clarity by a superior court on the issues that this court grappled with. This argument is mainly in support of the application for leave to appeal.

[12] The respondent's objections have been raised in the notice of opposition, the heads of argument and the supplementary heads of argument filed roughly a month before the hearing. At the hearing, I reserved judgment on the preliminary objections. Out of expedience, and with the consent of counsel, I proceeded to hear argument on the merits. I said I would hand down one composite judgment, dealing firstly with the preliminary points, and if need be, the merits. Here now is my judgment.

i/ Non-compliance with Rules 262 to 269 of the High Court Rules

[13] In terms of Order 34 r 262, as read with r 269, of the High Court Rules, 1971, application for leave to appeal shall be made orally immediately after judgment has been passed. If no such oral application is made as aforesaid, then in terms of r 263 the applicant can, in special circumstances, make it in writing within twelve days of the date of judgment, stating the reason why it was not made in terms of r 262. The written application must also state the proposed grounds of appeal and the grounds of leave to appeal. In terms of r 266, where the application is not made within the prescribed twelve days, then the applicant wanting leave may apply for condonation together with that for leave to appeal. Finally, in terms of r 267, no application in terms of r 266 (i.e. for condonation and leave to appeal) may be made after the expiry of twenty four days from the date on which judgment was passed, unless the judge otherwise orders (*emphasis by counsel*).

[14] The respondent submits that the application before me is incurably defective. The objection is three pronged:

- that the proposed grounds of appeal have not been attached or stated;
- that a composite application is impermissible as two separate applications – one for condonation and the other for leave – should have been filed; and
- that the combined application, having been filed outside both the twelve days permitted by r 263, and the twenty four days permitted by r 266, a third application to condone the condonation being sought outside these time frames is necessary, otherwise r 267 which bars an application after twenty four days is rendered nugatory, especially the words 'unless the judge otherwise orders.'

[15] The respondent develops its argument this way. The court should not be misled by the notice and grounds of appeal for the unsuccessful Supreme Court appeal that the applicant has attached to the founding affidavit. Nowhere in the founding affidavit is there any direct or indirect reference to them as being the notice and grounds of appeal the applicant will eventually file should leave be granted. All that it says in regards to them is what is contained in para 6 of the founding affidavit where it is stated: "*Applicant filed its notice of appeal on the 12th of November 2019. See attached a copy of the Applicant's issued Notice of Appeal as* ***Annexure C1***". At any rate, having been condemned by the Supreme Court when the appeal was struck off the roll, the notice and grounds of appeal have no legal standing as they are

pending nowhere. If leave to appeal is granted without the court having had sight of the intended grounds of appeal, there will be nothing to stop a mischievous applicant-cum-appellant filing completely different and new grounds of appeal with the Supreme Court.

[16] The court should not be over-fastidious. It is clear from the application that the applicant intends to return to the Supreme Court with the same grounds of appeal that suffered a still birth when its appeal was struck off. The applicant not only annexes that notice and grounds of appeal but also it annexes its heads of argument before the Supreme Court which do nothing but speak extensively to the grounds of appeal. These grounds of appeal were not considered by the Supreme Court. They were not dismissed on the merits. They were simply struck off the roll together with the notice of appeal because the applicant did not have the leave of this court to present them before that court.

[17] It is permissible in terms of r 263 to combine the application for condonation with that for leave to appeal. Where one has missed the chance to apply orally for leave to appeal immediately after the handing down of judgment in terms of r 262, they have another chance in terms of r 263. With this second chance, they must show the special circumstances of their case; they must state the reason why they did not utilise the first chance; state their proposed grounds of appeal, and state their grounds for seeking leave to appeal. This last requirement is the application for leave to appeal. It is an application within an application. The Supreme Court has said, albeit not in so many words, this can be done: see *Chomurema & Anor v TelOne* SC 86/14 and *Read v Gardiner & Anor* SC70/19 (*not yet reported*).

[18] On whether three applications, instead of two, should have been made, there is no doubt that given that the judgment of this court against which leave is being sought was issued on or about 22 October 2019, the application for leave, on 29 October 2020, is coming way out of time, in fact, more than a year later, or slightly less than a year, if allowance is made to the twenty-four-day period of r 267. But to say three instead of two applications should have been made, i.e., the one for condonation to bring the application for condonation outside the twenty four days; the second for the condonation that ought to have been brought within the twenty four days, and the third for the leave to appeal, is to compound a simple process.

[19] The whole object of the condonation process in terms of r 266 and r 267 is so that the application for leave to appeal may properly be made. Leave to appeal is the substantive remedy that is the object of these particular rules. Condonation is not an end in itself. It is a means to an end. The end is the leave to appeal. It is, if granted, the key to the door of the court so that when one enters, they then present their substantive case. They do not get the key to enter merely to apply to get another key.

[20] It is not my appreciation of these rules that it was intended to make access to justice so distant and far-flung. At any rate, the words "*unless the judge otherwise orders*" makes it plain that even outside the twenty four day period, leave to appeal can still be applied for. The applicant has sought, albeit belatedly, the court's indulgence in this regard. I consider that justice would miscarry if the applicant becomes non-suited merely by reason that one condonation, instead of two, has been sought.

ii/ Misleading Form No 29

[21] The citation of the application reads in part, "**In the Special Court for Income Tax, Held at Harare**." It begins by giving notice of the intention to apply to the Special Court for Income Tax at Harare for an order in terms of the draft. It advises of the right, where it is intended to oppose the matter, to file a notice of opposition in Form No 29A with the Registrar of the High Court at Harare within ten days, failing which the matter will be set down for hearing in the High Court at Harare without any further notice.

[22] Citing my judgment in *Marick Trading (Pvt) Ltd v Old Mutual Life Assurance Company* 2015 (2) ZLR 343 (H), the respondent argues that the application is decidedly misleading and fatally defective. It says it could very well have filed its opposing papers in the wrong court. The matter is not proceeding in the High Court, but in this court. In *Marick Trading* I said that an application, like a summons commencing action, is the founding process by which a matter is brought to court. If it is incurably defective, as it was in that case, there cannot be anything before the court over which it can sit in judgment. Such an application is simply a nullity and must be struck off the roll.

[23] *In casu*, the applicant has undoubtedly been careless. The application is mixed up on references to the High Court and this court. But it is a strong thing to say that the application

is fatally defective. It is a wrong thing to say that it must be struck off the roll. Potentially, it is misleading. But the respondent has not been misled. The citation on the application shows that it has been filed with this court. The case reference number is that peculiar to this court. The respondent filed its notice of opposition and other documents with this court. The respondent may be justified to complain of the applicant's sloppiness. But it is not justified to condemn the entire process and urge the court to dismiss it without further ado. That is nit-picking. *Marick Trading* was far different. Some alien document purportedly standing for Form No 29 was attached. There was simply no application before the court.

iii/ Draft Order problematic

[24] The applicant's draft order seeks the following relief:

- that condonation of the late filing of the application for leave to appeal to the Supreme Court against the judgment of the Special Court for Income Tax Appeals dated 22 October 2019 in Case No. ITC 10/19 be and is hereby granted.
- that leave be and is hereby granted for the applicant to appeal against the judgment of this Honourable Court in Case No. ITC 10/19.
- that there shall be no order as to costs

[25] The respondent's objection is that the draft order, even though seeking condonation in the first paragraph, and the leave to appeal in the second, makes no reference whatsoever to any notice of appeal to be filed. It says the applicant seeks leave to file an appeal on grounds which have not been presented before this court. This objection dove-tails with the argument already dealt with before, that a mischievous applicant who gets leave to appeal without having presented his or her grounds of appeal for scrutiny is unencumbered as to what else he or she may do afterwards in regards to the actual grounds of appeal that he or she may end up filing with the appellate court.

[26] At the hearing Mr *Tivadar*, for the applicant, was equivocal in his response. He seemed to blow hot and cold. He seemed to be dismissive of this objection, as indeed he was with all the rest of them. But also he seemed to be making half-hearted attempts at moving the court for an amendment to, *inter alia*, the draft order, in order to show that the grounds of appeal over which leave is sought are those set out on Annexure C1 to the founding affidavit.

[27] However, I need not be detained by this objection which, from the looks of it, is an objection just for the sake of it. The degree of precision sought by the respondent does not make the applicant non-suited by reason of the alleged imperfection in the draft order. In any event, the respondent does not go so far as to say this particular defect goes to the root of the case. It does not. I have already ruled that the application has shown that the grounds of appeal intended to be filed with the Supreme Court, if leave is granted, are those same ground as are attached to the founding affidavit.

iv/ Failure to connect High Court Rules with the Twelfth Schedule to the Income Tax Act

[28] The respondent objects to the alleged failure by the applicant to link the High Court Rules, particularly Order 34 that deals with condonation and leave to appeal, with para 1 of the Twelfth Schedule to the Income Tax Act, as read with s 65. The Twelfth Schedule provides that the Rules under it shall apply in the determination of appeals under s 65, or any proceedings incidental thereto. Para 1 then says the Special Court shall have all the powers of the High Court as in civil actions. It provides further that, save as specially provided by the Rules (in the Twelfth Schedule), the general procedure and practice in the High Court shall prevail in the Special Court where applicable.

[29] The full argument by the respondent on this point is that the applicant has failed to properly identify the law that governs its application; that there is a disconnection; that there is a bridge that the applicant has not crossed by its failure to cite para 1 of the Twelfth Schedule and connecting it to r 269 of Order 34; that r 269 rides on the back of the Twelfth Schedule. Mr *Magwaliba*, for the respondent, argues that r 269 does not walk alone. It is para 1 of the Twelfth Schedule that is the precursor to r 269.

[30] I must confess that the import, purpose and legal significance of the respondent's argument on this point have been lost to me. The connection between this court and the High Court Rules is by operation of the law by virtue of the Twelfth Schedule to the Income Tax Act. It is not the litigant that makes the connection. It is there. It is given. It is automatic. Pettifogging objections have been the hallmark of the respondent's case *in limine*. The judgment has become somewhat prolix largely by reason thereof. I find that all the respondents'

preliminary objections are devoid of merit. I therefore dismiss them in their entirety. I now turn to consider the merits.

The merits

[a] Condonation

[31] The factors to be considered in an application for condonation have been set out more elaborately in *Read's* case above. They are:

- the extent of the delay or non-compliance;
- the reasonableness of the explanation for the delay or non-compliance;
- the prospects of success on the merits should condonation be granted;
- the degree of prejudice to the other party;
- the need for finality to litigation and the need to avoid unnecessary delays in the administration of justice;
- the importance of the case; and
- the convenience of the court;

[32] The list is not exhaustive. The factors are considered cumulatively and conjunctively, not disjunctively. No one factor is exclusively decisive. Some may be more relevant in some cases than they may be in others. For example, the existence of strong prospects of success may compensate for any inadequacy in the explanation for the reasons for the delay, and vice versa. The court has a wide discretion. It exercises it judiciously. It should endeavour to be fair to all the parties involved: see *Chiweza & Anor v Mangwana & Ors* HH 186/17 p 4 (cited with approval in *Read's* case).

[33] I am satisfied by the applicant's explanation for delay. The application for condonation may be coming almost a year after the expiry of the period within which it ought to have been made. But this is because the applicant's earlier sojourn to the Supreme Court ended in failure. Except for the absence of the leave to appeal, which in its earnest belief it thought it did not need, the applicant had done everything possible to prosecute its appeal: like filing the appeal

timeously; filing heads of argument when called upon to do so, and briefing counsel to argue the matter on the date of set down. When the appeal was struck off the roll, the applicant was forced to go back to Order 34 of the High Court Rules. Unfortunately for it, time had moved. But I have no reason to doubt its sincerity when it says until the Supreme Court had spoken, it believed its grounds of appeal were all on questions of law, thus requiring no leave to appeal.

[34] The need for finality to litigation and avoiding unnecessary delays; the importance of the case; the convenience of the court, and the degree of prejudice to be suffered if condonation is granted, are all factors that, on their own, cannot stand in the way of the importance of getting an authoritative pronouncement from the superior court on the subject matter under contention. This matter is unlike others that the courts have sometimes dealt with where litigants try all manner of tricks to resurrect dead and rotten cases long buried by the courts in previous proceedings. The subject matter of the dispute is not fanciful or frivolous. It is important that the appellate court decides the matter to finality.

[b] Leave to appeal

[35] Condonation and/or leave to appeal can be granted if predominantly there are reasonable prospects of success on appeal: see *Pichanick NO v Paterson* 1993 (2) ZLR 163 (H). At the hearing, fireworks were on the points *in limine* and the prospects of success. The respondent argues strenuously that the applicant's appeal is moribund. It submits, among other things, that the decision of this court on jurisdiction is unassailable. In the previous case, the applicant did not bring itself within the four corners of s 62(1) of the Income Tax Act which was the only key available to it to unlock the doors of this court for the appeal. The grounds upon which a taxpayer may object to an assessment, decision or determination by the respondent are set out in paragraphs (a) to (c) of s 62(1). Under no method of statutory interpretation can the applicant's demand for a refund, which the respondent turned down, could amount to such an 'objection to an assessment' as would found an appeal.

[36] The respondent also argues that the appeal is also doomed for the reason that, even if the self-assessments in question by the applicant are taken as assessments by the respondent, within the meaning of 'assessment' in s 37A(11) of the Act, they are nevertheless unappealable because it would make no sense that one can appeal against their own self-assessments.

Furthermore, in terms of s 62(1) an assessment can only be objected to within 30 days from the date that it is served on the taxpayer. In the present case, even if the self-assessments are taken to be assessments by the respondent, the objection was made way out of time, some nine months later.

[37] The respondent also argues that since this court determined that it had no jurisdiction to hear the applicant's appeal and then proceeded to strike it off the roll, its further determination on the merits was *obiter dictum* over which no appeal lies. Yet the applicant has purported to appeal against it and unnecessarily filed lengthy heads of argument on it. It is also argued, under prospects of success, that contrary to the provisions of r 59(3)(a) of the Supreme Court Rules, the notice of appeal relied upon by the applicant in seeking leave, does not state the date when the judgment of this court was handed down.

[37] I do not have to decide the appeal myself. That will be the function of the Supreme Court. What I have to do at this stage is to weigh the prospects of success of the intended appeal. There is a world of difference. To show prospects of success of an appeal is a less onerous task than actually proving the merits of it. At this stage, I am concerned with whether or not the applicant has a fighting chance on appeal. As in an application for bail pending appeal, the question is not whether the appeal will succeed. It is whether the appeal is free from predictable failure. If that conclusion is reached, the applicant should be entitled to relief: see *S v Hudson* 1996 (1) SACR 431 (W) and *S v Chikumba* 2015 (2) ZLR 382(H).

[38] On the face of it, and without deciding the matter, the applicant's contention that a self-assessment by a tax-payer becomes an assessment by the respondent upon its being served by the respondent on the taxpayer is arguable, given the provisions of the Income Tax Act, particularly s 37A. The applicant's further contention that the respondent could only have reached the decision to reduce the NRFTs by 7 ½ % and refund the overpayment after an assessment is also arguable. The issue of the lateness of the applicant's objection was not before this court and was therefore not part of its judgment.

[40] The argument that the applicant has purported to appeal an *obiter dictum*, as opposed to appealing against the operative part of the judgment is, on the face of it, misplaced. Among other things, if the applicant succeeds on the question of jurisdiction, then the merits that this

court considered extensively and made a substantive decision on, will cease to be *obiter*. They will become the substantive part of the judgment. Finally, I consider that the respondent is just being finicky on the alleged failure by the respondent to mention the date of this court's judgment on the notice of appeal. The notice of appeal refers to this court "*…sitting in Harare on 26 September 2017 and 22 October 2019 …*". Attached to the notice of appeal is the entire judgment. It is dated and signed 22 October 2019. That obviously is when it was handed down. At any rate, it is for the Supreme Court to say whether such an appeal is irregular or not.

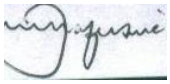
[41] In all the circumstances, I consider that condonation for the late noting of the application for leave to appeal, and the leave to appeal, should be granted. An order in terms of the draft is hereby granted, but with the addition that the leave to appeal is in respect of the same grounds of appeal incorporated in the notice of appeal in case no ITC 10/16 which were struck off the roll by the Supreme Court on 1 October 2019 in case no SC 612/19. Thus the following order is hereby made:

i/ Condonation of the late filing of the application for leave to appeal to the Supreme Court against the judgment of this court dated 22 October 2019 in case no ITC 10/19 is hereby granted.

ii/ Leave is hereby granted for the applicant to appeal against the judgment of this court aforesaid on the grounds set out in its notice of appeal dated 11 November 2019 in case no ITC 10/16 which was struck off the roll by the Supreme Court on 1 October 2019 in case no SC 612/19.

iii/ There shall be no order as to costs.

8 June 2021



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