THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

HIGH COURT CIVIL APPEAL NO. 6 OF 2003

(Arising out of Tax Appeals Tribunal Application No. 4 of 2003)

UGANDA REVENUE AUTHORITY……...APPELLANT

VERSUS

BWAMA EXPORTS LTD……. RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

JUDGMENT

Facts

1. The Appellant, Uganda Revenue Authority **("URA")** filed in this Court Civil Appeal No. 6 of 2003. That appeal arose out of Application No. 4 of 2003 which the Respondent ("BWAMA") had earlier flied and prosecuted in the Tax Appeals Tribunal ("TAT") in March 2003. In that application, BWAMA sought to recover from the URA the sum of US$71,593,763 by way of duty drawback.

2. Prior to filing the above Application No. 4/2003, BWAMA had written to URA on 25/09/02 seeking an explanation as to why URA had delayed processing BWAMA's refund claims. The relevant refunds claimed, covered the period Feb.-Dec. 2002 (except for June 2002 only). On 25/09/02, URA responded to BWAMA's letter of the previous day, citing URA's own internal personnel and organisational complications as the reason for the delays. More importantly, the letter promised to "investigate" further BWAMA's refund claims.

3. In its Statement of Defence before the TAT, the URA had contested one single entry only amounting to US$7,926,286) out of BWAMA's total claim of US$71,593,763. Accordingly, BWAMA applied for and TAT granted and entered a Judgment on admission for the uncontested amount of the claim — namely, US$64,725,017. URA now avers that TAT entered that judgment

in spite of a preliminary objection having been raised by the URA at the commencement of the proceedings.

ISSUES

4. The central issue canvassed by the URA before this Court appears to be whether, in entering judgment on admission, TAT was in error on two points. **First,** did TAT enter that judgment — indeed entertain the substantive application (No. 4/2003) — when there was no underlying taxation decision made by the Commissioner General of the URA, on which to base its jurisdiction? **Second,** even if it had jurisdiction to hear the substantive application, did TAT act prematurely — in particular, did it enter judgment without first entertaining and ruling on the preliminary point of law that had been raised by the URA to the effect that there was no taxation decision for TAT to review; and that, therefore, TAT did not have any jurisdiction in the matter?

5. In her submission, learned counsel for the URA contended that a preliminary objection by its nature should be raised at the commencement of the proceedings in order to bring to the court's notice an alleged irregularity or illegality, which must be cured first before proceedings in the substantive case can take off — see **Nassan Wasswa & 9 Ors. V Uganda Rayon Textiles [1982] HCB 137,** which was confirmed by the Supreme Court of Uganda in **National Union** of **Clerical, Commercial and Technical employees v National Insurance Corporation, SCCA No. 17 of 1993,** in which the trial Judge was held to have erred when he deferred to rule on a preliminary objection and proceeded, instead, to hear the substantive application on its merits; and, thereafter, proceeded to rule on the merits of the application as well as on the preliminary objection at the same time.

6. In the result, URA appealed to this Court seeking the following remedies:

(i) an order to set aside the Ruling and award of the TAT in Application No. 4 of 2003;

(ii) a declaration that there was no taxation decision by the Commissioner General of the URA; and

(iii) the costs of this appeal and of the application in the tribunal below.

7. In the course of hearing this appeal, both the scope and profile of the above prayers were shifted somewhat, as a result of subsequent understandings reached and undertakings made by and between both parties. In particular, URA undertook to pay to BWAMA the undisputed claim of US$64,725,017 by 31/07/03; whereupon BWAMA, on its part, abandoned its objection to URA's application (which was at that time before this Court) to stay execution of the TAT award. To that extent, it is quite evident that the first prayer (to set aside TAT's award) will now not be necessary. It has been overtaken by the parties' own subsequent and mutual agreement made before this Court. It has therefore become moot. Indeed, in the course of reaching that agreement, both parties made it quite clear to this Court that all they were now interested in was a definitive finding by this Court on the priority of hearing preliminary objections — as a guide to TAT in some pending and in all future disputes of the same kind as the present one.

8. Accordingly, the central — if not the sole issue for this Court to pronounce itself on — is whether TAT erred in not considering the preliminary objection at all, before entering its judgment in the substantive application. Even more importantly, however, is the question which is implicit in that first issue — namely, whether TAT had jurisdiction to hear an application that did not arise out of a taxation decision?

Analysis

9. As regards the substantive arguments against the instant appeal, learned counsel for BWAMA raised two contentions. **First,** that upon the admission by URA to pay the undisputed amount of US$64,725,017, there was no more need to consider the preliminary objection. That the effect of the admission was to formally waive BWAMA's need to prove its averments against the URA. In this connection, learned counsel argued that the effect of 0.11, r.6 of the Civil Procedure Rules is to empower the court to enter judgment where an admission of facts has been made, either on pleadings or otherwise, without waiting for the determination of any other question between the parties. **Second,** that in any event, TAT had jurisdiction in as much as BWAMA was an "aggrieved" party (i.e. an unpaid claimant, entitled to redress), within the meaning of the provisions of the Tax Appeals Tribunals Act and of the Customs and Transfer Tax Management Act. Similarly, it was contended that the Commissioner General's letter of 26/09/02 amounted to

an official communication and therefore a notification of URA's promise to pay the duty drawback and to expedite the refund of that drawback.

10. I have given the matter considerable attention, as the issues raised are important points for the development of our law — albeit procedural law mainly. Even more importantly, the TAT needs guidance in this area of the law for proper determination of future applications of this kind. The starting point is the one concerning the raising of preliminary objections. On this, the philosophy of our rules of procedure seems to be encapsulated in Order 13, rule 2 of the Civil Procedure Rules. That rule provides that:

"2. Where issues both of/aw and facts arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on the issue of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined." [emphasis added]

11. From 0.13, r.2 quoted above, it is evident that in the resolution of judicial disputes, determination of issues of law takes precedence over determination of issues of fact. This position is quite understandable in as much as the primary interest of justice is to dispose of disputes expeditiously. Accordingly, no matter how complex or interesting the facts of a case may be, if those facts are backed up by some legal irregularity, impropriety or nullity, then the court is enjoined to dispose of the matter on the basis of the particular legal issue — without waiting to resolve any other issues between the parties. In this connection, the Court is expressly allowed to postpone the issues of fact until after issues of law have been determined. In so doing, the court disposes of the entire dispute efficiently and expeditiously, without expending unnecessary judicial time and resources on a dispute that is after all a non-starter.

12. The requirement for expeditious judicial resolution of disputes is anchored in the Constitution itself — namely, Article 28(1) which entitles litigants to a fair and speedy public hearing; and Article 126(2) (b), which requires the courts to ensure that in adjudicating cases, justice is not delayed.

13. It is evident from the quotation in paragraph 10 above, that 0.13, rule 2 of the Civil Procedure Rules is completely in accord with the Constitutional requirement for speedy trials and

avoidance of delays in judicial proceedings. The language of that Order is mandatory. The use of the compulsory term "shall" in that Order leaves no discretion to the courts, but to consider points of law first. In the instant case, therefore, once URA had raised a preliminary point of law, TAT had no option but to dispose of that point first, before entertaining any other issue(s) between the parties.

14. The urgency and mandatoriness of 0.13, r.2, is to be contrasted with the flexibility of 0.11, r.6 of the Civil Procedure Rules (under which a judgment on admission may be entered). Order 11, r.6 provides that:

"6. Any party may at any stage of suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

As is clearly evident from the above quotation, the court's exercise of its powers under 0.11, r.6, is discretionary. The court may or may not enter judgment — as it "thinks just." Secondly, unlike 0.13, r.2 (where the court must try issues of law before any other issues between the parties), under 0.11, r.6, it is the Applicant who may come to court at any stage of the suit "without waiting for the determination of any other question between the parties."

15. In the particular application which was before the TAT (i.e. Application No. 4 of 2003), the preliminary point of law that was raised by the URA was both hefty and crucial, in as much as it called into question the very jurisdiction of the TAT to entertain that application at all. Once a tribunal's jurisdiction is challenged, there is simply no way that the tribunal can entertain any other issue between the parties without determining the jurisdictional challenge first, and satisfying itself that indeed it has jurisdiction to proceed with the matter. In the instant case, far from answering that crucial question first, TAT proceeded to entertain the merits of the substantive application, and, indeed went as far as entering a final judgment and an award in the case.

16. TAT's above procedure was plainly wrong. The scheme of our procedural rules does not sanction any such procedure. True, (as contended by the learned counsel for BWAMA) the parties may have consented to a judgment on admission. Nonetheless, as long as the URA canvassed the preliminary point of law, so long was TAT required to address and effectually dispose of that point. As a matter of law, the parties cannot consent to change the law, by waiving a legal requirement. If they do, certainly the courts cannot and should not condone it. Besides, it is difficult in the instant case to see what consent the parties ever reached, given that URA was all along actively and vigorously prosecuting its preliminary objection to TAT's jurisdiction.

17. In any event, any such consent of the parties could have been reached outside the ambit of the Tribunal's formal proceedings. Indeed, given the spirit of Article 126(2) (d) of the Constitution (for courts to promote reconciliation between the parties), the TAT could even have played a role in facilitating the settlement between the protagonists, but outside the formal proceedings. However, to make — as TAT did — a formal and definitive ruling on the mater prior to considering and resolving the jurisdictional challenge, was an error.

Accordingly, the Appellant's prayer on this point must succeed.

18. Having found for the Appellant as I have done in paragraph 15 above, it is not strictly necessary to consider the next facet of the Appellant's ground for appeal — namely, whether or not TAT based itself on a taxation decision of the Commissioner General of the URA. Nonetheless, for completeness sake I will touch very briefly on the question of whether indeed there was, or there was not, a taxation decision made by the URA in this case. The question is important because, absent such a decision, TAT would have no jurisdiction in the matter that was then before it — i.e. an application for review of a taxation decision under section 16 of the Tax Appeals Tribunals Act.

19. Section 1(1) (k) of the Tax Appeals Tribunals Act defines what a "taxation decision" is — namely:

"any assessment, determination, decision or notice."

It was not disputed by the Respondent, BWAMA that in the instant case, there was no "assessment", nor a "determination", nor indeed a "decision" taken by the URA in the matter. Therefore, the only question remaining is whether there was a "notice" made in this matter within the meaning of the above section 1(1) (k)? In this connection, BWAMA cited URA's letter of 26/09/02, which was in reply to BWAMA's own letter of 25/09/02. In their above letter, BWAMA had posed a specific inquiry as to why there had been long delays in URA's processing of BWAMA's duty drawback claims? URA's reply to that query was equally specific. It was that the delays were due to the imprisonment of its entire duty drawback team, which necessitated the training of a new duty drawback team, but that it would take some time before the new team would be able to process the backlog. Additionally, and more significantly for this appeal, the URA's letter contained a paragraph over which much has been made out by BWAMA. That paragraph promised that:

"I shall investigate whether any of your claims have been verified so far. If not, p/ease rest assured that we shall deal with them as soon as (sic) at all possible."

20. In their learned counsel's written submission, BWAMA contended that the above quoted paragraph of URA's letter of 26/09/02 was a "promise to pay or expedite the Respondent's refunds". I cannot agree. Quite clearly, the quoted paragraph was a promise to investigate whether BWAMA's claims had been so far verified or not; and, if not, to ensure that those claims would be so verified. That being the case, that exchange of correspondence cannot by any stretch of the imagination be said to have amounted to a notice, on URA's part, of an assessment or determination or decision on the tax payable by BWAMA. In this regard, it is quite clear that that term "notice" in section 1(1)(k) of the Tax appeals Tribunals Act has to be read *ejus dem generis* with the other three preceding terms (i.e. assessment, determination, decision). The most that the Commissioner General's above letter can be said to connote is that it gave a promise to investigate the question of the verification of BWAMA's claims to a refund. Only such verification (and not before, or even during the process of verification) would the URA make an assessment or a determination or decision or even a notification of BWAMA's taxability.

21. In the result, I have no hesitation at all in finding that URA's letter of 26/09/02 did not and cannot constitute a "taxation decision" within the meaning of section 1(1)(k) of the Tax Appeals

Tribunals Act. Accordingly, there was no taxation decision for TAT to review in BWAMA's Application No. 4 of 2003. This finding (on a subsidiary issue in this matter) merely aggravates the seriousness of TAT's error in not having first considered and resolved the URA's preliminary objection to TAT's jurisdiction to hear Application No. 4 of 2003, before entertaining and entering judgment in that application.

22. In view of all the above, the appeal is hereby allowed. Accordingly, the Appellant is entitled to the following reliefs (which the court hereby grants):

(a) a declaration that the Tax Appeals Tribunal did not have before it a taxation decision; and, therefore, had nothing at all before it that it could purport to review; and
(b) the costs of this appeal as well as of the proceedings before the Tax Appeals Tribunal.

Given the mutual undertakings made before this Court by the Appellant and the Respondent concerning UP.A's agreement to pay BWAMA the undisputed claim of US$64,725,017, there will be no order made to set aside the award made in that behalf by the Tax Appeals Tribunal in Application No. 4 of 2003.

Ordered accordingly.

James Ogoola
JUDGE
10/09/2003

DELIVERED IN OPEN COURT, BEFORE:
Ms Dorris Akol — Counsel for the Appellant
Anthony Wabwire, Esq — Counsel for the Respondent
J.M. Egetu — Court Clerk

James Ogoola
JUDGE
10/09/2003