THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0599-2001

KM Enterprises Ltd
Plaintiffs
Mirembe Wire Products Ltd
Seahorse Freighters Ltd

Versus

Uganda Revenue Authority
Defendant

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. All the 3 plaintiffs are incorporated in Uganda and bring this action, jointly and severally against the Uganda Revenue Authority, claiming Shs.172,022,792.00 as unpaid VAT refund, general damages for breach of contract, punitive and or exemplary damages for wilful conduct, a permanent injunction against the defendant from exercising its statutory powers in the recovery of Shs.533,908,106.00 allegedly still owed to the defendant, interest and costs of this suit.
2. On 10th April 2001 the plaintiffs executed a memorandum of settlement of tax liability with the defendant wherein the plaintiffs paid to the defendant Shs.400,000,000.00 in full and final settlement of all the plaintiffs' tax liabilities. The defendant agreed to refund to the plaintiffs Value Added Tax refund arising on the said sum of Shs.400,000,000.00 which is Shs.172,022,792.00. In spite of repeated demands from the plaintiffs the defendant has wrongfully refused to pay the sums of money to the plaintiffs. The failure of the defendant to make the VAT refund has inflicted loss of business on the plaintiffs as part of their working capital continues to be unreasonably withheld and general inconvenience for

which the plaintiffs seek general damages.

3. It is further contended that in breach of the said agreement the defendant has since then demanded an additional sum of Shs.533,000,000.00, as taxes and has threatened to use its statutory powers to collect the said sums of money from the plaintiffs. The plaintiffs contend that the conduct of the defendant after the agreement aforesaid is high handed, wilful and abuse of its statutory powers for which the plaintiffs seek exemplary and or punitive damages.
4. The defendant opposes the plaintiffs' claim. In its written statement of defence the defendant contends that the agreement in question is void as the defendant lacked capacity to enter such a contract. No right arose therefore which the plaintiffs could enforce.
5. In the alternative it is contended for the defendant that the said agreement did not decide and seal the plaintiffs' tax liabilities to the defendant as alleged in the plaint. The defendant denies that there is any provision in the said agreement for refund of VAT in the sum claimed or at all. Payment of taxes as reflected in annexture 'b' to the plaint does not automatically translate into VAT refunds. The defendant denies any breach of the agreement aforesaid, and contends that the sum of Shs.533,908,106.00 is truly outstanding unpaid tax by the plaintiffs.
6. The defendant counter claims for Shs.533,908,106.00 being the difference between the plaintiffs' tax liability assessed by 26th May 2000 as Shs.985,057,624.00 and Shs.400,000,000.00 which the plaintiff paid under the memorandum of understanding pending verification of the plaintiffs' final tax liability. The defendant further claims interest on the said sum from 20th May 2000 till payment in full and costs of the counter claim.
7. The plaintiffs in reply to the written statement of defence and counterclaim stated that the agreement of 27th April 2000 between the parties superseded all previous agreements between the parties and resolved the tax dispute between the parties. The agreement was executed by the defendant’s duly authorised officers and sealed with the defendant's seal. The defendant is estopped from denying the validity of the agreement as it has already acted upon it, and implemented some

provisions of the same. The plaintiffs deny that there is any tax liability due from the plaintiffs to the defendant as the same was settled by the agreement.

8. On the 27th May 2003 this matter came before my brother Lugayizi, J., for scheduling, and the parties agreed on three issues to be determined by the court without calling any witnesses, and agreed to file written submissions. The three issues were:

> '1. Whether the memo of settlement of tax liability dated 10th April 2003 settled the tax dispute between the parties.
> 2. Whether that memo entitled the plaintiff to a refund of VAT.
> 3. Remedies.'

9. On 16th July 2003 the court made the following note:

> 'After going through the submissions of counsel court feels that in order to determine the matter well, evidence needs to be adduced in respect of certain areas of the case. In fact the plaintiffs' side hinted on this in their submissions in respect of damages. For that reason court will not proceed to write a judgment now. Instead it will give a new date for mentioning this matter which is 22/8/2003. The registrar will inform the parties accordingly.'

10. On 4th September 2003 the parties appeared in the court, and were notified that the court wished to take evidence from Mr. Akabway. The matter came up before the court again on 6th October 2003, and on that day hearing was fixed for 25th November 2003. Counsel for the plaintiffs also indicated that he will call the Managing Director of the Plaintiffs. Mr. Akabway testified on 26th August 2004. Counsel for the plaintiffs applied for an adjournment on that day to allow him call a witness to prove general damages. The case came up for hearing on 19th October 2004 and 12th November 2004 but the plaintiffs were not able to produce the witness.

11. Thereafter at some point the case was reallocated to my brother Mukasa, J., and it came before him on 29th March 2006. Counsel for the parties requested that the matter be transferred back to the original judge. My brother granted their request.

The original judge was of a different view, and declined to handle the case further, and it was allocated to me.

12. When I called the case for hearing on 10th January 2008 the parties counsel proposed and I accepted that the case be decided with the evidence on record and the written submissions that they had initially provided to the first trial judge. Hence this judgment.
13. The question of tax liability is a matter of law provided for in the Constitution and different tax statutes and or regulations as are applicable to particular circumstances. In case of import duties Section 2(1)of the Customs Tariff Act, Chapter 337, states in part,

> '**Import duty.**
>
> (1) There shall be charged, in respect of the goods specified in the First Schedule to this Act which originate—
> a) in a country other than a member State of the Preferential Trade Area for Eastern and Southern African States, and which are imported into the Republic of Uganda, import duties at the respective rates specified in the fifth column of that Schedule;
> b) in a member State of the Preferential Trade Area for Eastern and
> Southern African States, and which are imported into the Republic of Uganda, import duties at such rates as may be declared by the Minister by statutory order,
> *and the import duties shall be levied, collected and paid in accordance with the Management Act*.'

14. In the written submissions of the defendant it is contended that the memorandum of understanding dated 26th April 2001 was fraudulently entered into with a view to defraud tax revenues, and is therefore void for illegality. Reference was made to the cases of *Napier v National Business Agency Ltd [1951] (2) All ER 264, Scott v Brown, Doering, McNab & Co. Slaughter and May v Brown, Doering, McNab & Co. [1891-94] ALL E.R. Rep. 654 and Maritime Electric Co Ltd v General Dairies Ltd [1937] (2) ALL E.R. 748* in support of this proposition.
15. With regard to issue no.2 it is submitted for the defendant that VAT refunds are governed by Section 48 of the Value Added Tax Act, and that the plaintiff had never submitted the required records for consideration of VAT refund, in

accordance with the applicable law. In addition it was contended that since the plaintiff is still indebted to the defendant in unpaid taxes of shs. 629,477,717.00, whose collection awaits the outcome of this suit, it cannot be entitled to the VAT refund.

16. With regard to remedies the defendant contended that the court orders the payment of the tax debt of shs.629,477,717.00 and that the plaintiffs' security deposited in court be handed over to the defendant.
17. In the written submissions of the plaintiff taken together, that is the initial submission and the reply to the defendant's written submissions, it is contended for the plaintiff that the agreement of 27th April 2001 taken in its ordinary meaning, resolved the issue of outstanding tax liability between the parties. Its language is plain and reveals a clear intention to settle the tax dispute between the parties. Secondly it is contended that the defendant is estopped from denying the validity of the agreement as the defendant had performed part of it, and handed back to the plaintiff cheques and a land title that had been in the possession of the defendant.
18. The plaintiffs contended that it is not The Customs Management Act that applied in resolution of this issue but the Uganda Revenue Authority Act, and in particular Section 6 thereof.
19. The plaintiffs' counsel written submissions, in reply to the claims of illegality of the memorandum of understanding, stated that the defendant being the guilty party of the illegality, he cannot be seen to rely on the claim of illegality. Secondly that it had not been shown in any case that the plaintiff was guilty of illegality. As a result, the doctrine of *Ex turpi causa non oritur* action invoked by the plaintiff was inapplicable to the present facts. In support of its submissions reference was made to *Scott v Brown, Doering, McNab & Co. (supra)*.
20. With regard to issue no.2 the plaintiff contends that the memorandum of understanding, clause 5 thereof, entitles the plaintiff to VAT refunds on the sum of Shs.400,000,000.00 that the plaintiff paid to the defendant. Annexture B to the plaint a document produced by the plaintiff sets out this VAT amount, and it should be refunded.

21. With regard to remedies the plaintiff prayed for a refund of the VAT, general damages for breach of the memorandum of understanding, and exemplary and or punitive damages, given the defendant's conduct. The court needed to punish the defendant for acting in a high handed manner and in flagrant disregard to what the parties had agreed to. As the memorandum of understanding settled the tax liability between the parties, the plaintiff was entitled to a permanent injunction against the defendant from attempting to recover the sums claimed as unpaid taxes. Costs should be awarded to the plaintiff as well.
22. The plaintiff's counsel further prayed that this court dismisses the counter claim given that the memorandum of understanding settled the tax liability of the parties.
23. The facts of this case are in fact hardly in dispute on the pleadings. It is what those facts mean that would appear in contention. This is perhaps the reason that the parties did not bother to call any evidence and requested the judge to write a judgment upon the parties filing written submissions. In spite of that, it is kind of strange that they propose to do so without formally agreeing on any agreed facts.
24. Nevertheless as can be gathered from the pleadings, the plaintiffs are importers of goods, which were in Uganda but had not been declared. The goods in the plaintiffs' warehouse were seized by the URA. Import/custom duties were imposed. On or about 26th May 2000, Shs.985,057,624.00 was assessed by the defendant as the tax due from the plaintiffs. The plaintiffs objected. The parties, *inter alia,* agreed to a verification exercise. In the meantime the plaintiffs paid Shs.400,000,000.00 as part payment, in accordance with a memorandum of understanding between the parties dated 26th May 2000. I shall set out its substantive contents below:

> 'Whereas
> (1) The Taxpayer's Bonded warehouse No.258 was closed by the URA in demand for taxes on uncustomed goods totalling 985,057,624/- subject to verification as provided under paragraph 5 in the Memorandum of Understanding below.
> (2) Three trucks which transported the uncustomed goods were also subsequently seized by the URA as enforcement

action to collect the taxes in issue.
(3) The Taxpayer acknowledges that he is the legally appointed agent of the owner and manager of the 3 trucks (M/S Sea Freight (U) Ltd) in Uganda.
(4) The Taxpayer has requested the URA to re-open his premises and release the said trucks on the understanding contained hereinbelow.
(5) The URA is also agreeable to the opening of the Taxpayer's premises provided that a full verification of the taxes due will be conducted and an arrangement made for the payment of the said taxes.
NOW THEREFORE THIS MEMORANDUM OF UNDERSTANDING WITNESS AS FOLLOWS:
(1) The Taxpayer agrees to immediately pay Ug. Shs.50MN/- towards his tax liability upon which the URA will re-open his premises and release the seized trucks.
(2) The Taxpayer further undertakes to pay an additional Ug. Shs.200MN/- towards his tax liability within one month from the date of this Understanding.
(3) In addition to Ug. Shs.150MN/- earlier paid by the Taxpayer, the Taxpayer shall have made a total interim payment of Ug. Shs. 400MN/- in all.
(4) It is understood by the Taxpayer that he shall be paying taxes on any consignments which are currently in Bond or he may import hereafter in the normal way.
(5) The two parties agree to complete the re-verification exercise of the taxes owed by the Taxpayer within one month from the date hereof and enter into final arrangements on payment of any outstanding amount.
(6) Should the Taxpayer breach any of the conditions stated herein, this Memorandum of Understanding shall stand breached and the URA shall be entitled to demand immediate and full payment of any taxes due.'

25. About a year later, on 21st April 2001 the parties entered into another memorandum of understanding in which they purported to settle the tax dispute between themselves. I shall set out the most relevant parts thereof below:

'Whereas
(1) The taxpayer has paid a total sum of Ushs.400,000,000.00 to the URA being payment on account pending verification and final agreement on the tax liability matters with URA.
(2) The taxpayer has submitted to the Internal Revenue Department VAT refund claims from his business operations which have not been processed due to his outstanding tax obligations.

(3) The parties herein are desirous of reaching a final settlement and understanding on the taxpayer tax obligation.
NOW THEREFORE THIS MEMORANDUM OF UNDERSTANDING WITNESSES AS FOLLOWS:
(1) The Uganda Revenue Authority hereby acknowledge the sum of Ushs.400,000,000.00 already paid by the taxpayer as full and final payment in settlement of tax arrears.
(2) On the execution of this Memorandum of Understanding, the URA shall return to the following documents……
…….. ……
(3) Upon execution of this agreement URA shall provide the Taxpayer with the requested for detailed breakdown on receipts in respect to the shs.400,000,000.00 paid as tax.
(4) The URA shall further cause to be reopened and cause to allow the operations of the bonding to continue and or resume in Bond 258.
(5) Accordingly the URA shall also clear the Taxpayer for consideration of his VAT refund claims by the Internal Revenue Department.
(6) The tax dispute between the Taxpayer and the URA concerning customs duty shall stand settled between the parties upto the date of execution of this agreement.
(7) The Taxpayers shall with effect from execution of this agreement be free to transact business of importation in the normal course.'

26. After the 10th April 2001agreement was executed the defendant subsequently notified the plaintiffs that there was outstanding tax liability of Shs.533,908,106.00 for which it demanded that the plaintiffs must pay. The plaintiffs answer is, pointedly, not that this amount is not actually due in law, but that it is not due on account of the 10th April 2001 agreement set out above in which the defendants accepted that Shs.400,000,000.00 already paid by the plaintiffs was the full and final payment in settlement of the tax arrears.
27. It is clear from this memorandum which purported to settle the question of liability that no reference was made to any relevant law which provided for the levying of the taxes in question, collection and payment of the same. No mention is made of the original amount that was levied, and what became of it. Those are the facts, as can be gathered from the pleadings, which I presume are not in

dispute, upon which this case must be decided.

28. The consequence of the agreement in question would be to compromise the tax liability of the plaintiffs, reducing the same by more than 50% of what was due to be levied, collected and paid. I have no hesitation in my mind whatsoever to arrive at the conclusion that neither the defendant nor the defendant's servants of whatever rank had authority whatsoever, real or ostensible to enter into such an agreement. The motivation for doing so, on the part of all involved, must inevitably be, to unlawfully deprive the Ugandan Treasury of the true value of whatever actual tax was due from the plaintiffs to the defendant, given that an assessment of a much higher figure had already been notified to the plaintiff. That assessment of Shs 985,057,624.00 was now being nullified, not by application of the relevant law, or issuance of a fresh assessment of tax liability but by agreement of the taxpayer and the officers of the defendant that the taxpayer should not pay the unpaid balance of the assessed sum.

29. The agreement of 10th April 2001 does not mention if the re verification exercise agreed to in the first agreement was carried out, and what were the results of such re-verification. This re verification ought to have been carried out within one month from the date of the first agreement. The second agreement comes about a year later, and no mention is made of this re-verification. Was the initial assessment of custom duties notified before the first agreement found to be erroneous? Was that assessment compiled in breach of the applicable law? The second agreement ought to have answered these questions in the interests of all the parties, if the matter was to be put to rest. It was not enough just to assert that what was paid as an interim payment is the final payment for the tax arrears and the tax dispute is settled. The substance of the resolution of the dispute is not stated in that agreement.

30. The different tax laws being administered by the defendant and other statutes provide for the handling of tax disputes. Though it is possible for the tax payer and the defendant to reach agreement in event of a dispute, that agreement must be consistent with the applicable law. This is as much for the protection of the tax payer as it is for the public interest. The defendant or its officers can not go

outside the applicable law. If the tax payer is not satisfied with the position of the law, as applied by the defendant, the tax payer can proceed to utilise the dispute resolution mechanisms the law avails for that purpose.

31. In their written submissions counsel for the plaintiffs submitted that the doctrine of *Ex turpi causa non oritur action* is not applicable to the facts of this case. Relying on the words of *Lindley, L.J., in Scott v Brown (supra), at page 341,*

> 'No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality.'

32. It was contended for the plaintiff that there are two conditions necessary for this doctrine to apply. And that only one had been met, which was to bring to the notice of the court the illegality. The plaintiff had not, however, been implicated in the illegality as the memorandum was drawn by the defendant, and it had been the idea of the defendant all along to draw such a memorandum. The defendant's officers had represented to the plaintiffs that they had the powers to enter into such an agreement. The plaintiffs on the other hand had at all times acted within the law, and honourably.

33. This reasoning is ingenious but unpersuasive. First of all no evidence was adduced by the plaintiffs to show how they were persuaded by the defendant's officers to enter into this agreement and the alleged representations made by the defendant's officers with regard to authority to make the agreement in question. Clearly in my view the plaintiffs cannot invoke innocence in this case, and in any case, even if they were to succeed in doing so, since they admit the illegality of the agreement in their written submissions filed on 30th June 2003 in reply to the defendant's written submissions, it is sufficient that this agreement is shown to be illegal. The plaintiffs cannot persuade this court to assist the plaintiffs partake of their illegal harvest. The agreement cannot be enforced for it is illegal. It was actuated by a fraudulent intent to deprive the Government of Uganda of tax revenue.

34. Fraud apart, the plaintiff is beset with another insurmountable hurdle. In *York*

Corporation v Henry Leetham & Sons Ltd, [1924] All E.R. Rep. 477, it was held, (in the head note of the case),

> 'A body charged with statutory powers for public purposes is not capable of divesting itself of those powers or of fettering itself in their use, and an agreement by which it seeks to do so is ultra vires and void. Such an ultra vires agreement cannot become intra vires by reason of estoppel, lapse of time, ratification, acquiescence, or delay.'

35. In *Maritime Electric Co Ltd v General Dairies Ltd , [1937] (1) All ER 748*, the appellant company, was a public utility company, within the meaning of the Public Utilities Act of New Brunswick. It sold electric current to the respondent. As a result of a mistake made by the appellant's servants the respondent was only billed for one tenth of the cost of the power. Under the Public Utilities Act, a public utility company is strictly limited as to the charges it can make, and a public utility company charging or receiving for any service rendered less or greater compensation than prescribed by the Act is liable to penalty. It was held that the respondent could not rely upon an estoppel which would have the effect of defeating the unconditional statutory imposed by the Public Utilities Act. The duty put upon both parties by the statute could not be avoided or defeated by a mistake. No corporate body can be bound by estoppel to do something beyond its powers, and therefore cannot be bound to do something which is regulated by statute in any other way than the statute requires.
36. These English cases set out the accepted position of the law within this jurisdiction with regard to the exercise of statutory powers. Exercise of statutory powers and duties cannot be fettered or overridden by agreement, estoppel, lapse of time, mistake and such other circumstances. To hold otherwise would be to suggest that an agreement between the parties can amend an Act of Parliament, and thus change what parliament ordained by allowing the defendant's servants to choose to act, or operate outside or contrary to the provisions of the law, willy-nilly. And that cannot be.
37. The authority of the Uganda Revenue Authority is to administer certain tax laws, collecting the tax due. The Uganda Revenue Authority cannot, in breach of duties imposed by statute, agree to collect less tax than due from any particular tax

payer. Such an agreement as the one in question would simply be void.

38. Neither officials of the defendant nor tax payers like the plaintiffs' or their combined agreement can substitute the statutory scheme for levying, collection and the payment of the taxes due by agreement between themselves without complying with the law in the first place, which determines what tax is to be levied, collected and paid. To determine the actual tax liability of the plaintiffs' recourse must be made to relevant law, and not to a compact between the parties. An agreement between the parties such as the one in question cannot settle tax liability, even if it purports to do so. I would accordingly hold that the memorandum of settlement of tax liability dated 10th April 2001 did not and could not settle the tax dispute between the parties. Neither would it entitle the plaintiffs to a refund of VAT, a matter that is regulated by statute.
39. I would dismiss the suit with costs.
40. With the regard to counter claim, which is basically a claim for taxes due, given that no hearing proceeded on it, I would direct the parties to proceed as the law mandates.

Signed, dated, and delivered this 25th day of February 2008

FMS Egonda-Ntende
Judge