

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0008 OF 2013

RADIO PACIS LIMITED PLAINTIFF

VERSUS

**THE COMMISSIONER GENERAL }
UGANDA REVENUE AUTHORITY } DEFENDANT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff is a not-for-profit private company limited by guarantee. It operates a community Radio owned by the Registered Trustees of Arua Diocese, whose activities include radio broadcasting, newscasts, adverts, talk shows, sports adverts and services of a similar nature. It obtains financial support from the Registered Trustees of Arua Diocese, whenever it fails to break even. During or around November 2012, through its Arua Domestic Tax Department, the defendant issued the plaintiff with a Tax Assessment Notice in the amount of shs. 30,000,000/= under section 151 of *The Income Tax Act*, as penal tax for failure to file Income Tax Returns for the following financial years; 2007 / 2008, 2008 / 2009 and 2009 / 2010. The plaintiff contends that being a non-profit religious organisation, it was under an honest but mistaken belief that it was not obliged to file annual income tax returns, more especially since it does not earn any profit and thus has no income to declare.

Being dissatisfied with the assessment, by a letter dated 7th November 2012, the plaintiff formally objected to the assessment. In a letter dated 29th January 2013, the Manager of Domestic Taxes, Northern Region, responded rejecting the objection. By another letter dated 11th February 2013, the plaintiff then appealed to the Commissioner Domestic Taxes who in a letter dated 10th April 2013 rejected the appeal stating that the assessment had correctly been arrived at, thereby

upholding the assessment and insisting on the plaintiff's obligation to pay. The plaintiff contends that since its income tax liability for the period of assessment is nil and penal tax is a percentage pegged onto the amount payable as income tax for the relevant period, the defendant erred in its assessment. The plaintiff therefore seeks a declaration that it is not liable to pay the penal tax, a permanent injunction restraining the defendants from enforcing recovery of that tax, general damages for unlawful assessment, interest and costs.

In their defence, the defendants denied liability for the plaintiff's claims and contend that the plaintiff is a registered tax payer liable to file annual tax returns. Upon failure to comply with that requirement, the defendant made an assessment of the penal tax lawfully due from the plaintiff and for that reason the plaintiff's suit ought to be dismissed with costs and instead the plaintiff be directed to pay the tax as assessed. The only issue to be decided as agreed at the scheduling conference is whether the plaintiff is liable to pay the assessed penal tax with interest.

It is an agreed fact in this suit that the plaintiff is a registered tax payer. It is further agreed that the plaintiff was by law obliged to file annual income tax returns for the years in question but did not. It is further agreed that the plaintiff's tax liability in respect of all the financial years in question is nil. The only question in contention is whether or not as a result of that default the plaintiff is liable to penal tax under the provisions of section 151 of *The Income Tax Act* as assessed.

The Commissioner's determination of tax liability is ordinarily presumed correct (see *Okello Okello v. The Commissioner General, Uganda Revenue Authority H. C. Civil Suit No. 229 of 2010*). Under section 102 of the Act, the onus is on the taxpayer to prove, on the balance of probabilities, the extent to which the assessment made by the commissioner is excessive or erroneous. The answer to the question whether the assessment made by the commissioner in the instant case was erroneous calls first for a determination of whether or not liability under section 151 is strict, requires proof of general *mens rea* or rather the specific intent of wilfulness. Strict liability would imply that the plaintiff may be liable to a penalty even if it was not at fault or took all reasonable care to ensure compliance with the law, but did not.

There is a common law presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence. The presumption of *mens rea* is rebutted by express provision in the statute excluding the requirement of *mens rea*. Where the statute is silent as to the requirement the general presumption remains. However, the courts may look at other offences created under the same Act. If the other offences expressly require *mens rea*, the courts may well take the view that the omission to refer to such a requirement was deliberate and that Parliament intended to create an offence of strict liability (see *PSGB v. Storkwain Ltd* [1986] 2 All ER 635). In *Gammon (Hong Kong) Ltd v. Attorney-General of Hong Kong* [1985] AC 1, the appellant was a builder who had deviated from plans in the construction of a building. It was an offence to deviate from the plans in a substantial way. The appellant accepted he had deviated from the plans but he believed that the deviation was only minor rather than substantial. It was held that the offence was one of strict liability and therefore his belief was irrelevant and his conviction upheld. In determining whether an offence is one of strict liability there is a presumption that *mens rea* is required. This presumption may be rebutted where:

1. The crime is regulatory as opposed to a true crime; or
2. The crime is one of social concern; or
3. The wording of the Act indicates strict liability; or
4. The offence carries a small penalty.

Crimes that are regulatory are often of social concern and carry small penalties. Examples of regulatory offences include health and safety regulations. Examples of offences of social concern include driving offences. In *Jason John Williams v. R* [2011] 1 WLR 588, the offence of causing death by driving without a licence was considered to be one of strict liability as the penalty was a maximum of two years' imprisonment whereas the offence of causing death by reckless driving carried a maximum sentence of fourteen years. However, just because an offence carries a heavy penalty does not mean that it is one requiring *mens rea* (see *R v. Howells* [1977] 3 All ER 417).

Tax crimes are regulatory crimes and of social concern. While section 151 of *The Income Tax Act* provides for a meagre penalty of 2 percent of the tax payable for that year or one currency point per month, whichever is the greater, for the period the return is outstanding for failure to

file the return, section 94 (3) empowers the Commissioner may, by notice in writing, to grant the taxpayer an extension of time for a period not exceeding 90 days, for furnishing a return where the taxpayer is unable to furnish the return by the due date because of absence from Uganda, sickness or "other reasonable cause." The Act therefore provides for adequate safeguards for genuine cases of default through providing additional time before the penalty provision becomes operational. While the section provides some relief for genuine cases, wilful and deliberate failure, in absence of sufficient reason, is penalised. From its wording, in a prosecution of offences under section 151 of *The Income Tax Act* provides, Court has to presume the existence of *mens rea* and it is for the accused to prove the contrary. Although it is an offence of strict liability, where the prosecution is not required to prove *mens rea*, but there is a defence of other reasonable causes akin to absence from Uganda and sickness available to a taxpayer. The plaintiff therefore has to prove the circumstances which prevented it from filing the returns.

The explanation advanced in this case is that the plaintiff was mistaken about its obligation to file returns in that it had not earned any profits during the financial years in question. A similar explanation was offered by the accused in *United States of America v. Dr. Frank L. Benus*, 196 F. Supp. 601 (1961), where the accused, a practicing dentist, was indicted for wilful failure to file income tax returns for five successive years. He admitted all of the material averments of each count of the indictment, except wilfulness. There was no doubt that he was aware of the existence of such a tax, but he claimed that it was his belief that a person with such a low income was not required to file income tax returns. In each of the years in question, however, he received Internal Revenue Service forms from the Army showing how much he had been paid by the Army as a result of his service as a reserve officer and how much had been withheld for federal income tax purposes. It was stated on each form that the form was not an income tax return. Each form received from the Army reported less than \$1000 in income. In light of those facts the court held;

Assuming for the moment that the appellant was in fact unaware of the exact amount of income one must have before reporting is required, we can only wonder why in the light of these warning signs he made no effort to find out. We conclude that the evidence was sufficient to establish that he did not have reasonable cause for believing he was not subject to the reporting requirements and acted with a careless disregard of whether he was subject to those requirements.

Similarly in *O'Brien v. United States*, 51 F.2d 193 (1931), the appellant was a contractor having a substantial business. For a decade, he had represented a district in Chicago in the Illinois State Legislature. His gross income for the three years was nearly a half million dollars. He received over \$100,000 a year from the Sanitary Drainage District. He bought and sold stocks and bonds, from which source alone his income exceeded \$5,000 in one year. On the other hand, he is pictured by his counsel as a somewhat illiterate, untutored individual with little or no knowledge of the complicated federal income tax laws. There was, however, evidence received which tended to refute his inexperience in and unfamiliarity with business in its various phases. The appellant contended that the evidence did not show that he wilfully failed to file income tax returns for the three years under consideration. Although admitting that his income was such as to necessitate the filing of income tax returns, he offered as his explanation for not doing so his belief that because he was a member of the Illinois State Legislature, he was not required to pay an income tax, nor was he under any duty of making an income tax return. The Court held;

The offense of wilful failure to file an income tax return is not the same as a wilful attempt to evade and defeat an income tax..... A prosecution for a wilful failure to file a return might be maintained although there was in fact no tax due. There could, however, be no such prosecution for a wilful attempt to evade or defeat a tax unless there was some tax due from the taxpayer. Moreover, there could be a successful prosecution for a wilful attempt to evade a tax even though the accused filed his return.

Under the Federal tax laws of the United States of America, the offence consists wholly in the single act or omission or failure to make income tax returns. This failure in order to be criminal must have been "wilful," and wilfulness in that context means "voluntary, purposeful, deliberate, intentional as distinguished from accidental, inadvertent or negligent." It has the connotation of "done with a bad purpose or done without justifiable excuse, or done stubbornly or obstinately or perversely, or with bad motives or with criminal intent to avoid the law." There, "wilfulness" serves to distinguish situations involving bona fide misconceptions of what is required from those where the failure to file has been attended by knowledge of the legal obligation.

Ignorance of the law is no defence to crime, except that, where wilfulness is an element of the crime, ignorance of a duty imposed by law may negative wilfulness in failure to perform the duty. In the case of Uganda, the offence does not require a specific intent of any kind, apart from and

beyond the mere omission or failure to file the return. Whereas in the United States of America the state must prove beyond a reasonable doubt that accused's failure to file the return was voluntary, purposeful, deliberate and intentional, and not accidental, inadvertent or negligent, in Uganda all that should be proved is that the accused was required to file a return and that the accused did not file a return within the prescribed time.

Under section 2 (sss) of *The Income Tax Act*, “taxpayer” means any person who derives an amount subject to tax under the Act and includes;- (i) any person who incurs an assessed loss for a year of income; or (ii) for the purposes of any provision relating to a return, any person required by the Act to furnish such a return. Under section 4 (1) of the Act, the obligation to pay Income Tax is imposed for each year of income on every person who has chargeable income for the year of income. Any income derived by a person in carrying on a business is characterised by section 18 (1) as business income and forms part of gross income within the meaning of section 17 (1) (a) of the Act. Under section 15 of the Act, the chargeable income of a person for a year of income is the gross income of the person for the year less total deductions allowed under the Act for the year (expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income). The plaintiff is not one of the listed institutions whose income is exempt from tax. It's income derived from radio broadcasting, newscasts, adverts, talk shows, sports adverts and services of a similar nature is not exempt income within the meaning of section 21 of *The Income Tax Act*. As a result, the plaintiff derived income subject to tax in each of the years in question as demonstrated by exhibits P. Ex. 8, P. Ex. 9, P. Ex. 10 and P. Ex. 11. It is therefore clear in the instant case that the plaintiff earned income from business constituting part of its gross income which consequently was reportable income in the years in question, yet it failed to file returns during those years.

Section 92 (1) of the Act requires every taxpayer to furnish a return of income for each year of income of the taxpayer not later than four months after the end of that year, except where the tax payer is exempted under section 93 thereof. Under section 151 of the Act, a person who fails to furnish a return of income for a year of income within the time required under the Act is liable to pay a penal tax equal to 2 percent of the tax payable for that year or one currency point per month, whichever is the greater, for the period the return is outstanding.

The obligation to file annual income tax returns applies to every taxpayer, i.e. a person with reportable income (the liability is at the point of receipt of business income), although the obligation to pay tax is that of taxpayers who after assessment, have chargeable income (i.e. income minus deductions) during the year of income. Filing annual income tax returns is a method of bringing business income to assessment rather than an obligation for only taxpayers with chargeable income. The income tax payable by a taxpayer for a year of income is calculated by applying the relevant rates of tax determined under the Act to the chargeable income of the taxpayer for the year of income and from the resulting amount are subtracted any tax credits allowed to the taxpayer for the year of income (see section 4 (2) of *The Income Tax Act*). The obligation to file annual income tax returns is intended to provide the defendant with information, of which it likely to be uninformed unless the tax returns are filed. Tax returns contain declarations of the gross income earned from taxable activities on basis of which the liability to pay tax, if any, and the amount payable can then be determined. By virtue of section 95 (1) of *The Income Tax Act*, it is on basis of the taxpayer' return of income that the Commissioner makes an assessment of the chargeable income of the taxpayer. It is after the returns are filed that the tax payable by an individual under *The Income Tax Act* is determined by application of prescribed rates to a taxpayer's chargeable income, if any, calculated in the prescribed manner. It is for that reason that according to section 2 (sss) (i) of *The Income Tax Act*, a person remains a "taxpayer" by deriving an amount subject to tax under the Act, even when that person incurs an assessed loss for a year of income.

Whereas section 94 (3) of the Act envisages absence from Uganda, sickness or "other reasonable cause" as possible justifications for extension of time for furnishing a return, where the taxpayer is unable to furnish the return by the due date, the latter cannot include mistake as to liability to file a return since ignorance of the law, however innocent, is never a defence. In any event, "other reasonable cause" under that provision has to be interpreted *ejusdem generis*. When a list or string of genus-describing terms is followed by wider residuary or sweeping-up words, the latter words are taken to be restricted by implication to matters of the same limited character with the former. It is assumed that the general words were only intended to guard against some accidental omission in the objects of the kind mentioned and were not intended to extend to objects of a wholly different kind (see *Tillmans & Co v. S.S. Knutsford Ltd* [1908] 2 KB 385).

In the instant case, the genus-describing words "absence from Uganda" and "sickness" have implicit in them factors extrinsic to the taxpayer over which the taxpayer has no control, that had the effect of preventing the taxpayer from making a timely filing. Ignorance of the liability to do so lacks that character common to the two genus-describing terms. The plaintiff therefore did not discharge the onus imposed upon it by section 102 of *The Income Tax Act*, of proving on the balance of probabilities, the extent to which the assessment made by the commissioner is erroneous. Since the plaintiff's objection is as regards the validity rather than the quantum of assessment, the agreed issue is answered in the affirmative. Consequently I find that the plaintiff is liable to pay the assessed penal tax.

Be that as it may, the suit raises an ancillary issue addressed by both counsel in their final written submissions as to the jurisdiction of this court in tax matters which ought to be dealt with as a well. A court of competent jurisdiction is one that has jurisdiction over the parties, the subject matter of the litigation and the remedy being sought. It is contended by counsel for the defendant that the original jurisdiction to decide tax related disputes vests in the Tax Appeals Tribunal by virtue of section 4 of *The Tax Appeals Tribunal Act*, with appeals lying there from to the High Court. It is argued that by virtue section 27 of *The Tax Appeals Tribunal Act*, the High court lacks original jurisdiction in tax matters and is only vested with appellate jurisdiction. Counsel for the plaintiff disagrees. He argues that the High Court has unlimited original jurisdiction by virtue of article 139 (1) of *The Constitution of the Republic of Uganda, 1995* and specific original jurisdiction over tax matters by virtue of section 100 (1) (a) of *The Income Tax Act*.

Exclusion of jurisdiction means prevention or prohibition of the court from entertaining or trying a matter, in essence limiting its ability to discharge its constitutional mandate. Therefore when interpreting statutes that have a bearing on the jurisdiction of courts, it is the principle of law that statutory provisions tending to oust the jurisdiction of the court should be construed strictly and narrowly. The rationale can be found in De Smith's *Judicial Review*, 6th ed 2007 by H. Woolf, J. Jowell and A. le Sueur, where they state at para 4-015 as follows;

The role of the courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the

citizen. Legislation which deprives them of these powers is inimical to the principle of the rule of law, which requires citizens to have access to justice.

For that reason, it is now a well recognized rule in the interpretation of statutes that a curtailment of the powers of a court of law, in the absence of an express provision or clear implication to the contrary, is not to be presumed. In the case of *Smith v. East Elloe Rural District Council* [1965] AC 736 Lord Viscount Simonds stated as follows:-

Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.

It was also held similarly, in *Davies and Another v. Mistry* [1973] EA 463 where Spry VP, quoting the case of *Pyx Granite and Company v. Ministry of Housing and Local Government* [1960] AC 260 stated that: “It is a principle not by any means to be whittled down that the subject’s recourse to Her Majesty’s courts for the determination of his rights is not to be excluded except by clear words. That is a ‘fundamental rule’ from which I would not for my part sanction any departure.” Therefore, the right of access to any court can only be taken away by clear and unambiguous words of Parliament.

The principle of law that statutory provisions tending to oust the jurisdiction of the court should be construed strictly and narrowly was further propounded in the landmark decision in *Anisminic v. Foreign Compensation Commission* [1969] 1 All ER 208 where Lord Reid stated:

It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

Similarly, the stand of the Australian Courts is that although Parliament bears the popular mandate, and that it can, indeed, provide for an ouster clause in a statute, it has to have spoken unequivocally. This is particularly clear from *Craig v. South Australia* [1995] 184 CLR, in which the High Court observed:

Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of

administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so.

Mulenga, JSC (as he then was) in *Habre International Company Limited v. Kassam and others* [1999] 1 EA 125 as well stated that:

The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this.

The structure of the judiciary in Uganda as established by article 129 of *The Constitution of the Republic of Uganda, 1995* features a court system that is unitary, generally regionally or territorially constituted, comprising inferior and superior courts of original and appellate jurisdiction. The courts of record have their jurisdiction conferred by the constitution itself whose provisions have been re-enacted in enabling statutes enacted by Parliament while the jurisdiction of subordinate courts and tribunals is entirely assigned by Parliament through enactments creating such courts and tribunals. Its noteworthy at this stage that the key feature of civil jurisdiction of the courts of judicature in Uganda is that they are of various grades with different pecuniary limits of jurisdiction, whereby a suit must be instituted in the Court of the lowest grade competent to try it.

Courts of judicature are established by or under the authority of the Constitution. Both Article 139 of *The Constitution of the Republic of Uganda, 1995* and Section 16 (1) of *The Judicature Act*, "subject to the provisions of the Constitution," confer unlimited original jurisdiction on the High Court in all matters. By unlimited original jurisdiction is meant that the court has all the jurisdiction and powers of a court of law and equity. It is a general jurisdiction over all justiciable disputes arising. It hears in first instance every suit not assigned exclusively to another court or tribunal by a specific provision of law. However, under article 129 (3) of the Constitution, Parliament may make provision for the jurisdiction and procedure of the courts of judicature (both superior courts of record and subordinate courts) "subject to the provisions of

this Constitution." It is well established that the jurisdiction of courts so created to try suits of a civil nature is assumed unless it is taken away statutorily, either expressly (by enactment) or by necessary implication (based on general principles of law and equity or on ground of public policy). However with regard to the High Court, it has consistently been held by the Supreme Court that an Act of Parliament cannot repeal, alter or reverse a provision of the Constitution unless it is an Act to amend the Constitution (see *Former Employees of G4S Security Services v. G4S Security Services Ltd*, S.C Civil Appeal No.18 of 2010; *David Kayondo v. Cooperative Bank Limited*, S.C. Civil Appeal No 19 of 1991; *Kameke Growers Cooperative Society Limited and 7 others v. North Bukedi Cooperative Union*, S.C. Civil Appeal No. 08 of 1994; [1994] VI KALR 1 and *Commissioner General, Uganda Revenue Authority v. Meera Investments Limited*, S. C. Civil Appeal No. 22 of 2007). As a result, although retaining exclusive subject matter jurisdiction over some matters such as judicial review of administrative action, relief from forfeiture and civil claims beyond the pecuniary limits of the subordinate courts and tribunals, being a court of unlimited civil jurisdiction, the High court has *de-facto* concurrent jurisdiction with most, if not all, subordinate courts and Tribunals whose parent statutes have not expressly amended the Constitution.

Concurrent jurisdiction occurs when more than one court or other adjudicative entities are seized of the same matter. It means that a subordinate authority can deal with the matter equally with any superior authority in its entirety so that either one of such jurisdictions can be invoked. Normally, when concurrent jurisdiction is conferred, it would mean that there is overlapping jurisdiction and each of the authorities mentioned in the respective laws or statutory provisions would have jurisdiction to deal with the same subject-matter, that is to say, the jurisdiction of one authority would be co-extensive with that of the other authority. In a hierarchical judicial system, such as that established by article 129 of *The Constitution of the Republic of Uganda, 1995*, for a more organised, orderly and structured disposal of cases, a model of exclusive jurisdiction is to be preferred to one of concurrent or overlapping jurisdiction. Nonetheless, the need for promotion of judicial economy through specialisation has seen the creation of Divisions of the High court and speedy, inexpensive and effective alternative forums for dispute resolution such as specialised tribunals making concurrent or overlapping jurisdiction a reality, albeit, an undesirable one.

Concurrent jurisdiction creates overlapping jurisdiction among courts which may result in fundamental questions about whose decisions should prevail and which norms are applicable. Even where the High Court and the subordinate court or tribunal agree on the substantive law to be used, the reasons set out in their respective decisions may show divergent interpretations of the same legal principle, thus undermining the unity of the law, or even its certainty. Limiting incidences of concurrent jurisdiction not only establishes an institutional hierarchy but also a hierarchy of legal norms. By this is avoided the potential conflict arising from differences in the interpretation of the same legal norm by two different bodies.

The phenomenon of concurrent jurisdiction in an otherwise highly hierarchical court system is not unique to Uganda. Other jurisdictions have had to grapple with it. One way of looking at situations like this is that once concurrent jurisdiction is conferred without limiting the choice of forum to which a party may take recourse, then a party is given the right to choose one or the other forum, in which case the party should be taken to be the best judge as to the forum which would be more convenient to him or her. In that case, the choice which the legislature has given to a party in respect of the forum to be taken recourse to by him or her, cannot be taken away by the High Court.

For example in the South African case of *Fedlife Assurance Ltd. v. Wolfaardt* (2001) 22 ILJ 2407(SCA), an employee (the respondent on appeal) whose fixed-term contract was prematurely terminated approached the High Court to claim damages for breach of contract. The respondent, was employed on a fixed-term contract of five years. After only two years, the employer (appellant) terminated the contract on the ground that the respondent's position had become redundant. The respondent averred that the appellant had repudiated the contract. He further claimed that he had elected to accept the repudiation and claimed damages for breach of contract in the High Court, whereupon the appellant claimed that the High Court lacked jurisdiction and that the matter should therefore have been referred to the Labour Court under the LRA. The employer (appellant on appeal) submitted that the matter should have been referred to the Labour Court in terms of the Labour Relations Act and that the High Court lacked jurisdiction. In its special plea (filed in the court a quo), the appellant relied on Section 157(1) which states that "subject to the Constitution and unless otherwise provided for by the Labour Relations Act, the

Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court”. It contended that the Labour Court has exclusive jurisdiction to adjudicate dismissals occasioned by operational requirements in terms of the Labour Relations Act. The employee excepted to the special plea and submitted that it did not disclose a defence. The Court had to answer two questions: (i) whether the remedies under the LRA abolished the employee's common law claim for breach of contract and (ii) whether the premature termination of the employment contract in this matter fell under the exclusive jurisdiction of the Labour Court. The Court a quo held in favour of the employee. The case went on appeal and the same defence was still relied upon with the appellant submitting that the employee (respondent) had no remedies other than those provided for in chapter 8 of the Labour Relations Act (which protects employees against unfair dismissal and caps damages at 12 months' remuneration in cases of unfair dismissal and 24 months in cases of automatic unfair dismissal). The Court of Appeal therefore decided that the legislature could not, by chapter 8, be deemed to have intended to deprive the employees of common law remedies which may, by comparison, be more generous than those provided by the Labour Relations Act. The Court of Appeal further held that a dispute will fall under the exclusive jurisdiction of the Labour Court only if the “fairness” of the dismissal is the subject of the employee's complaint. If the subject in dispute is “lawfulness” of the dismissal, then the High Court might as well entertain the matter.

However in *Petronella Nellie Nelisiwe Chirwa v. Transnet Limited and Others* [2007] ZACC 23, at the time the appellant was dismissed, she was employed by Transnet Limited in the capacity of human resources executive manager of the Transnet Pension Fund Business Unit. The dismissal was preceded by an enquiry held by her supervisor, on the grounds of inadequate performance, incompetence and poor employee relations. The appellant first challenged her dismissal in the Commission for Conciliation, Mediation and Arbitration on the basis that it was procedurally unfair. After conciliation failed, she did not pursue the labour relations mechanisms further, but rather approached the High Court on the basis that the dismissal violated her constitutional right to just administrative action, as given effect to by the Promotion of Administrative Justice Act (PAJA). Her dismissal as a public sector employee gave rise to two causes of action, one under the labour law regime and the other under the administrative justice

regime. The High Court applied the principles of natural justice and found that the dismissal of the appellant was unfair and granted the order for her reinstatement. Transnet appealed the order to the Supreme Court of Appeal. The majority of the court upheld the appeal on the basis that her dismissal did not fall to be reviewed under the provisions of PAJA. She then approached the Constitutional Court, seeking leave to appeal against the decision of the Supreme Court of Appeal.

One of the issues before the Constitutional Court of South Africa was whether the High Court had concurrent jurisdiction with the Labour Court in matters that arise out of an employment dispute. The Court held that her claim was based on an allegation of an unfair dismissal for alleged poor work performance and should therefore have followed to the end the procedures and remedies under the Labour Relations Act (LRA), which specifically regulate this type of labour dispute. The High Court did not have concurrent jurisdiction with the Labour Court in the matter since the appellant had expressly relied on provisions of the LRA in formulating her claim in the lower courts as well as in the Constitutional Court. The court observed that multiple pieces of legislation created inconsistency and unnecessary duplication of resources as well as jurisdictional problems. It observed that one of the primary objects of the LRA was to create a comprehensive framework of law governing the collective relations between employers and trade unions in all sectors of the economy. If the appellant were to be allowed to depart from the finely-tuned dispute resolution mechanisms created by the LRA, a dual system of law would be perpetuated, one applicable in the civil courts and the other in the forums established by the LRA. One of the problems associated with the labour relations regime was of overlapping and competing jurisdictions and the use of different courts to adjudicate labour and employment issues. This invariably led to forum-shopping. A declared purpose of the LRA was to establish the Labour Court and the Labour Appeal Court as specialised superior courts with exclusive jurisdiction to deal with matters arising from the LRA. Therefore, to the extent that PAJA and the LRA overlap, the Court urged the legislature to revisit the applicable provisions.

In order to prevent conflicting decisions and promote adjudicative efficiency, normally, in the case of concurrent jurisdiction, when one authority has taken cognizance of the matter, then the other authority would not take cognizance of the said subject-matter. In grappling with the reality

of concurrent jurisdiction between itself on the one hand and subordinate courts and tribunals on the other, the High court has tended to discourage plaintiffs from approaching it with matters that can be dealt with in an alternative forum at less expense to the litigants. This practice is not a divestiture of jurisdiction but rather an exercise of discretion by the court especially in light of Article 126 (2) (d) of the Constitution, which provides that in exercising judicial authority, reconciliation between parties shall be promoted. This provision requires courts to be guided by the principles of alternative forms of dispute resolution including conciliation, mediation, arbitration and traditional dispute resolution mechanisms. Courts of law cannot be said to be promoting ADR when they readily entertain disputes which ought to be resolved in other legal forums. Deference to such alternative forums is not an admission of lack of jurisdiction.

Such reasoning can be found in the case of *Uganda Broadcasting Corporation v. Kamukama*, H.C. Misc. Application No. 638 of 2014 where the learned trial Judge agreed with the submission that the court had unlimited original jurisdiction in all causes. However, the learned Judge went ahead to say that;-

This position of the law was not meant to deny lower courts and quasi judicial forum the mandate to adjudicate over matters which the different legislations empower them to do. For easy access to justice and proximity to the public it is reasonable and is court policy that causes should be instituted in the lowest mandated forum possible before resort is had to the High Court to avoid unnecessary expenses..... by parliament enacting other subordinate legislation conferring jurisdiction to different forum to adjudicate over disputes does not in any way diminish the fact that the High Court has unlimited jurisdiction.....Much as this court has unlimited jurisdiction if one looks at the intention of parliament in conferring jurisdiction on the Labour officer and the creation and operationalisation of the Industrial Court with appellate jurisdiction it would be prudent if these two institutions are put to good use. This is our current court policy. Avoiding these institutions would be defeating the intentions of the legislature since the Industrial Court is now operational. I find it proper to refer this matter to the Labour Officer for appropriate handling.

Accordingly, the court agreed that where there was an alternative remedy and procedure available for the resolution of a dispute, that remedy ought to be pursued and the procedure adhered to, since the alternative dispute resolution processes are complementary to the judicial process. Sometimes courts are obligated by the rules of procedure to promote these modes of alternative dispute resolution by either staying the proceedings until such time as the alternative

remedy has been pursued or bringing an end to the proceedings before the court and leave the parties to pursue the alternative remedy. An express grant of exclusive jurisdiction is not necessary to sustain judicial deference to the statutory dispute resolution process. It may be a procedural irregularity but there is nothing illegal though, or fundamentally affecting the jurisdiction of the court, if it instead chose to proceed with the suit rather than defer to these mechanisms. While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent or general jurisdiction where there are strong policy reasons for doing so.

Against that background, article 152 (3) of *The Constitution of the Republic of Uganda, 1995*, empowers Parliament to make laws establishing tax tribunals for the purposes of settling tax disputes. A Tax Appeals Tribunal was established by enactment of *The Tax Appeals Tribunal Act* Cap 345, in 1997 which commenced on 1st August, 1998. Under section 14 (1) of *The Tax Appeals Tribunal Act*, any person who is aggrieved by a decision made under a taxing Act by the Uganda Revenue Authority has the right to apply to the tribunal for a review of the decision. Noteworthy is the fact that this provision does not state that the Tribunal is to exercise its jurisdiction to the exclusion of any other tribunal or adjudicative body. The Tribunal therefore is not given exclusive jurisdiction. Then under section 27 thereof, appeals lie to the High Court from decisions of the Tax Appeals Tribunal on questions of law only.

The existing law at the time was *The Income Tax Act* which commenced on 1st July, 1997. Section 100 of the Act provides that;

- (1) A taxpayer dissatisfied with an objection decision may, at the election of the taxpayer—
 - (a) appeal the decision to the High Court; or
 - (b) apply for review of the decision to a tax tribunal established by Parliament by law for the purpose of settling tax disputes in accordance with article 152 (3) of the Constitution.
- (2) An appeal under subsection (1) to the High Court shall be made by lodging a notice of appeal with the registrar of the High Court within forty-five days after service of notice of the objection decision.
- (3)

- (4) An appeal to the High Court under subsection (1) may be made on questions of law only, and the notice of appeal shall state the question or questions of law that will be raised on the appeal.

Both section 100 (1) (a) of *The Income Tax Act* and section 27 of *The Tax Appeals Tribunal Act* vest appellate jurisdiction in the High Court from the administrative decisions of the Commissioner and Tax Appeals Tribunal respectively. Not having been enacted specifically to amend the Constitution, none of the two Acts repealed, altered or reversed article 139 (1) of *The Constitution of the Republic of Uganda, 1995* vesting unlimited original jurisdiction in the High Court. The implication is that in tax matters, the High Court is vested with three forms of jurisdiction;- it retains the *de jure* constitutionally conferred original unlimited jurisdiction that is now concurrent and coextensive with that of the Tax Appeals Tribunal over tax matters; the practice of deference which has gained the force of law whereby in situations of concurrent jurisdiction the High Court now only exercises its original jurisdiction sparingly as a residual power, has transformed that jurisdiction into a *de facto* residual jurisdiction; and lastly appellate jurisdiction conferred by both enactments from two levels of administrative decision making.

The concept of having both appellate and original jurisdiction over tax matters vested in the High Court is a most unusual one and is not likely to have been intended. There appears to be no logic in giving the High Court exclusive appellate jurisdiction and then concurrent original jurisdiction in relation to the type of case or matters such as the present one. However, it is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament but that, if there be a word or phrase therein to which no sensible meaning can be given, it must be eliminated. Words may be robbed of meaning by a subsequent change in the law and the failure of the drafter of the amending Act to effect a consequential amendment (see *R v. Wilson (Clarence)* [1983] 3 WLR 686 at 691).

The court must bear in mind a presumption, which is of fundamental importance in the law of statutory interpretation, that except one that repeals existing law, an enactment does not alter the existing law more than is necessary. Statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later statute expressly alters the provisions of the earlier one in that respect

or such alteration is a necessary inference from the terms of the later statute. It is one of the rules of statutory interpretation that statutes addressing the same subject matter must, if possible, be construed together to give full effect to each. Statutes relating to the same subject matter should be construed *in pari materia*, gathering the legislative intent from the whole of the enactments. If statutes are irreconcilable, the statute prevails that is later in its effective date.

The assumption should be that the Parliament, advisedly and in all its wisdom, conferred concurrent jurisdiction after considering all pros and cons and all the implications of what it was doing. Parliament must be assumed to have considered all the implications of conferring concurrent jurisdiction on two forums, one superior and the other inferior, and must then have deliberately and advisedly conferred concurrent jurisdiction. The question is whether this embraces or implies any power to restrict the litigants' choice of forum where the legislature has in clear and unequivocal terms given them such choice by conferring concurrent jurisdiction on two forums. In such a scenario, courts elect not to exercise, or tend to defer, jurisdiction until the subordinate entity seized of the matter has made a decision. This is a rule of practice, ordinarily and unless exceptional reasons exist, obliging the subordinate Court or tribunal having concurrent jurisdiction exercising that jurisdiction first before the High Court is called upon to exercise such jurisdiction. Under the self imposed rule of restriction, the High Court will not ordinarily exercise its jurisdiction, before the subordinate court or tribunal having concurrent jurisdiction is moved for identical relief. The rule is not absolute. It is to be applied *ex debito justitiae*. There may be a case where the interests of justice may be defeated if a party is required to apply to the inferior forum first before approaching the High Court. The rule must then give way to the interest of justice.

But on the other hand, whenever concurrent jurisdiction is vested by statute simultaneously in two forums, one superior to the other, I am inclined to agree with the preponderance of Judicial opinion in this regard and consider it appropriate that a party should resort to the inferior one first. There are a number of reasons persuading me to that conclusion. Firstly, if a party is required to go to the inferior forum in the first instance the superior Court has the advantage of the opinion of the inferior forum when the occasion arises for the exercise by it of its jurisdiction in the matter. Secondly, it provides against the superior Court being flooded with cases which

can be more appropriately disposed of by the inferior forum. Thirdly in matters like this involving the interpretation and application of tax laws, a helpful and cautious approach would be for courts to defer to specialised institution when appropriate.

By Parliament vesting jurisdiction over tax disputes in the Tax Appeals Tribunal, as the culmination of an administrative process designed to provide a specialised, inexpensive and effective alternative forums for tax dispute resolution and appropriate remedies, the residual, inherent jurisdiction of the High Court to hear direct challenges to tax matters remains in place to provide the appropriate and just remedies where required. However, in light of the broad powers accorded to the Tax Appeals Tribunal, the High Court should exercise sparingly its residual jurisdiction to award relief in tax claims and should only do so in exceptional cases, to complement, not to weaken, the administrative process.

For example in *The Commissioner General Uganda Revenue Authority v. Meera Investments, Civil Appeal No.22 of 2007* it was decided that the interpretation and application of conflicting provisions of various tax laws is a matter for a court of law and not for the parties or a tax tribunal. The Supreme Court having found that the case was not concerned with the mere assessment, demand and refusal to pay tax but with the interpretation of and relationship between the Uganda Revenue Authority Act and the Uganda Investment Act, the need to first present the matter to the Tax Tribunal did not arise. Because the dispute revolved around powers granted by two Acts of Parliament to different entities, it was the High Court to deal with what was in essence an issue of statutory interpretation and not mere assessment.

In light of that decision, recourse to the High Court for urgent injunctive relief as well as the interpretation of tax laws as opposed to disputes of assessment arising from the application of tax laws, remains possible in certain circumstances, but it should remain the rare exception, rather than the rule. There is a procedural obligation for litigants to follow the administrative tax appeals process and the administrative appeal process may not be bypassed except in very exceptional circumstances. Seeking injunctive relief as well as the interpretation of tax laws should not be allowed to develop into a means of bypassing the administrative process.

The High Court's deference to such alternative forums in a situation of concurrent jurisdiction is not an admission of lack of jurisdiction. It has generated though the concept of a residual jurisdiction vested in the High Court. The inherent power to ensure that the Constitution is adhered to necessarily requires that the High Court retains jurisdiction, where the circumstances are appropriate, to fill the remedial vacuum. It is precisely for this reason that the common law developed the notion of inherent jurisdiction. Under section 33 of *The Judicature Act*, the High Court retains a residual discretionary power to grant relief not available under the statutory schemes. If the rule of law is not to be reduced to a patchwork, there must be a body to which disputants may turn where statutes and statutory schemes offer no relief. Deference to a tribunal and exclusivity of jurisdiction to a tribunal is not inconsistent with a residual jurisdiction in the High Courts to grant relief unavailable under the statutory scheme. The High Court retains the residual jurisdiction to grant injunctive relief in certain urgent situations and to consider, in appropriate circumstances, a direct challenge to tax laws.

The decision in *The Commissioner General, Uganda Revenue Authority v. Meera Investments, Civil Appeal No.22 of 2007* was distinguished in *Uganda Revenue Authority v. Rabbo Enterprises (U) Ltd and another S. C. Civil Appeal No. 12 of 2004*, a judgment delivered on 10th July 2017, where the Supreme Court, interpreting the entire Constitution as an integrated whole with no particular provision destroying the other but each sustaining the other so as to promote harmony of the Constitution, and taking into account all provisions bearing on the specific issue so as to give effect to the purpose of the Constitution, decided that where there is an attempt by the Uganda Revenue Authority to enforce payment of what the tax body perceives as taxes owed by a tax payer and the tax payer denies liability, the resultant dispute as to whether or not the tax payer in fact and in law owes such tax, involves interpretation of tax law and as a tax dispute, it should start with the Tax Tribunal and only go to the High Court as an appeal. "The proper procedure therefore is that all tax disputes must first be lodged with Tax Appeals Tribunals and only taken before the High Court on appeal."

A Tribunal established by Parliament under 152 (3) of *The Constitution of the Republic of Uganda*, 1995 can only exercise jurisdiction where the empowering statute confers jurisdiction over the case. However, such "special enactment" is not sufficient to oust the jurisdiction of the

High Court whose accessibility should not in principle be open to statutory limitation except by an Act which amends the Constitution.

Although in *Uganda Revenue Authority v. Rabbo Enterprises (U) Ltd and another S. C. Civil Appeal No. 12 of 2004* the Supreme Court opined that that a finding to the effect that a tax dispute should start with the Tribunal and only go to the High Court as an appeal would not be tantamount to an Act of Parliament taking away the constitutionally given powers of the High Court because it is the Constitution itself which, through Article 152 (3), limits the original jurisdiction of the High Court and clothes the Tribunals with jurisdiction, I observe that unlike article 139 which provides for the creation of the High Court as well as the extent of its original jurisdiction, article 152 (3) of the Constitution only provides for the establishment of Tax Appeals Tribunals through an Act of Parliament without designating their jurisdiction. As a result, whereas the jurisdiction of the High Court is conferred by the Constitution itself, that of the Tax Appeals Tribunal is conferred by an Act of Parliament, made under authority of the Constitution. While limitation of the remedial power to an inferior court or tribunal may well be permissible by enactment, this, in my view, can only be possible if the High Court is available to fill the remedial vacuum that would result. In that regard, the jurisdiction of the Tax Appeals Tribunal is concurrent with and has never displaced the residual jurisdiction of the High Court.

That said, the residual jurisdiction of the High Court cannot be entirely ousted by Parliament or the courts except by an Act which amends the Constitution, in particular where recourse to the Court is necessary to obtain an appropriate and just remedy. The proper interpretation of the decision in *Uganda Revenue Authority v. Rabbo Enterprises (U) Ltd and another S. C. Civil Appeal No. 12 of 2004* therefore is that it only extends further, the reach of the procedural obligation for litigants to follow the administrative tax appeals process, in that even in matters of interpretation of tax law, the administrative appeal process may not be bypassed except in very exceptional circumstances.

The implication is that the residual jurisdiction of the High Court over tax matters has never been ousted by any enactment or court decision but has by judicial practice and precedents, only been curtailed and limited to very exceptional matters of interpretation of tax law such as that which

presented itself in *The Commissioner General, Uganda Revenue Authority v. Meera Investments, Civil Appeal No.22 of 2007*. In the instant suit, the plaintiff invoked the *de jure* constitutionally conferred original jurisdiction of this court that is now concurrent and coextensive with that of the Tax Appeals Tribunal. By the practice of deference to the Tax Appeals Tribunal which has gained the force of law, that jurisdiction is now only exercised sparingly as a *de facto* residual jurisdiction. I do not find that the nature of dispute in the instant suit belongs to the category of very exceptional matters of interpretation of tax law that would justify bypassing the administrative process and subsequent appeal to this court.

The plaintiff having found unsatisfactory, the decision of the Commissioner Domestic Taxes as communicated in the letter dated 10th April 2013, rejecting the appeal for review and stating that the assessment had correctly been arrived at, thereby upholding the assessment and insisting on the plaintiff's obligation to pay, ought to have invoked either section 100 (1) (a) of *The Income Tax Act* and appealed to this Court on questions of law only (by way of a notice of appeal) or section 100 (1) (b) thereof and / or section 14 (1) of *The Tax Appeals Tribunal Act*, by way of an application for review of the decision to the Tax Appeals Tribunal, and thereafter if still dissatisfied, an appeal to this court under section 27 (1) of *The Tax Appeals Tribunal Act*, on questions of law only (still by way of a notice of appeal), not by direct suit.

For all the above reasons the Plaintiffs suit is clearly misconceived and incompetent. It is hereby dismissed with costs to the Defendant.

Dated at Arua this 24th day of August 2017.

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Stephen Mubiru
Judge
24th August 2017

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