

TANZANIA / JUDGMENT

20171103 TZCA Dar es Salaam

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' IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM {CORAM: JUMA, CJ., MUSSA, J.A. And MUGASHA, J.A.) CIVIL APPEAL NO. 101 OF 2017 COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITYAPPELLANT VERSUS JSC

ATOMREDMETZOLOTO {ARMZ) RESPONDENT {Appeal from Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam) _ _ _ _ _ {Mattaka, Vice~Chairman.-) - - - - - dated the 6 th day of March, 2013 in Tax Appeal No. 7 of 2012 RULING OF THE COURT 30 th October & 7th November, 2017 MUGASHA, J.A.: The respondent JSC ATOMREDMETZOLOTO a company incorporated in the Russian 'Federation engages in uranium mining industry. On 15th December, 2010, the respondent purchased on the Australian Stock Exchange all shares in Mantra Resources Limited (Mantra Resources) a company incorporated in Australia and owner of Mkuju River Project situate in Namtumbo District, Ruvuma region in the United Republic of Tanzania. Later in March, 2012, the respondent sold and transferred 13.19% of its 1 shares in Mantra Resources to "Uranium One" a company incorporated in Canada. Following these transactions, the appellant inquired from the respondent the record of tax paid and further expressed intention to issue an assessment on investment income because the transaction between the respondent, Mantra Resources and Uranium One involved land and __ domestic asset whereby income earned has a source in the United Republic

- - - - - of Tanzania by virtue of section 68(1) (e) of the Income Tax Act of 2004. This prompted the respondent to lodge an appeal before the Tax Appeals Board (the Board) to challenge the tax liability on grounds that, the appellant lacks mandate on tax related matters over the respondent because the transaction in question took place outside the United Republic of Tanzania and the respondent company is neither present nor registered in Tanzania. The appellant lost in the initial appeal and unsuccessfully appealed to the Tax Appeals Revenue Tribunal (the Tribunal) where the appeal was dismissed hence the present appeal. In the Memorandum of Appeal, the appellant has raised six (6) grounds of complaint as follows: 2

1. That, the Tax Revenue Appeals Tribunal erred in law in not holding that Tax Appeal No. 26 of 2011 before the Tax Revenue Appeals Board was incompetent for being instituted prior to issuance of tax assessment on investment income. I

2. That, the Tax Revenue Appeals Tribunal erred in law in not holding that the respondent Company was not liable to pay income Tax in Tanzania because it had no income that had a source in Tanzania.
3. That, the Tax Revenue Appeals Tribunal erred in law by failing to consider and evaluate the evidence produced by the appellant which showed that the acquisition of shares by the Respondent in Mantra Resources Ltd and subsequent sale and transfer of the said shares to Uranium One INC related to acquisition and realization of interests in the Mkuju River Uranium Project in Tanzania.
4. That, the Tax Revenue Appeals Tribunal erred in law in holding that the Tanzania Revenue Authority had no jurisdiction to tax the respondent Company. 3
5. That, the Tax Revenue Appeals Tribunal erred in law in holding that to tax the respondent Company would amount to double taxation. The appellant was represented by Mr. Salvatory Switi learned counsel and the respondent had the services of Mr. Fayas Bhojani, learned counsel. The appeal was confronted with a notice of preliminary objection on ---the - G0mpeter:1Ge-Gf-tl'le--appeal for violating_Ru.le __ 9_6_0Ltbe_Tanzania Court ____ _ of Appeal Rules, 2009 (the Rules). In his submission, Mr. Bhojani contended that, the record of appeal lacks annexure FB Tl which accompanied appellant's written submissions filed before the Tribunal. He argued this to be an omission violating Rule 96 (1) (k) of the Rules. He added that, the missing vital annexure was extensively referred to and acted upon by the Tribunal in its judgment and it ought to have been included in the record of appeal. To support his propositions, he cited to us the cases of FEDHA FUND LIMITED AND OTHERS vs GEORGE VARGHESE AND ANOTHER, Civil Appeal No. 8 of 2008 and DODSAL HYDROCARBONS AND POWER TANZANIA LIMITED AND OTHERS vs HASMUKH BHAGWANJI MASRANI, Civil Appeal No. 77 of 2011 4 and JALUMA GENERAL SUPPLIES LIMITED vs STANBIC BANK (T) LIMITED, Civil Appeal No. 77 of 2011 (all unreported). In all those cases, he submitted, the Court held in common that where the record of appeal is incomplete, then the appeal is rendered incompetent deserving to be struck out. He thus urged us to strike out the present appeal without any order as to costs. On his part, Mr. Switi submitted that the lacking annexure is the
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- - - - - speech of the Minister for Finance which is not crucial for the determination of the appeal. However, he conceded not to have sought requisite leave for its exclusion in the record of appeal. He urged us to invoke Rule 2 of the Rules to allow the appellant to amend the record of appeal, include the said annexure and proceed to overrule the preliminary point of objection. In a brief rejoinder, Mr. Bhojani was quick to reply that, it is not for the party to opt what should be contained in the record of appeal. Thus he submitted, the appellant should have sought requisite leave to have the annexure excluded in the record of appeal. In this regard, Mr. Bhojani concluded that, in the absence of leave to exclude the said annexure in the record of appeal, the present appeal is not competent.

He reiterated his earlier prayer that the incompetent appeal deserves to be struck on account of the said fatal omission. It is undisputed that before the Tribunal, the appeal was disposed of by way of written submissions pursuant to the Tribunal's Order dated 21/10/2013. The appellant's submission seemed to have been accompanied by

- Annexure FB Tl pages 1, 53, 54, 57 and 61. At the Board the respondent made reference to the said annexure as follows: "At this juncture honourable Chairman, we wish to bring to your Board's attention that in the Finance speech of the Ministry of Finance of 2012, the Minister had the following to say about indirect transfer of shares (see Annexure 5 in book B). We have carefully gone through the record of appeal and satisfied ourselves that, annexure FB Tl or annexure 5 in book B is not included in the record of appeal before us. Since the appeal before us concerns a matter which was before the Tribunal on a first appeal, the omission to include annexure 5 in book B is in violation of Rule 96 (2) (c) of the Rules which provides that: "For the purpose of any appeal from the High Court in its appellate Jurisdiction/ the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) and shall contain also the following documents relating to the appeal to the first appellate court.
 - (a)
 - (b) (c) the record of proceedings;
 - (d) .. 1 8 ..
 - (e)
 - (f) , [Emphasis supplied]. As rightly pointed out by Mr. Bhojani which was not contested by Mr. Switi, Rule 96 (3) of the Rules envisages the exclusion of copies of any documents or any of their parts that are not relevant to the matters in controversy. However, Rule 96 (3) of the Rules cannot be

- invoked without seeking an application for directions as follows: ~ Justice or Registrar of the High Court or tribunal, may, on the application of any party, direct which documents or parts of documents should be excluded from the record application for which direction may be made informally." Moreover and to address Mr. Switi's concern that the annexure is not pertinent, under the cited Rule the decision to choose documents relevant for the determination of the appeal is not optional on the party filing the record of appeal. It is either the Judge or a Registrar of the High Court who has to direct which documents to be excluded from the record of appeal. This was reiterated by the Court in the case of FEDHA FUND I LIMITED AND TWO OTHERS vs VARGHESE AND ANOTHER (supra), which considered Rule 89 (3) of the old Court of Appeal Rules, 1979 which is the current Rule 96 (3) of the Rules. The Court thus stated that:- "... the decision to choose documents relevant for the determination of the appeal is not optional on the party filing the record of appeal. Under rule 89
- (3) of the Court Rules/ it is either a Judge or a Registrar of the High court who/ on an application by a party has to direct which documents to be excluded from the record of appeal. ... " (See also the case of JALUMA GENERAL SUPPLIES LTD vs STANBIC BANK (T) LTD (supra). The omission to include in the record of appeal annexure FB Tl filed before the Tribunal or annexure 5 in book B filed before the Board makes the present record incomplete and the appeal incompetent. (See also the cases of MAZHER LIMITED vs WAJIDALI RAMZANALI, Civil Appeal No. 64 of 2010, BADUGU GINNING COMPANY LIMITED VS SILWANI GALATI 10 .. MWANTEMBE AND 3 OTHERS, Civil Appeal No. 91 of 2012 (both unreported). Furthermore, what can be gleaned from the record exhibits laxity on the part of the appellant's counsel for which the Court is not to blame. Pursuant to Rule 95(5) of the Rules, the appellant's counsel signed and issued a certificate certifying the correctness of the record of appeal lodged --without including --annexure in the record of appeal. -- considered -- ~ view, the appellant's counsel ought to have checked the record of appeal before certifying it to be correct which we think he did not do because the record is incomplete. Besides, the appellant's counsel did not utilize another opportunity of including the annexure within 14 days from the date of lodging the record of appeal as provided under Rule 96 (6) of the Rules which does not require prior leave of the Court. Since the appellant in the present matter did not seek any of the above stated options to remedy the shortfall, and given the raised preliminary objection pointing out the shortfall, we cannot accede to Mr. Switi's prayer to include annexure FB Tl as that would have the effect of amending the record and thus pre-empting the preliminary objection. We say so because once the notice of preliminary objection was lodged, it was no longer open for the appellant to remedy the defect complained of by including the missing document. [See the unreported cases of MARYJOHN MITCHEL vs SLYVESTER MAGHEMBE CHEYO AND OTHERS, Civil Application No. 161 of 2008 and METHOD KIMOMOGORO vs BOARD OF TRUSTEES OF TANAPA, Civil Application No. 1 of 2005 where among other things we said:- "This Court has said in a number of times that it will not tolerate the practice of an advocate trying to pre-empting objection either by .. trying to rectify the error complained

of .. " I Therefore, the prayer to have the record of appeal amended to include the missing exhibit is hereby refused. In view of the aforesaid, the omission to include the said annexure in the record of appeal and whose exclusion was not sought and obtained, the record of appeal is incomplete violating Rule 96(2) (c) of the Rules and the appeal is rendered incompetent. In the result, we find the preliminary meritorious uphold the same and accordingly strike out the incompetent 12 I appeal. We make no order as to costs since the respondent did not press for them. _____ , - - - - - ' - - - - - - - - . - -- ~ - ~----- . - ~ - - - - - - -

- - DATED at DAR ES -SALAAM this 3 d~} br ·No~~niber, 2017 .. rd ----- I.H. JUMA CHIEF JUSTICE K.M. MUSSA JUSTICE OF APPEAL S.E.A. MUGASHA JUSTICE OF APPEAL I certify that this is a true copy of the original. ---~----- A.H. MI DEPUTY REGISTRAR COURT OF APPEAL (.. 13 --~ - - - - - . - -- --~..-----~- ;,r;. - - - - - =:-~· ... ~ - ~.,,,,,,. -~ -!~:~· ~· -,----(- - "-

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