

UGANDA / JUDGMENT

Nile Breweries Limited v Uganda Revenue Authority (Miscellaneous Application 87 of 2024) [2024] UGTAT 1 (5 July 2024)

[2024] UGTAT 1

COURT

Tax Appeals Tribunal (Uganda)

BEFORE

Ali, Panel Member, Katwe, Najjemba

CASE / FILE NUMBER

Miscellaneous Application 87 of 2024

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THE REPUBLIC OF UGANDA IN THE TAX APPEALS TRIBUNAL AT KAMPALA MISC.
APPLICATION NO.87/2024 (ARISING FROM TAT NO.135/2024)

NILE BREWERIES LIMITED

VERSUS

APPLICANT

UGANDA REVENUE AUTHORITY..... RESPONDENT

BEFORE; MR. SIRAJ ALI, MS. CHRISTINE KATWE, MS. NAJJEMBA ROSEMARY.

RULING

This ruling is in respect of an application brought under Rule 30 of the Tax Appeals Tribunal (Procedure) Rules, 2012, Order 41 Rule 9 Civil Procedure Rules 71-1 seeking orders that:

A temporary injunction be granted restraining the Respondent, its agent and/or servants from enforcing the additional assessment issued on 19th March 2024 for Shs.

18,509,052,729/wuntil the determination of the main application for review of the objection decision; and for the costs of the application.

Background facts 1.

The application is supported by the affidavit and a supplementary affidavit of the Legal Manager and Company Secretary of the Applicant Ms. Faith Mirembe. The grounds upon which this application is premised are laid out in the Chamber Summons and the affidavit in support and are briefly that;

- \$a)\$ The Respondent unlawfully assessed and charged Local Excise Duty on goods that were exported by the Applicant; and
- \$\mathbf{b}\$) The Respondent further unlawfully assessed Value Added Tax on exported sales at a rate of 18% instead of the zero rate applicable to export sales.
- It is crucial that the status quo be maintained by preventing the Respondent, its \$c)\$ agents and/or servants from enforcing the assessment, pending the hearing and determination of the main application.
- \$d\$) That the balance of convenience is in its favor because the Applicants is in a business in which cash flow is of great importance for the running and continuity of the business.
- It is in the interest of justice that the application and all the reliefs sought be granted \$e)\$ in favor of the Applicant.

The Respondent filed an affidavit in reply and a supplementary affidavit in reply deponed by Mpumwire Christine, sworn on 19th June 2024 opposing the application on grounds that:

- That the Applicant has not paid the mandatory statutory 30% of the tax in dispute \$ \overline{a}\$ which renders the application premature and is in contempt of the Tribunals orders in Miscellaneous Application No.88/2024 as it has never paid the 30% as ordered by the Tribunal on 12th June 2024.
- \$b)\$ That the application for review does not show a prima facie case and has no likelihood of success that the Applicant will not suffer irreparable damages given its financial capacity and be adequately compensated for by an award of damages by the Respondent
- That there is no threat from the Respondent as alleged by the Applicant. \$c)\$
- That the balance of convenience lies with the Respondent as it is its statutory \$d\$) mandate to collect revenue for the benefit of all Ugandans.
- That it is in the interest of justice that the orders prayed for by the Applicant are not \$e)\$ granted and that this Application should be dismissed with costs.
- **Representation \$2.\$**

At the hearing of this application, Mr. Bruce Musinguzi, Henry Agaba and Charlotte Ahabwe appeared for the Applicant while Ms. Gloria Twinomugisha and Charlotte Katutu appeared for the Respondent. Both parties filed written submissions that were adopted as their legal arguments.

\$3.\$ The Applicant's Submissions

Counsel for the Applicant submitted that the Applicant is not opposed to paying 30% of the assessed tax as provided under Section 15 of the Tax Appeals Tribunal Act. The Applicant however submits that given the dire impact which the payment will have on the Applicant's cash flow and business it can only pay the sum in question in installments. In support of its submissions the Applicant relied on S. 98 of the Civil Procedure Act which provides for inherent powers. The Applicant also relied on the decisions, in MTN Uganda Ltd V. URA (TAT Application No. 15 of 2018), as quoted in Century Bottling Company Limited V. URA (Miscellaneous Application No. 32 of 2020) where the Tribunal held that it had jurisdiction to review the exercise of the discretion by the Commissioner General on the rejection of the Applicants request to pay 30% of the assessed tax instalments as it has the inherent jurisdiction to allow the Applicant to pay the 30% instalments in order to achieve the ends of justice.

The Applicant submitted that further that Elgon Electronics V. URA (HCCA No. 11 of 2007), the High Court held that it may be useful, as a matter of discretion to consider the use of some other security other than cash as one way of accommodating tax payers while applying Section 15 (1) of the Tax Appeals Tribunal Act. Accordingly, Court allowed the appeal to be heard on that basis

\$4.\$ The Respondent's Submissions

The Respondent submitted that the Applicant is a manufacturer of alcoholic beverages which are sold locally in Uganda and also exported to Democratic Republic of Congo and South Sudan and was assessed an additional tax assessment of UGX 18,509,052,729 being Value Added Tax and Local Excise Duty. The Applicant, aggrieved by the objection decision, filed an application for review before the tribunal. The Applicant seeks to pay the statutory amount of 30% of the tax in dispute installments.

The Respondent filed an affidavit in reply opposing the grant of the application and its attendant prayers because the Applicant has no locus to appear before the Tribunal and more so, seek an injunction, as it has failed to pay 30% of the assessed tax. In support of its submissions the Respondent relied on the decision in Uganda Project Implementation and Management Centre V URA, Constitutional Appeal No. 02 of 2009 where the court cited with approval the decision in the South African case of

Metcash Trading Co. LTD V Commissioner for South African Revenue Services and Another.

Further the Respondent relied on the decision in *E. L. T Kiyimba Kaggwa V Haji Abdu* Nasser Katende, [1985] HCB 43 where the court laid down the following rules for the grant of temporary injunctions;

- The grant of a temporary injunction is an exercise of judicial discretion and the \$(i)\$ purpose of granting it is to maintain the status quo until the question to be investigated in the main suit is finally disposed.
- The Applicant must show a prima facie case with a probability of success \$(ii)\$
- \$(iii)\$ The Applicant must show that if the injunction is not granted will suffer irreparable injury which would not adequately be compensated for by an award of damages and that if the court is in doubt, the application should be decided on the balance of convenience.

The Respondent submitted that the conditions for the grant of the interlocutory injunction are not in favor of the Applicant because it does not have a prima facie case with a probability of success because it has not yet paid the statutory payment of 30% of the disputed tax. The Respondent submitted further that there will not be any injury to the Applicant that cannot be compensated for by damages. In support of this submission the Respondent relied on the decision Victor Construction Works Limited V Uganda National Road Authority Miscellaneous Application No. 601 of 2010. The Respondent submitted further that the balance of convenience does not favor the Applicant since it is still struggling to pay the 30% of the amount in dispute.

The Respondent submitted that the Applicant cannot introduce a new cause of action by praying for payment of 30% of the tax in dispute in installments by way of a supplementary affidavit. The Respondent submitted that the correct procedure was for the Applicant to amend its pleadings as provided for in Horizon Coaches Ltd V Edward Rubangaranga & Anor, S. C. C. A No. 18 of 2009.

The Respondent submitted that the permission to pay in installments is in violation of the law and prays that orders be granted that the Applicant is not entitled to be granted a

temporary injunction. The Respondent submitted further that the Tribunal does not have jurisdiction to grant the payment of tax in installments. In support of its submissions the Respondent relied on the decision in Cape Brandy Syndicate vs. Inland Revenue Commission [1921]1 KB 64.

\$5.\$ The Applicant's submissions in rejoinder

In rejoinder, the Applicant submitted that the Tribunal is not a rigid court of strict procedure as is the case in the Courts of Judicature.

The Applicant cited Section 22(1) and (2) of the Tax Appeals Tax Appeals The Applicant cited Section 22(1) and (2) of the Tax Appeals that in any proceeding before the tribunal, the procedure of the tribunal is within the discretion of the tribunal and that matters before the tribunal shall be conducted with as little formality and technicality as possible and the fribunal shall not be bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

The Applicant submitted that on 5th June 2024 it wrote a letter to the Respondent requesting to furnish it with a bank guarantee on to pay 30% of the tax in dispute in installments. However, the request was denied hence prompting the Applicant to file a supplementary affidavit on 19th June 2024.

In response to the issue as to whether the tribunal is clothed with jurisdiction to order for payment of 30% of the tax in dispute in installments, the Applicant submitted that Section 98 of the Givil Procedure Rules, gives the Tribunal the inherent powers to grant any orders which are necessary for the ends of justice as provided in the case of MTN Uganda LTD v URA (TAT Application No.15/2020) as quoted in Century Bottling Company Limited V URA (Miscellaneous Application No. 32/2020). Additionally, the Applicant invited the Tribunal to take judicial notice of the fact that the payment of 30% of the tax assessed is always required by the Respondent only at the point of hearing an application before the Tribunal and not at the objection stage.

6. Resolution of the Application by the Tribunal

Having read the submissions and perused the affidavits of the parties, the following is the ruling of the tribunal.

The conditions under which a temporary injunction will be granted were set out in the High Court decision of Kiyimba Kaggwa vs. Haji Katende Abdu-Nasser Civil Suit No. 2109 of 1984 as follows:

- \$1.\$ The granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve matters in status quo until the question to be investigated in the suit can finally be disposed of.
- The conditions for the grant of an injunction are first that; the Applicant must show a \$2.\$ prima facie case with a probability of success, Secondly, such injunction will not normally be granted unless the appellant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Third wif the court is indoubt, it will decide an application on the balance of convenience
- Irreparable injury does not mean that there must not be physical possibility of repairing \$3.\$ injury but means that the injury must be a substantial or material one, that is, one that cannot be adequately compensated for in damages

The Applicant's Legal Manager and Company Secretary, Faith Mirembe stated in paragraph 7 of her affidavit that the Applicant had disclosed a prima facie case with a probability of success. Under paragraph 7 of the said affidavit, the said deponent stated that the Respondent unlawfully assessed and charged Local Excise Duty on goods that were exported by the Applicant and secondly that the Respondent unlawfully assessed VAT on exported sales at a rate of 18% instead of the zero rate applicable to export sales.

At the hearing of the main application, the tribunal will be required to determine the question whether the goods in question were exported. This fact will determine whether the Local Excise Duty and the VAT were unlawfully assessed and charged against the Applicant. The Respondent through the affidavit in reply deponed by Mpumwire Christine and its submissions denies that a prima facie case with a likelihood of success has been made out by the Applicant. This is based on the argument that without payment of 30% of the tax in dispute as required by S.15 of the Tax Appeals Tribunal Act, the Applicant cannot be said to have a prima facie case with a probability of success.

The supplementary affidavit of the Applicant deponed by the said Faith Mirembe shows that the Applicant wrote to the Respondent requesting to pay 30% of the tax in dispute in four equal installments of Shs. 1,388,178,955 (One Billion Three Hundred Eighty Eight

Million One Hundred and Seventy Eight Thousand Nine Hundred and Fifty Five only). The reason given by the Applicant for seeking to pay the above amount in installment is because the assessed amounts are substantial and payment of 30% of the amounts assessed in one go would jeopardize the running of the Applicant's business. As per the said supplementary affidavit, no response has been received by the Applicant to this request.

In the High Court decision of Kigongo Edward Nakabale ws. Kakeeto Rogers & Another Misc. Application No. 144 of 2017, the Court stated as follows

"A prima facie case with a probability of success is no more than that the Court must be satisfied that the claim is not frivolous or vexatious. In other words, that there is a serious question to be tried. In Robert Kavuma vs. M/s. Hotel International SCCA No. 8 of 1990, Wambuzi CJ (as he then was) was emphatic and stated that the Applicant is required at this stage of the trial, to show a prima facie case and a probability of success but not success.

As to whether the suit establishes a prima facie case with a probability of success, case law is to the effect that though the Applicant has to satisfy court that there is merit in the case, it does not mean that one should succeed. It means that there should be a triable issue, that is, an issue which raises a prima facie case for adjudication. The case of Kiyimba Kaggwa (1985) HCB 43 is in point".

The evidence before us shows that the Applicant is willing to pay 30% of the tax in dispute however owing to the substantial amounts involved it can only pay the amount in question in installments. The Applicant cannot in these circumstances be compared to a litigant who has failed to comply with S.15 of the Act. Owing to the substantial amounts involved we are of the opinion that this is a proper case for the Applicant to be permitted to pay 30% of the tax in dispute in installments.

We are satisfied at this stage that a prima facie case with a probability of success has been made out by the Applicant.

The Applicant has also stated that it will suffer irreparable injury if this application is not granted. In *Giella v. Cassman Brown & Co.* (1973) E. A 358, it was held that by

irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or a material one that is; one that cannot be adequately atoned for in damages.

In the instant case, the Applicant has stated that the payment of the 30% of the tax in dispute in one installment will affect its cash flows thereby affecting its business operations. It is common knowledge that a business such as the Applicant's, relies on longstanding contractual relationships, with suppliers of raw materials on the one hand and purchasers of finished products like wholesalers and retailers on the other. Any closure to the Applicant's operations as a result of inadequate cash flow will not only affect the Applicant's business but all the other businesses which have contractual relations with the Applicant. In these circumstances, it is difficult to see how such farreaching loss and injury can adequately be atoned for in damages.

Having found that the Applicant has established a prima facie case with a probability of success and that it will suffer irreparable injury which cannot be adequately atoned for in damages, the application for temporary injunctions accordingly granted. The Applicant will pay 30% of the tax in dispute in four equal monthly installments of Shs. 1,388,178,955 (One Billion Three Hundred Eighty Eight Million One Hundred and Seventy Eight Thousand Nine Hundred and Fifty Five only) each beginning on 15th July, 2024. Each party will bear its own costs.

Dated at Kampala this ...day of July, 2024

SIRAJ ALI CHAIRMAN

Christie Kartine

CHRISTINE KATWE MEMBER

NAJJEMBA ROSEMARY. MEMBER

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