HH 479-21
ITC 5/21

A B
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
MAFUSIRE J
HARARE, 20 July 2021

**Application for leave to appeal**

Date of written judgment: 13 September 2021

Mr *T. Shadreck*, for the applicant
Mr *S. Bhebhe*, for the respondent

MAFUSIRE J

[1] The applicant seeks leave to appeal. This is in respect of a composite judgment of this court and the Fiscal Appeals Court on 22 April 2021 under the reference no HH 197-21, *per* NDOU AJ. That judgment dismissed some appeals by the applicant. The appeals had been noted against certain decisions by the respondent in respect of some objections by the applicant over the tax assessments on it for the period 2011 to 2016.

[2] The dispute centred on the allowable deductibles over the rental income earned by the applicant from a certain immovable property that she had inherited from her late husband. Paraphrased, the final issues for determination by the court were:

- whether or not the rental income had correctly been taxed in the hands of the applicant prior to 2016, allegedly the year in which she took over the management of the property, as opposed to 2012, the year in which she had inherited it;

- whether or not the respondent had correctly disallowed certain cleaning and general expenses the applicant claimed to have incurred in the management of the property;

- whether or not the respondent had correctly disallowed the alleged director's salary claimed by the applicant for the year 2016;

- whether or not the respondent's use of estimated figures to arrive at the amount of rentals paid for the property had been proper.

[3] The court heard argument on both matters as agreed to by the parties even though they had not been formally consolidated. It was more expedient to proceed that way given that the subject matter of the dispute had been the same and the issues closely interrelated. Judgment was reserved. The court eventually delivered it in April 2021 as aforesaid. It found in favour of the respondent on all the issues.

[4] In a nutshell, and in my own words, the court held as follows on the issues in contention:

- the correct date over which the applicant's liability for tax on the rental income was 8 March 2012 when the property was bequeathed to her, as opposed to 9 October 2012 when the property was transferred to her, or 15 October 2012 when the executor notified the tenants of the takeover of the property by the applicant, or 2016 when the applicant claims she started to manage the property herself;

- the applicant could not properly claim as deductibles cleaning and other expense incurred in the running of the property because these had not been incurred by herself but by a completely different entity;

- the applicant could not properly claim as deductible the director's salary earned by herself, because as a sole trader, this was income for her own upkeep which is treated as advance drawings over which there is no deduction;

- the respondent had been correct to use estimated figures obtained from some of the tenants at the property in coming up with the amount of rental proceeds on the property given that the applicant had been uncooperative and that, in any case, the Income Tax Act [*Chapter 23:06*] empowers the respondent to do so.

[5] It is upon the decision of the court as aforesaid that the applicant now seeks leave to appeal to the Supreme Court. The applicant attaches a draft notice of appeal which incorporates the intended grounds of appeal. There are seventeen of them. They straddle over four pages. The court is alleged to have misdirected itself on all the issues in contention. But virtually all of them were issues of fact. The applicants argues that the court wrongly found in favour of the respondent when there was no evidence to support such findings. In other respects, the court is accused of having wrongly shifted the onus of proof onto the applicant. At the end of argument, I dismissed the application with costs for lack of merit. I gave my reasons *ex tempore*. Here now are the details.

[6] In line with cases such as *Pichanick NO v Paterson* 1993 (2) ZLR 163 (H), in an application for leave to appeal, the court considers the following factors, cumulatively:

- whether there are any reasonable prospects of success;
- whether the amount in dispute is not trifling;
- whether the matter is of substantial importance to one or both of the parties, and
- where does the balance of convenience lie as between allowing an appeal, or refusing it to ensure finality in litigation.

[7] In the present case, the application for leave to appeal falls on all fronts, and more. The one defect is the sheer size of the grounds of appeal. They are convoluted. They are repetitive. They are argumentative. They are not concise as required by r 44(1) of the Supreme Court Rules, 2018. Grounds of appeal must be stated clearly and concisely: see *Econet Wireless (Pvt) Ltd v Trustco Mobile (Pty) Ltd & Anor* 2013 (2) ZLR 309 (S). 'Concise' means brief but comprehensive in expression: see *Master of the High Court v Turner* SC 77-93. It is not the business of the court to sift through a morass of verbal matter to identify what valid grounds may be lying submerged: see *Chikura N.O. & Anor v Al Shams Global BVI Ltd* 2017 (1) ZLR 181 (S) and *Songono v Minister of Law and Order* 1996 (4) SA 384 [E].

[8] Grounds of appeal that do not comply with the rules are invalid. If they are invalid the appeal will be struck off the roll. Therefore, the invalidity of any proposed grounds of appeal speaks to the prospects of success of the appeal. It means that if the appeal is more likely to be struck off the roll, then it has no prospects of success.

[9] On the issues in contention, this application forces the courts into a merry-go-round, like a dog chasing its tail. The appeal is doomed to fail. The judgment of this court which the applicant wants to appeal against devoted generous attention and treatment to all the issues in dispute. It gave detailed reasons on why the applicant's appeal failed. The grounds of appeal do not go outside the precincts of that judgment. The application goes no further than merely disputing the court's findings. The applicant and those advising her dogmatically refuse to recognise the following hurdles in her case:

- her own evidence showed that she had inherited the property on 8 March 2012 and that any other date subsequent thereto was just a desperate afterthought;

- in terms of s 11(3) of the Income Tax Act, the liability for tax over income accruing in respect of an inherited property starts to run on the date of the inheritance of the property;

- the applicant could not properly claim as deductible the director's salary earned by herself, because as a sole trader, this was income for her own upkeep which is treated as advance drawings over which there is no deduction;

- the respondent had been correct to use estimated figures obtained from some of the tenants at the property in coming up with the amount of rental proceeds on the property given that the applicant had been uncooperative and, at any rate, the Act empowers the respondent to do so.

[11] An appeal court is unlikely to find fault with the judgment of this court. The intended appeal raises no novel or important points of law. The appeal will just overburden the Supreme Court with frivolous and ill-conceived arguments. It is designed to turn the Supreme Court into a platform for a trial *de novo*. No court can allow that.

[12] The amount in issue is a modest RTGS $74 773-3, comprising a principal sum of RTGS $37 386-66, and a similar amount in penalties. That is meagre. That is trifling. But Mr *Shadreck*, for the applicant, argues that it may be trifling to the respondent, but not to the applicant, allegedly a small time businesswoman. But the assessments of whether or not a sum of money in any given situation is trifling, or of whether or not the matter is of importance to the parties, are not based on the subjective value of the money to the claimant or the subjective interest of the applicant in her own case. They are based on objective parameters. On this aspect, Mr *Bhebhe*, for the respondent, lashed out with what was probably a speculative and exploratory punch. He argued that the applicant's legal practitioners' own fees exceeded the principal amount in dispute. Incredibly, he was right! Mr *Shadreck* conceded the point!

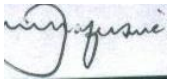
[13] Looking at all the factors cumulatively, the balance of convenience favours leave being refused. In matters like this, no single factor is exclusively decisive. Some factors may be more relevant in some cases than they may be in others. For example, the existence of strong prospects of success may compensate for any inadequacy in the other factors. But in this matter, a consideration of all the factors, whether individually or collectively, return one result, namely that the appeal lacks merit. The fact that the appeal is moribund and the amount in dispute so trifling, means that, objectively, the matter cannot be that important to the applicant. Therefore, the balance of convenience weighs in favour of dismissing the application. Balance of

convenience includes the convenience of the courts as well, not just the parties. It encompasses the whole administration of justice. There ought to be finality in litigation.

[14] It was for the above reasons that the application for leave to appeal was refused and the following order issued:

The application be and is hereby dismissed with costs.

13 September 2021



*Kanoti & Partners*, applicant's legal practitioners
*Kantor & Immerman*, respondent's legal practitioners