

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE S.G. ENGWAU, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.
HON. LADY JUSTICE C.K.B. BYAMUGISHA, JA.

CIVIL APPEAL NO.05 OF 2007

BETWEEN

UGANDA REVENUE AUTHORITY:..... APPELLANT

AND

1. RWAKASHAIJA AZARIOUS
2. DR. KAGGWA JAMES RESPONDENTS
3. MUHANGI KATO

[Appeal from the decision of the High Court, Civil Division, Kampala (Okumu Wengi, J. as he then was) dated 3rd May 2006 in H.C.C.S No.176 of 2003]

JUDGMENT OF ENGWAU, JA.

This is an appeal against the decision of the High Court wherein it was ordered that the appellant pays to the respondents herein after referred to as the 1st, 2nd and 3rd respondents respectively the sum of Uganda Shillings two hundred fourteen million with interest until payment in full plus costs of the suit.

The brief facts of the case are that the respondents claimed to have provided information to the Special Revenue Protection Services (SRPS) of the appellant about an evasion of paying VAT taxes by the Grupo Dragados S.A. to the appellant.

The respondents' case was that acting on that information, the appellant carried out an audit on the company and as a result the sum of Ug.Shs.2,139,355.747/= in tax was recovered. By virtue of the provisions of section 7 of the Finance Act 2000, the respondents were entitled to 10% of the tax recovered.

The appellant declined to reward the respondents as provided for under section 7 of the Finance Act, 2000. The reason being that revenue was known to the appellant and that it was a case of delayed payment resulting from the clause in VAT policy of the Government on donor projects.

The learned trial judge allowed the respondents' claim in the sum of Shs.214 million with interest at 11% from the date of filing the suit till payment in full and costs of the suit to the respondents, hence this appeal on the following grounds:

1. *The learned trial judge erred in law and fact when he failed to properly evaluate the evidence before him thereby coming to a wrong conclusion that the respondents provided information to the appellant that led to recovery of all taxes in issue.*
2. *The learned trial judge misdirected himself when he failed to find that the taxes recovered were known to the appellant well before the joint audit.*
3. *The learned trial judge erred in law and fact when he granted interest on decretal sum which had not been pleaded and or prayed for during the trial.*
4. *The learned trial judge erred in law in writing a judgment that did not conform to rules on contents of judgment and relying on conjecture.*

At the commencement of hearing this appeal, Mr. Moses Kazibwe, learned counsel for the appellant; argued grounds 1 and 2 together and abandoned grounds 3 and 4 of the appeal. Mr. Christopher Madrama, learned counsel for the respondents also argued grounds 1 and 2 together and I shall follow the same in this judgment.

Grounds 1 & 2

It is the contention of the appellant that the Court was wrong to hold that the respondents gave information upon which the appellant recovered taxes. Mr. Kazibwe referred us to appellant's written statement of defence in which a number of documents were pleaded and annexed thereto. The annexures in question include documents A,B,C,D,E,F and G respectively.

Mr. Kazibwe submitted that the Value Added Tax (VAT) payable by Grupo Dragados SA was known from the project documents between the Donors/Government and the contracting company itself at all stages of the project. Counsel pointed out that issues arising from the interpretation of the clauses in the VAT Statute of 1996 arose and as a result, the appellant was called in to investigate and collect any taxes due. A copy of the agreement is annexed as “A”.

Confirmation of the sum is annexure “B”. This is a letter from the Secretary Central Tender Board, Ministry of Finance, dated 4th February, 1998. It was addressed to the Permanent Secretary, Ministry of Health and reads in parts as follows:

“The Permanent Secretary

Ministry of Health

ENTEBBE

*TENDER FOR REHABILITATION
AND EXTENSION OF MULAGO
NATIONAL REFERRAL HOSPITAL
COMPLEX AND CONSTRUCTION
OF A NATIONAL DRUG QUALITY
CONTROL LABORATORY.*

Reference is made to your letter PHCA 11B of 28th January, 1998 in connection with the above mentioned subject.

This is to inform you that the Board has revised the contract sum for the above works to be all Tax Inclusive.

You are therefore advised to renegotiate with M/S Dragados on the following basis:

- 1. Award tender sum without taxes \$28,006,068.75*
- 2. Taxes*
 - (i) Import Duty*

- (a) *Estimated Value of materials 70% of \$19,604,248.13 = \$19,604,248.13*
- (b) *Estimated value of Imported materials 65% of 19,604,248.13 = \$12,742,761.28*
- (c) *Estimated Value of Import Duty 20% of 12,742,761.28 = \$2,548,552.26.*

(ii) *Value Added Tax (VAT)*

VAT = 17% (Tender sum + Import duty)

17% (\$28,006,068.75 + \$2,548,552.26) = \$5,194,285.57

Revised Tender Sum inclusive of Taxes \$35,748,906.58

This letter supersedes my earlier one on FC 16/164 of 16th January, 1998 on the same subject.

Signed

SECRETARY/CENTRAL TENDER BOAR”.

Mr. Kazibwe submitted that the above letter mentions the VAT. Mr. Kazibwe further referred to the letter from the Ministry of Health, dated 14th June, 2001, Annexure “E” It reads in part:

“The Commissioner General,

Uganda Revenue Authority

KAMPALA.

Ref: ADB/FUNDED HEALTH SECTOR REHABILITATION

PROJECT:- MULAGO HOSPITAL COMPLEX – VAT

COMPUTATION.

Reference is made

The contract works expired on 31st March, 2001 and the Contractor is in the process of demobilising from the site. It is therefore advisable that all outstanding issues, related to the contract, and particularly the VAT issues are resolved before the contractor effectively leaves the site.....

Signed

PERMANENT SECRETARY

In further support of his argument, Mr. Kazibwe referred to another letter, Annexure “E”. The Ministry of Finance, Planning and Economic Development wrote to:

“21st August 2001

The Commissioner-Tax Investigations

Uganda Revenue Authority

Nakawa Industrial Area

Atten: Mr. A.R. Kyamugina

RE: HEALTH SECTOR REHABILITATION PROJECT (MULAGO HOSPITAL PROJECT) – VAT MATTERS

Reference is made

.....
The purpose of this letter is to forward to you a copy of the local agreement for your necessary information.

By copy of this letter, I am requesting the Permanent Secretary-Ministry of Health to provide you with a copy of the contract agreement and any other relevant documents in this matter.

Signed

For: THE PERMANENT SECRETARY/SECRETARY TO THE TREASURY”.

Finally, Mr. Kazibwe referred to a letter at page 155 of the record. It is a report of an internal memorandum where some taxes were added to the tune of Shs.16,294,415/=. Further research to be carried out. It is Annexure “C”.

After referring us to the above documents, Mr. Kazibwe contends that the tax was already known to the appellant. He further contends that the respondents claimed to have given information to Special Revenue Protection Services, but according to the oral testimony

of the 1st respondent, PWI, the nature of information to SRPS is not clear. In his view, the respondents should have called the head of SRPS to testify but did not. According to counsel, the letter at page 132 of the record, the head of SRPS never mentioned the names of the respondents to the Commissioner General of the appellant.

Mr. Kazibwe pointed out further that the appellant gave evidence in the trial court as to how information relating to tax evasion is handled. The evidence was given by Lutta Harriet, DW2, but her evidence was not considered at all by the trial judge. In *Dragados* case, it was DW2 who entered the particulars in the Case Control Sheet – Exhibit D. According to DW2, the basis of information was two letters, one of 2/8/2000 from Ministry of Finance and another of 14/6/2001. Mr. Kazibwe submitted that by then the information of VAT liability was already known and the joint audit already carried out by the appellant and SRPS.

Mr. Kazibwe pointed out that the only attempt made to bring the respondents into the picture is through a letter at page 119 of the record (page 68 of the Supplementary record by the respondents).

The letter in question was from State House, dated 16/12/02 by Levi Mugalu, Capt head F/IA SRPS. It reads:

*“TO WHOM IT MAY CONCERN
RE: INFORMERS AS REGARDS VAT TAX
INVESTIGATION ON GRUPO DRAGADOS
FOR THE PERIOD JULY 1996-2001*

This is to confirm that the following informers assisted the SRPS in investigating alleged Tax evasion by M/S GRUPO DRAGADOS for the period July 1996-June 2001.

- 1. RWAKASHAIJA AZARIOUS*
- 2. DR. KAGGWA JAMES*
- 3. MUHANGI KATTO*

We hope this information will be treated with the confidence it deserves as informers are entitled to remain anonymous for their own protection.

Signed

LENI MUGALU

CAPT

HEAD F/IA SRPS".

Mr. Kazibwe pointed out that this letter was written 18 months even after the taxes were paid. In counsel's view, that letter does not introduce what information the respondents gave to the SRPS. He further submitted that it was erroneous for the learned trial judge to conclude that the respondents provided information that led to the recovery of taxes.

Mr. Kazibwe further submitted that the learned trial judge ignored material evidence that was adduced by the respondents. He pointed out that the 1st respondent, PWI, at page 26 of the record, testified as follows: *"I got information around April 2000. I cannot recall the exact date. The periods were January 1999 to June 2000. Dragados had paid over Shs.12 million. From what I saw it only paid that"*.

Mr. Kazibwe submitted that the sum of money which the 1st respondent is talking about is the result of an internal memorandum at page 155 of the record, dated 24th October, 2000. The so-called information was, therefore, non-existent at the material time. Mr. Kazibwe further submitted that PWI testified that he had passed 4 or 5 certificates issued after the completion of work to Special Revenue Protection Services (SRPS) but did not know the person who issued these certificates.

Mr. Kazibwe pointed out further that Ms Najja Twaha, DWI, who was part of audit team by the appellant, says at page 59 of the record: *"I was not told of the existence of informers in this case"*. According to DWI, the issue was about late payment and not tax evasion as claimed by the respondents. Counsel further referred us to the minutes of the audit reconciliation meeting held on 20th September 2001 in SRPS offices at 4:00p.m that was attended by DWI, especially MIN.3 thereof:

MIN 3	Purpose of the meeting
	<i>The Chairman outlined the purpose of the meeting as follows:</i>

	<i>To discuss the technical issues relating to the accounting of both Input tax and output tax which were not clear to the Tax payer on the payment system of VAT on donor funded projects.</i>
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According to counsel Kazibwe, the learned trial judge did not properly evaluate the evidence before him and came to wrong findings. He prayed that this appeal should be allowed with costs.

Mr. Christopher Madrama, learned counsel for the respondents, supports the findings of the trial judge to the effect that there was information given to the appellant by the respondents. According to counsel, it was a case of evasion of tax and not late remittance. He pointed out that according to the evidence of PW1, there was tax evasion and not delay in payment. In counsel's view, the evidence of PW1 is supported by Exhibit RI at page 32 of the supplementary record of appeal. It was a communication by Special Revenue Protection Services to Commissioner General calling for a joint audit of Dragados.

Mr. Madrama submitted further that the evidence of Lt. George Abekuu, PW2, identifies the informers as the respondents – exhibit P II. He pointed further that the testimony of the auditors, DWI, PW3 and PW4, showed that there was under estimation of VAT by the Dragados company but not late payment asserted by the appellants.

Consequently, Mr. Madrama prays for the dismissal of this appeal with costs to the respondents.

This being the first appellate court, it is duty bound to re-appraise the evidence on record as a whole and come to its conclusion, bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in that regard. *See: D.R. Pandya V.R [1957] E.A.336; Ephraim Ongom & Anor vs Francis Binega Donge, S.C.C.A No. 10 of 1987 (unreported) and rule 30(1)(a) of the Rules of this court.*

Having cautioned myself about the role of this Court in its capacity as the first appellate court, I have subjected the evidence on record as a whole to a fresh and exhaustive examination and scrutiny.

Regarding issue No.1, the respondents contend that the record of appeal does not comply with the mandatory requirements of rule 87(1) and (5) of the Rules of this court. The respondents argue that the rule is mandatory and non compliance renders the record a nullity and it ought to be struck off.

The appellant does not agree. It is their submission that under rule 90(3) of the Judicature (Court of Appeal Rules) Directions, time to file a supplementary record does not expire and that a supplementary record could have been filed any time.

It is my considered view that since the respondents have filed their supplementary record, the appellant can use the same in support of their case. In the premises, I make no order for costs.

The agreed issues of great concern to be resolved in this appeal are:

1. *Whether the respondents gave information to the appellant that led to the recovery of all or part of the tax the subject matter of the suit.*
2. *Whether the joint audit exercise between Special Revenue Protection Services and Uganda Revenue Authority established a case of under declaration of VAT or delayed remittance to the appellant.*
3. *Whether the respondents were entitled to the remedies prayed for.*

It is convenient and harmonious for me to consider 1 and 2 together. The respondents' claim is based on the provisions of section 7 of the Finance Act which provides:

“The Commissioner General shall reward any person who provides information leading to recovery of tax or who seizes any goods or by whose aid goods are

seized under any law in relation to tax or duty, with a reward of 10 percent of the tax recovered”.

The only major issue in the respondents’ case is the supply of information. The nature and quality of any information allegedly supplied must be proved to the satisfaction of court on the balance of probabilities. In the instant case, the principal source of information to the SRPS was Rwakashaija Azarious, PWI, 1st respondent. He claimed to have recovered the information for the period January 1999 to June 2000.

Apparently, the information which the 1st respondent received and passed to SRPS in April 2000 was that at the material time, Dragados company had only paid over shillings twelve million as taxes from the returns he saw. This information, in my view, cannot be true. The internal memorandum, Annexure “C” at page 155 of the record, demanding for Ug.Shs.12,174,313/=, was written on 24th October 2000, much later. It is also inconceivable how information for June 2000 was received by him before the month the money was generated.

Normally, certificates are issued for particular pieces of work completed. It is, therefore, wrong for the respondents to claim their issuance at monthly interval. Moreover, they failed to name the person who issued them. The respondents also claimed to have supplied all the information to SRPS requesting for joint investigation was written on 17th August 2001. *See Annexure “A”* at page 132 of the record.

Prior to the request for a joint investigation by the SRPS, the Secretary to the Treasury had asked the appellant to carry out investigation of Grupo Dragados S.A for recovery of VAT. The letter is dated 2nd August 2000. *See Annexure “B”* at page 133 of the record.

In both annexures “A” and “B” there is no mention of the names of the respondents as informers. I can only see an attempt at page 68 of the Supplementary Record of Appeal. In that letter, Leni Mugalu Capt, Head F/IA SRPS mentions the names of the respondents as informers. The letter does not state the nature of information that the respondents passed to the SRPS. Worse still the letter was written 18 months after the taxes were paid. In the circumstances, the respondents were not known to the appellant and the

collection of the taxes due from Grupo Dragados S.A was not based on the respondents' alleged information. *See Annexure "C and "D" of the record at pages 134 and 135 respectively.*

Looking at the project documents between the Donors/Government and the contracting company itself, VAT payable by Grupo Dragados SA contract were further communicated to the appellant by the Ministry of Health vide annexure "E" at page 157 of the record. As a result, the appellant requested for the Contract Document, which was provided as an attachment to the letter dated 21st August 2001. Both letters are annexed and marked "F" and "G" respectively.

Natumanya Emmanuel, PW3 and Ibrahim Kyeyune, PW4, were officials working with S.R.P.S. Both witnesses audited Grupo Dragados SA on the issue of VAT. (Exhibit P10 and P 11). In cross-examination, PW3, stated among other things:

A photocopy was brought to us by informers. I don't remember their names. I saw them. If I see them I can remember them. I saw two".

That is the evidence of the respondents. He does not remember their names. Whereas the respondents are three but the witness saw only two of them. The witness further stated:

"They did not know they were required to declare whether or not there were delayed payments".

Ibrahim Kyeyune, PW4, another witness for the respondents, during cross-examination stated after looking at Exhibit P4 thus:

*"We used the term late payment rather than evaded tax
In this case we meant late payment The tax was known by both parties. It was estimated and actuals would go up or down".*

In her evidence in-chief, Najja Twaha, DWI, at page 59 of the record stated thus: *“I was not told of the existence of informers in this case”*. The witness then gave evidence regarding a system of handling informers. Her evidence was not controverted.

Lutta Harriet, DW2, in Dragados case entered the particulars in the Case control Sheet-Exhibit D5. It is, therefore, evident that the taxes recovered from the Grupo Dragados SA project were not evaded or under declared but late payment to the appellant. In my view, if the learned trial judge had properly evaluated the evidence before him, he would have found that the respondents gave no information to the appellant that led to the recovery of the tax in dispute. He would have also found that the joint audit exercise between Special Revenue Protection Services and Uganda Revenue Authority did not establish a case of under declaration but delayed remittance to the appellant. In the circumstances, the respondents were not entitled to anything in terms of section 7 of the Finance Act.

In the result, I find merits in this appeal. Since my Lords Kitumba and Byamugisha, JJA, also agree, I would allow this appeal with costs here and in the lower court to the appellant.

Dated at Kampala this day of 2009.

S.G.Engwau
JUSTICE OF APPEAL

JUDGMENT OF KITUMBA JA

I have read in draft the judgment of Engwau JA. I entirely agree with it.

The respondents did not provide any information of tax evasion to the appellant to justify the reward provided for under section 7 of the Finance Act.

I would therefore, allow the appeal with costs to the appellant.

Dated at Kamapala this ..30th ...day ofMarch.....2009.

C.N.B.Kitumba,
Justice of Appeal

JUDGMENT OF BYAMUGISHA, JA

I had the benefit of reading in draft form the very full judgment that was prepared by Engwau, JA which has just been delivered. It has set out the facts that led to the institution of the case in the lower court with sufficient clarity.

The judgment also sets out my own views of the case that I find it unnecessary to add anything further.

I concur that this appeal ought to succeed with costs both here and in the court below.

Dated at Kampala this30th ...day ofMarch,..... 2009.

C.K.Byamugisha
Justice of Appeal