IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MWARIJA, J.A. And MZIRAY,J.A.)

CIVIL APPEAL NO 20 OF 2018

TANELEC LIMITED.....APPELLANT

VERSUS

THE COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY.....RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Arusha)

(Hon. G. J. K. Mjemmas, J.)

dated the 4th day of December, 2017
in
Income Tax Appeal Number 30 of 2016

RULING OF THE COURT

25th June, & 3rd July, 2018

JUMA, C.J.:

The appellant **TANELEC LIMITED** (the taxpayer) is a limited liability company in the business of manufacturing and distribution of electrical transformers and switchgears. Its head quarters is in the city of Arusha. **THE COMMISSIONER GENERAL (Tanzania Revenue Authority)** (the respondent) is, on the other hand, a body corporate established under section 4 of the Tanzania Revenue Authority Act (Cap 399) for purposes of assessment and collection of taxes and other revenues.

On 31st December 2014 the respondent, acting under section 28 of the Value Added Tax Act, 1997, issued and served the appellant with a notice of Value Added Tax Certificate/Interest No. 429663074 for the years 2009 to 2012. In its essence, the notice required the appellant to pay Value Added Tax amounting to Tshs.1, 039,065,475/= on imported services the appellant had enjoyed during that period of tax assessment.

The Appellant was aggrieved with that assessment. By a letter dated 9th January, 2015, the appellant communicated its objection to the respondent, on two grounds. Firstly by insisting that the respondent had erred to demand the value added tax on imported services which the appellant had already been properly accounted for, and also declared through the appellant's VAT returns. Secondly, that the respondent had erred by charging interest under section 28 of the Value Added Tax Act, Cap. 148 R.E. 2006 (the VAT Act) on value added tax which the appellant had accounted for in its returns to the respondent. Despite the objection, the respondent stuck to its position by insisting that according to section 16 (1) (b) of the VAT Act the appellant should first have paid the input tax, which the appellant had not. Finally, on 18 March2015 the respondent invoked section 13 (5) of the Tax Revenue Appeals Act, Cap. 408 to

formally inform the appellant that the assessment of Tshs.1, 039,065,475/= was not only correctly assessed by the respondent, but was also due from the appellant.

The appellant lodged its appeal to the Tax Revenue Appeals Board (the Board) against the respondent's assessment. At the Board where the appellant filed its Statement of Appeal the main issue was whether; the appellant should have paid input tax on imported services before claiming the same in its Value Added Tax returns.

The Board dismissed the appellant's appeal after finding that the respondent had correctly assessed the tax, which is due and payable. The Board relied on additional documents it asked the parties to supply and found that the appellant failed to prove that the Trans Century Investing Africa of Nairobi Kenya supplied management services to the appellant.

Aggrieved by the decision of the Board, the appellant lodged an appeal, Tax Appeal No. 30 of 2016, to the Tax Revenue Appeals Tribunal (The Tribunal).

On 04/12/2017, the Tribunal dismissed the appellant's first appeal, by upholding the Board in its conclusion the appellant should have first paid

the input tax on imported services first before the appellant could claim the same in VAT returns.

The appellant is dissatisfied with the decision of the Tribunal and has lodged the present appeal before us, raising the following eight grounds of appeal:

> *1.-That the Honourable Tax Revenue Appeals Tribunal erred in holding that input tax on imported services has to be paid first before claiming the same in the VAT returns.*
>
> *2. - That the Honourable Tax Revenue Appeals Tribunal overstepped its authority by adopting a construction of the Value Added Tax Act, Cap. 148 which results in absurdity and renders the law ineffective and impracticable.*
>
> *3.- That the Honourable Tax Revenue Appeals Tribunal erred in holding that the Tax Revenue Appeals Board has been given wide powers and is not bound by rules of evidence, thereby condoning breach of the rules of natural justice by the Tax Revenue Appeals Board in VAT Appeal No. 15 of 2015.*
>
> *4. - That the Honourable Tax Revenue Appeals Tribunal erred in holding that the Appellant ought to have*

produced documents notwithstanding that one of the issues which were framed concerned a point of law.

5.- That the Honourable Tax Revenue Appeals Tribunal contradicted itself and erred in law in that, while it insisted on the duty of the Appellant to produce documents to the Board, it, through its ruling in Application No. 25 of 2017, denied the Appellant the opportunity to prove that the documents were actually presented to the Board, but the Board made a determination without hearing the Appellant.

6.- That the Honourable Tax Revenue Appeals Tribunal erred in law by holding that the Board was correct in making a determination on accounting for VAT on imported services which was not an issue before it.

7.- That the Honourable Tax Revenue Appeals Tribunal contradicted itself and erred in law in holding that the Board had to satisfy itself that the appellant had accounted for VAT before he claimed for input tax, but it failed to appreciate that the Board made the determination on accounting for VAT from documents presented to it by the Appellant after closure of the proceedings, but such determination was made without giving the Appellant opportunity to explain and make a submission on the documents as presented.

8.-That both the Honourable Tax Revenue Appeals Tribunal and the Board trampled on the fundamental principle of justice that they are the parties' judge and not their oracle by embarking on issues not brought before them for determination.

At the hearing of the appeal, Mr. Elvaison Maro and Mr. Nicholaus Duhia, learned advocates who appeared for the appellant, made oral submissions and relied on written submissions they had filed in earlier on. Likewise, Mr. Primi Telesphory Manyanga, learned advocate who appeared for the Respondent made oral submissions and placed reliance on the written submissions he had filed in earlier on.

On the third and eighth grounds of appeal which Mr. Maro argued together, he complained that the Board and the Tribunal had condemned the appellant without according the appellant hearing thereby violating the rules of natural justice. He referred us to pages 21 and 22 of the record of appeal where parties were before the Board, had agreed on only one main issue for Board's determination, i.e., whether the Appellant should have paid input tax on imported services before claiming the same in its VAT returns. But, after hearing the parties on 17/11/2016 and setting 21/11/2016 as the date to deliver its judgment, the Board while

deliberating alone in the absence of the parties, inexplicably ordered the parties to furnish extra documents.

The Board asked Appellant's VAT returns for the years 2009, 2010, 2011 and 2012. The Board also wanted the Appellant's invoices relating to the imported management services for the same period. Mr. Maro expressed his deep alarm over the way, after receiving the documents it had requested to assist in its deliberations, the Board used the same documents to make conclusions which were adverse and damaging to the appellant's appeal without according the appellant the right to be heard over those extra documents.

The learned advocate referred us to pages 69, 70, 71 and 72 of the Judgment which show how the Board used the added documents tomake statements and conclusions which fundamentally turned the outcome of the appeal against the Appellant, all without hearing the appellant. Mr. Maro submitted that ideally, after the Board had called for the additional documents while composing its Judgment, the Board should have accorded the Appellant an opportunity to be heard before making comments and conclusions adverse to the appellant. In cementing his stand against the decision of the Board using extra documents and raising new issues

without hearing the parties, Mr. Maro, cited to us several decisions where this Court has taken a firm stand to reiterate the mandatory duty of courts to observe the rules of natural justice.

Mr. Maro cited to us, the case of **EX-B.8356 S/SGT SYLVESTER S. NYANDA VS THE INSPECTOR GENERAL OF POLICE & THE ATTORNEY GENERAL**, CIVIL APPEAL NO. 64 OF 2014 (unreported) where at the commencement of the trial, three issues were framed in respect of which the parties gave evidence to support their respective positions in that case. It later transpired that the trial Judge did not decide the outcome of the case on the issues which were framed and submitted on by the parties, but on an issue which the trial Judge had framed *suo motu*. The Court made the following observations which are pertinent to the instant appeal before us:

> *"...we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying any of the parties the right to fair hearing.—see among others, the case of* ***Mire Artan Ismail &***

Another V. Sofia Njati, *Civil Appeal No. 75 of 2008 (unreported).*

However, as correctly submitted by both parties, we are aware that the trial court had power to amend, add, or to strike out issues under Order XIV Rule 5 of the CPC.....

It is important to note nevertheless, that this provision has qualified that the amendment or additional issues should be done as may be necessary for determining the matters in controversy between the parties, in our view, meaning limitation according to the issues raised by the pleadings. We desire to add, as correctly submitted by the appellant that where this is done, prudence requires that the parties are afforded opportunity to address the court on the issues so amended or added, in tandem with the ***audi alteram partem*** *principle of natural justice as has been insisted in a range of cases including those relied upon by the appellant as pointed out at the beginning. In the case of* ***MBEYA—RUKWA AUTOPARTS AND TRANSPORT LTD VS JESTINA GEORGE MWAKYOMA*** *[2003] T.L.R. 251 in which the English case of Ridge V. Baldwin [1964] AC 40 was considered, the Court emphasized that:*

"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard among attributes of equality before the law..."

Mr. Maro blamed the Tribunal for failing to rectify the fundamental error of denying the appellant its right to be heard by the Tribunal condoning the decision of the Board.

Mr. Maro also took particular exception to the Tribunal's holding that the Board has wide powers, including not being bound by a rules of evidence applicable to ordinary courts. This holding of the Tribunal, the learned advocate submitted, resulted in the breach of the rules of natural justice which occasioned injustice to the appellant leading to the dismissal of his appeal. Powers of the Board are neither absolute nor arbitrary, but must be exercised judicially, Mr. Maro submitted. In so far as the learned advocate is concerned, the powers of the Board and the Tribunal when receiving evidence, is not as wide as suggested by the Tribunal in this appeal. He submitted that section 17(2) of the Tax Revenue Appeals Act, Cap 408 directs the Board and the Tribunal, when receiving evidence, they are to act as if they are ordinary courts exercising jurisdiction in a civil case

in accordance with the provisions of the Civil Procedure Code. Mr. Maro urged us to find that the Board is not vested with such a wide power as to violate the principles of natural justice.

For the respondent, Mr. Manyanga, urged the Court to dismiss the appeal maintaining that it is devoid of merit.

With regard to the right to be heard, the learned advocate submitted that the main issue which the parties proposed for determination, that is, when input tax was supposed to be paid, expected the appellant to tender evidence like VAT returns and invoices, which the appellant failed to present at the Board during the hearing. He submitted further that the Board was in fact lending assistance to the appellant by calling for documents to assist the Board in its deliberations and final decision.

With respect to the complaint over the appellant's right to be heard, Mr. Manyanga submitted that the Tribunal had properly interpreted the wide powers of the Board to call for additional evidence because Rule 17 (1) of the Tax Revenue Appeals Board Rules 2001allows the calling for any document which may assist the Board in its deliberations. He submitted that the appellant has no cause to complain because the documents were

supplied long before deliberations were made, and parties were called before the Board off the record for clarification purposes.

In his rejoinder, Mr. Maro stoutly disputed Mr. Manyanga's line of submission that after the Board had received the documents from the appellant, deliberations were made and parties were called, albeit off the record, for clarification purposes. Mr. Maro referred us to pages 39 and 40 of the record of appeal which shows that on 17/11/2016, after the Board had completed the hearing of the parties, it scheduled to deliver its judgment on 21/11/2016. But the following day on 18/11/2016, while deliberating in the absence of parties, the Board invoked Rule 17(1) of the Tax Revenue Appeals Board Rules, 2001 and ordered the parties to submit new documents. Mr. Maro refuted the claim that the appellant was invited to deliberate on the documents.

From submissions of the two learned counsel we feel obligated, before considering the opposing submissions on other grounds of appeal, to address ourselves first to the complaint over the denial of fundamental right of the appellant to be heard by the Board.

From our perusal of the record,we think Mr. Maro is right to express his deep concern over the way the Board, and later the Tribunal, relied on documents the Board had received and acted on, while in the boardroom composing its judgment. Excerpts from the Judgment of the Board on pages 69 to 72 of the record of appeal, illustrate how the Board analysed the appellant's tax returns and invoices, casting doubt on such matters as the identity of the suppliers of management fees, nature of imported services which the appellant would probably have clarified had he been summoned for hearing. So adverse to the appellant was the analysis of the Board, that the Board made such conclusions as:

> *...the Board is of the findings that by making incorrigible allocations in the VAT returns the Appellant wrongly accounted for input tax in his tax returns which gave him undue advantage of paying to the Respondent less value added tax, hence the Respondent was right to invoke the provisions of section 43 of the VAT Act, 1997.....**[page 72]***

Our perusal of pages 286 and 287 of the record of appeal bears out Mr. Maro's exasperation on how the Tribunal which had a chance to rectify, failed to step in. While on one hand the Tribunal accepted the fact that the

right to be heard is an integral part of ordinary courts, but on the next breath the Tribunal denied the appellant that same right to be heard on explanation that: "...*the Board has been given wide powers and it should be noted that the Board is not bound by rules of evidence.*"

It seems clear from decisions of this Court that the right to be heard is not exclusively meant for ordinary courts. Even the Tax Revenue Appeals Boards and the Tax Revenue Appeals Tribunal shave the duty to accord parties their right to be heard. This position of the law came out in the decision of the Court which Mr. Maro cited to us, in **MBEYA—RUKWA AUTOPARTS AND TRANSPORT LTD VS JESTINA GEORGE MWAKYOMA** (supra) to the effect that natural justice is now a fundamental constitutional right in Tanzania.

The case of **SAMSON NG'WALIDA VS THE COMMISSIONER GENERAL OF TANZANIA REVENUE AUTHORITY**, CIVIL APPEAL NO. 86 OF 2008 (unreported) is perhaps, a reminder to the Boards and Tribunals, that they too are bound by the constitutional principle of the right to be heard. One of the grounds of appeal to the Court of Appeal in **SAMSON NG'WALIDA** (supra) was that the Tax Revenue Appeals Tribunal had dismissed the appellant's appeal on a ground that was neither

raised by the parties, nor were the parties called to address the Tribunal on that ground which the Tribunal had raised *suo motu*. On appeal, this Court stated:

> *"The last ground of appeal is that the Tribunal in arriving at its decision that it had no jurisdiction to hear the appeal did not give the parties an opportunity to be heard on the matter. This issue was raised by the Tax Revenue Appeals Tribunal* ***suo motu*** *and a decision made without hearing the parties. The case of* ***Highlands Estate Ltd V. Kampuni ya Uchukuzi Dodoma Ltd & Another****, Civil Application No. 183 of 2004 (unreported) was cited to support the complainant by the appellant that the Tribunal erred in this respect. On this ground of appeal there is no need to waste time. In the case of* ***Highlands*** *supra, the Court cited the case of* ***VIP Engineering and Marketing Limited and Others Vs City Bank Tanzania Limited,*** *CAT Consolidated Civil References No 6, 7, and 8 of 2006 (unreported) to emphasize the importance of giving a party the right of hearing before making an adverse decision against that party. In the case of* ***VIP*** *(supra) the Court in arriving at its decision had quoted from another case and said:-*

'The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts on numerous decisions. The right is so basic that a decision which is arrived at in violation of it would be nullified...'

The Tribunal was required to hear the parties before it made its decision on the question of its jurisdiction on the matter. It went against the rules of natural justice to raise the issue ***suo motu*** *and then gave a decision on it without first giving the parties an opportunity to address the Tribunal on the matter. This ground has merit and it is allowed."*

In view of the clear stand which this Court took in cases of **NG'WALIDA** and **VIP** (supra), to the effect that the right of a party to be heard before an adverse action or decision is taken against such a party is a basic constitutional duty, and that any violation of which nullifies the entire proceedings; we shall not in the instant appeal before us, consider other grounds of appeal.

In the instant appeal, the third ground of appeal contending that the appellant was denied its right to be heard is sufficient to dispose of the appeal.

We shall allow this appeal and order that the Tax Revenue Appeals Board at Arusha shall hear afresh the APPEAL NO. 15 OF 2015 between TANELEC LIMITED and the COMMISSIONER GENERAL OF THE TANZANIA REVENUE AUTHORITY. Each party shall bear its own costs

DATED at **DODOMA** this 30th day of June, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL