



**IN THE CHIEF RESIDENT MAGISTRATE'S COURT SITTING AT BLANTYRE AS A SPECIAL
ARBITRATOR UNDER THE TAXATION ACT
ARBITRATION APPEAL NO 2 OF 2013**

NICO HOLDINGS LIMITED APPELLANT

AND

COMMISSIONER GENERAL , MALAWI REVENUE AUTHORITY..... RESPONDENT

CORAM: Ligowe : Special Arbitrator/ Chief Resident Magistrate
Sauti Phiri : Counsel for Appellant
Chungu : Counsel for Respondent
Magwira : Court Clerk

JUDGMENT (PHASE 1)

- 1 This is an appeal by NICO Holdings Ltd against the decision of the Commissioner General on an appeal against the decision by the Malawi Revenue Authority requiring NICO Holdings Ltd to pay capital gains tax amounting to K114 689 550 upon disposal of some capital assets and acquisition of replacement assets.
- 2 Let me, before I go into the matter at hand; take the opportunity of this case to discuss issues of costs and fees in an arbitration of this nature. There are more and more appeals and references coming before Resident Magistrates under the Taxation Act, Customs and Excise Act and the Value Added Tax Act. In these cases issues of costs and fees will inevitably arise, which have to be put in proper perspective. This is what I would like to do now. As I do this, it will be noted that the law as provided in the Taxation Act, Customs Act and the Value Added Tax Act does not sufficiently deal with the subject. Hence this discussion. And to that end I will deliver the judgment in two phases.



- 3 S. 98(1) of the Taxation Act provides that a taxpayer aggrieved by the decision of the Commissioner General under section 97 may appeal to a Special Arbitrator appointed generally or specially for the purpose by the President. Under General Notice No. 136 of 1980 the Minister appointed the persons for the time being performing the duties of Chief Resident Magistrate, Principal Resident Magistrate and Senior Resident Magistrate as the Special Arbitrators for purposes of the Taxation Act. This is a general appointment.
- 4 Under S. 120 of the Customs and Excise Act, appeals with regard to disputes as to the amount of duty payable under the Act are supposed to be made to a Special Referee appointed by the Minister. Under General Notice No. 160 of 1970, the Senior Resident Magistrate at Blantyre was appointed the Special Referee for the purpose. This would not be tenable today. Perhaps there was only the Senior Resident Magistrate at Blantyre then who had the capacity to deal with such matters. Today there are such Magistrates around the country. There is no need to restrict to Blantyre.
- 5 Under S. 44(1) of the Value Added Tax Act, a person dissatisfied with the decision of the Commissioner General may lodge an appeal with any court of a Resident Magistrate. Note that while an appeal from the Commissioner General goes to a Resident Magistrate as a Special Arbitrator under the Taxation Act, and to the Senior Resident Magistrate at Blantyre as a Special Referee under the Customs and Excise Act, it goes to the court of a Resident Magistrate under the Value Added Tax Act. The impression given is that the Magistrate does not conduct the proceedings as a court under the Taxation Act and the Customs and Excise Act but under the Value Added Tax Act. Why should there be this difference?
- 6 With regard to costs, rule 13 of the Rules of Procedure for Appeals, as provided in the Eighth Schedule to the Taxation Act, states that "the Special Arbitrator shall not make any order as to costs save when the grounds of appeal are held to be frivolous or the reply unreasonable. There is no specific provision with regard to costs under the Customs and Excise Act, but S. 122 provides that "the procedure on any appeal shall be as determined by the Special Referee, who may permit evidence to be led by the Controller, the appellant and any person who has entered an appearance in accordance with the provisions of section 121 (5)."

Would the Special Referee be free to deal with the issue of costs as he deems fit under this provision? Under the Value Added Tax Act, the fact that the appeal is brought to the court of a Resident Magistrate means that rules of procedure of the court will be applied.

- 7 I guess the inconsistencies regarding the issue of costs under the three Acts are clear. My only opinion is that a uniform approach would have been better and easier.
- 8 With regard to fees, under S. 98(6) of the Taxation Act, the Special Arbitrator is required upon hearing the appeal to set out his findings in a written judgment a copy of which should be supplied to the taxpayer and the Commissioner General on application and payment of any prescribed fee. Thus upon delivery of the judgment, if either party needs a copy they have to apply for it and pay the prescribed fee. It is just that the Taxation Act does not provide for the prescribed fees.
- 9 In an ordinary arbitration under the Arbitration Act, S. 20 provides that the Arbitrator can demand fees from the parties to the dispute taxable in the High Court, and may refuse to deliver his award except upon payment of the fees. These are the Arbitrator's personal fees and not for the copies of the award.
- 10 Rule 14 of the Rules of Procedure for Appeals, as provided in the Eighth Schedule to the Taxation Act, gives power to the Special Arbitrator to decide his own rules of procedure, save as is provided in the Act. Would this be considered to extend to issues of fees and the manner they would be paid? Why did the Minister generally appoint persons for the time being performing the duties of Chief Resident Magistrate, Principal Resident Magistrate and Senior Resident Magistrate as Special Arbitrators? Was this an easy way of having the Special Arbitrators in place in view of the already existing structures and rules of the Courts? Did the Minister then, expect the appointed Special Arbitrators to demand fees just as a specially appointed Special Arbitrator would do? Say demanding fees charged at an hourly rate or howsoever for personal benefit as does an Arbitrator under the Arbitration Act? My strong view is that Subordinate Courts Rules have to apply as regards fees that would need to be paid upon

lodging an appeal to a Special Arbitrator who is a Magistrate under the Taxation Act, Special Referee who is a Magistrate under the Customs and Excise Act and the Resident Magistrate under the Value Added Tax Act

- 11 The practice of the Magistrates Courts in this country is that according to Order VI of the Subordinate Courts Rules, appropriate fees have to be paid first before a summons for commencement of an action is issued. In this appeal and other appeals that have come before me, the Commissioner General has on lodging the appellants' grounds of appeals and his own replies, paid fees per the Third Schedule to the Subordinate Courts Rules as amended by the Courts (Subordinate Courts) (Amendment) Rules 2011. From this practice it would appear the Commissioner General agrees to the need for payment of the fees. But how much fees should be paid? What I have noted is that he paid K500. Would this be commensurate with the huge sums of money involved in taxation matters? Was the K500 paid as though the Commissioner General was filing a statement of claim? In any case the Third Schedule I have just referred to, provides on item 1 that the fees for a statement of claim is K500; and for a summons and statement claim to a defendant (for each defendant more than one) where quantifiable minimum the fee is K1000. Whereas where the amount exceeds K50 000, the fee is 1% of the claim and for any non quantifiable claim the fee is K500. Apparently there is no specific item in the said Third Schedule covering appeals under the Taxation Act, Customs and Excise Act and the Value Added Tax Act. But item 4 provides for K500 for "notice of any kind (for each person to be notified)". Item 9 provides for K1 500 for "any application not otherwise provided for." Item 14 provides for K500 for "filing or issuing any document not herein provided for, otherwise than a statement of defense." Would the Schedule have contemplated the taxation appeals to fall within it and that they would be guided by items 4 or 9 or 14? I doubt. If for example 1% of the amount of tax in issue in the appeal were to be charged for filing fees at the time the Commissioner General lodges the appellant's grounds of appeal and his own reply, in the present appeal he would have to pay K1 146 895.50 because the amount in issue is K114 689 550. Would it be reasonable?

12 Court filing fees apparently serve two main purposes. The first is to deter frivolous litigation, thereby controlling court caseloads. The second is that they represent a proper charge for the use of the courts by individuals seeking a private benefit. However caution is always taken in setting the fees in view of the fact that the court system is a social institution which must be conceived as a "public service" in terms of costs and revenues. In a paper entitled "Survey and Analysis of Court Filing Fees" published in the "State Court Journal" Vol. 2. Issue 2 (Spring 1978) pp. 8113, 38-49,¹ E.K. Scott and R.N. Ross have written at page 9 quoting from "Alaska Judicial Council, Report on Policy Considerations for Court Fee Structures" (Anchorage, Alaska: February 1974), p. 2. That:-

"Like Police protection, ambulance services and fire protection, the courts require such a broad economic base of support that they cannot be conceived as potentially self-sufficient. The cost of mobilizing fire equipment and trained fire fighters is far in excess of what any citizen could afford to pay, or would be expected to pay if his house caught fire. Similarly, the cost of a court facility, a judge, the clerks of court, etc., could never be offset by the users of the process alone. Indeed the basic reason for having a community-wide tax base is to provide the revenues necessary to finance services which no one uses regularly but everyone wants available, and services which no one can afford but everyone needs the potential benefit of. Hence, ... [this] policy discussion does not presume in every case that users should pay their own way, that the system should necessarily be revenue producing, or that fees should necessarily be commensurate with benefits received."

13 Thus in the long run, in this country, filing fees need to be a legitimate charge levied to raise revenue to support the activities of the courts, as provided under S. 4(b) of the Judicature Administration Act, even though the fees alone would not meet the total cost of administering justice.

14 Rule 2(1) of the Subordinate Court Rules provides that where the rules do not provide for any matter of practice or procedure the court may apply any

¹ <https://www.ncjrs.gov/pdffiles1/Digitization/47398NCJRS.pdf> accessed on 2nd December 2015

appropriate provision thereof by construing the same with such modification not affecting the substance as may be necessary or proper to adapt the same to the matter before it. I have already found that these rules have to apply with respect to filing fees for lodging an appeal to a Magistrate under the Taxation Act, Customs and Excise Act and Value Added Tax Act. Therefore item 1 in the Third Schedule to the Subordinate Court Rules is the appropriate to be applied and construed with modification in this case. That provision envisages a claim of up to K2 000 000 per the jurisdiction of Magistrates under the Courts Act. The amount of tax in issue in this appeal is K114 689 550. The filing fees would be K1 146 895.50. The same would not be commensurate with the policy considerations for court fees discussed above. Perhaps the Schedule of Fees under the High Court (Commercial Division) Rules gives a better guide. The High Court has unlimited jurisdiction but under the said Schedule, while the filing fees for originating processes are pegged at 1.5% of the value of the subject matter in dispute, the maximum that is allowed is K150 000, i.e. for a value of K10 000 000 in dispute. The same principle has to be applied here and so for the mean time I am of the view that a maximum of K150 000 is appropriate. So the commissioner General has to pay 1% of the value of the tax in issue in the appeal up to a maximum of K150 000 in appeals under the Taxation Act, Customs and Excise Act and Value Added tax Act.

- 15 This appeal required K150 000 filing fees which have not been paid. The fees should be paid before we proceed with the rest of the judgment.
- 16 Made in Chambers this 2nd day of December 2015.


T.R. Ligowe
CHIEF RESIDENT MAGISTRATE