LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO.29/2018**

CIV/A/14/2016

In the matter between:

THE LESOTHO REVENUE AUTHORITY **APPELLANT**

AND

BOSIU CONSULTANCY (PTY) LTD **RESPONDENT**

CORAM: DR MOSITO P
DR VAN DER WESTHUIZEN AJA
N T MTSHIYA AJA

DATE OF HEARING: 22 OCTOBER 2019

DATE DELIVERED: 1 NOVEMBER 2019

SUMMARY

The preparation and registration of mortgage bonds by the respondent fall within the meaning of "financial services" in Section 6(1)(c) of the Value Added Tax Act 9 of 2001 and are thus exempted from the payment of VAT. The High Court correctly dismissed an appeal against the Revenue Appeal Tribunal's decision to overturn the appellant's rejection of an objection by the respondent to a tax assessment.

JUDGMENT

VAN DER WESTHUIZEN AJA

The issue

[1] Is the registration of a mortgage bond by a consulting company a *"financial service"* and thus exempt from value added tax (VAT) in terms of section 6 of the Lesotho Value Added Tax Act 9 of 2001 (the VAT Act)? This is the question at the heart of this appeal.

Background

[2] The appellant, the Lesotho Revenue Authority (appellant; Revenue Authority), contends that the fees for preparation and registration of a mortgage bond are not exempt. The respondent, Bosiu Consultancy (Pty) Ltd (respondent; Bosiu), argues the opposite.

[3] The respondent is a company that provides a wide range of legal and financially related services. Following an audit conducted by the appellant's officers in 2012, the appellant issued a Notice of Assessment on the tax liability of the respondent. It included VAT to the amount of M232 043.32, related to the preparation and registration of mortgage bonds on behalf of banks for their clients. In a letter dated 30 October 2012 the respondent objected to the assessment. It argued that the preparation and registration of mortgage bonds should be exempt from VAT, because it qualifies as "financial services" in terms of section 6(1) of the VAT Act. The appellant disallowed the objection.

[4] Bosiu approached the Revenue Appeal Tribunal (Tribunal). The Tribunal ruled in its favour on 29 April 2016.

[5] The Revenue Authority appealed to the High Court. The appeal was dismissed on 17 April 2018. A series of events followed and resulted in this Court having to consider an application for the condonation of the late filing of the appeal.

Condonation

[6] On 21 June 2018 the appellant noted an appeal to this Court and applied for special leave to appeal. Special leave was granted on 17 August 2018. However, on 31 August 2018 its legal representatives wrote to the respondent's lawyers, with a notice withdrawing the appeal notice of 21 June 2018, because the

appeal had been noted before leave was granted. A new notice of appeal was filed on 5 September 2018, informed by the contents of the 31 August letter.

[7] When the appeal came before this Court on 1 February 2019, the respondent argued that the notice of 5 September 2018 was out of time and that the appellant should have applied for condonation for its late filing, which it did not do. The Court agreed with the respondent. The matter was struck off the roll.

[8] Thus an application for condonation was brought before this Court. Together with the degree of lateness and the reasons for it, the prospects of success of the appeal had to be considered in order to decide whether or not to grant condonation. Counsel and this Court thus agreed that the merits of the appeal had to be argued, together with the delay and its reasons.

[9] Counsel for the Revenue Authority and Bosiu agreed that the notice of appeal was two months and 17 days late, calculated from 17 April 2018, when the High Court dismissed the appeal against the Tribunal's decision. This is substantially shorter than in the cases where condonation was refused, referred to by the respondent. The reasons for the delay are evident from the letter of 31 August 2018 and the related above-mentioned events. It cannot be said that a flagrant breach of the Rules of this Court occurred.

[10] What has to be decided in this appeal is important, with significant potential consequences. The VAT Act is an essential piece of legislation. As is evident below, the arguments presented by both parties on its interpretation deserve proper attention and debate. It cannot be said that the appeal bears no reasonable prospects of success.

[11] Condonation has to be granted.

Interpretation

[12] Section 6(1) of the VAT Act exempts *"financial services"* from VAT. What has been argued in this matter, is the definition of "financial services" in subsections (a) and (c):

> "(a) *The granting, negotiating, and dealing with loans, credit, credit guarantees, and any security for money, including management of loans, credit, or credit guarantees by the grantor;*
>
> ...
>
> *(c) Transactions relating to shares, stocks, bonds and other securities, other than custodial services;*
>
> ...."

[13] Before the Tribunal, in the High Court and before this Court the respondent relied on the direct meaning of the wording of the statute. Counsel for the appellant presented a range of arguments based on subsection (a) as well as (c). It was especially argued that the term "financial services" must be interpreted within the context of the VAT Act and its purpose as a whole.

[14] The granting, negotiating and dealing with loans, securities, etc, mentioned in (a) are all activities of banks as proper financial institutions, according to the appellant. The registration of a mortgage bond can be done by an attorney, for example, like in this case. It is a legal service, not a financial service. As a legal service, it is also not a *"transaction"* under (c). The term *"bonds"* in subsection (c) furthermore does not include mortgage bonds.

[15] The Tribunal considered all these arguments. It pointed out that some had not been canvassed in the appellant's earlier Opposing Statement, but nevertheless permitted counsel for the appellant to present them because their consideration would not result in unfairness.

[16] The Tribunal rejected the Revenue Authority's argument that the service provided by Bosiu was legal and not financial. One and the same service cannot be classified as a legal service when provided by a legal practitioner in private practice, but as a financial service when rendered by a legal practitioner in the employ of a bank. The nature of the establishment should not be over-emphasised at the cost of the nature of the service.

[17] In the opinion of the Tribunal the words *"... credit guarantees, and any security for money ..."* in (a) are wide enough to encapsulate mortgage bonds. In the interpretation of (c) the *eiusdem* generis rule, relied on by the appellant, is not invoked.

The word *"bonds"* appear in a list of words and the legislature would have excluded mortgage bonds if that was the intention.

[18] The Tribunal concluded that *"mortgage bonds are exempt from VAT in terms of Section 6 (1) (a) to (c) of the Act"*. It upheld the appeal.

[19] In dismissing the appeal against the Tribunal's finding, the High Court pointed out that the term *"bonds"* in subsection (c) is not defined in the VAT Act. To interpret it as excluding the preparation and registration of mortgage bonds "would trespass the legislative terrain". The Court stated that "(g)eneral interpretation must be preferred over an exceptional version not clearly stipulated and provided by statute". Tax liability and exemption should be clearly defined without room for doubt.

[20] According to the High Court, tax laws are usually strict, stand on their own footing and have to be interpreted contextually and subject to the *contra fiscum* principle.

[21] In my view the most relevant provision is section 6(1)(c). The two concepts directly in point are *"transaction"* and *"bonds"*. Neither term is defined in the VAT Act. There can be little doubt that the preparation and registration of a mortgage bond is a transaction.

[22] The appellant argued that the term *"bond"* refers to several kinds of bonds, but not to mortgage bonds. The words *"and other securities"* in (c) implies that the bonds must be securities. According to the appellant, securities can be bought and sold, whereas mortgage bonds cannot.

[23] The requirement regarding buying and selling does not appear in the wording of the VAT Act. Furthermore, it is an over-simplification. While a mortgage bond cannot be bought and sold, like for example a government bond, the property over which it is registered certainly can. A mortgage bond is indeed security.

[24] If the intention of the provision were to exclude mortgage bonds from the straight forward generic term *"bonds"*, it could have been expressly stated. This subsection (c) indeed does regarding *"custodial services"*. A court should not step into the terrain of the legislature by way of creative interpretation.

[25] Counsel for the appellant correctly stressed the relevance of context. Language is used for human communication in a variety of contexts. Legislation is passed with a purpose.

[26] On behalf of the appellant it was argued that a wide interpretation of the term *"bond"* brings *"the real possibility of leading to glaring absurdities and stultifying the operation of the VAT legislation"* and *"effectively amounts to exempting every form*

of advice, attendance or service provided by a legal practitioner or any other person relating to bonds ... having no relation whatsoever to do with the financial markets and instruments". This is obviously overstated. By no stretch of the imagination could, eg, *"every form of advice ... by a legal practitioner or any other person relating to bonds without any relation to financial markets and instruments"* – if indeed it could exist – be a *"financial service".* Something that has nothing whatsoever to do with the financial world could hardly qualify as "financial" – a key concept in section 6. Furthermore, counsel did not provide concrete examples or evidence, other than to state that all attorneys who register mortgage bonds on behalf of banks would be exempt from VAT.

[27] It might be argued that it seems awkward to exempt what may well be regarded as legal services from VAT in a country where tax revenue is much needed for a range of social and economic needs. Thus possible unintended consequences of an interpretation of the VAT Act for the very same statute and related legislation deserve attention. Counsel were asked by the Court about, for example, prevailing practice in Lesotho and legislation and legal practitioners in neighbouring countries, like South Africa. In the High Court Peete J stated that it would be interesting to find out if in Lesotho legal practitioners and conveyancers who prepare and register mortgage bonds had been paying VAT. Little or no information was forthcoming on this point.

[28] In the High Court judgment Peete J remarked that each country had its own tax regime befitting its own particular circumstances. It would indeed seem that that legislation in, for example, South Africa differs from the Lesotho VAT Act and does not provide for an exemption for financial or legal services. Peete J also pointed out that exemption from VAT is meant to benefit the borrower, not the bank or other financial institution.

[29] Taking context into account does not necessarily lead to the interpretation preferred by the Revenue Authority. On the one hand it could be argued that the government needs income from tax, including VAT. On the other, the intention may well be to assist borrowers who already find it difficult to obtain money for housing and other investments. The client is the one who pays VAT. The service provider collects and has to pay it over to the tax authority.

[30] This takes one back to the wording of the statute, which is clear. The *contra fiscum* presumption, invoked by the High Court, is not necessary. It is not the task of this Court to speculate in the abstract about policy considerations. Vague concerns about absurd and counter-productive possible consequences cannot override the meaning of the words used in the VAT Act. Real and valid concerns about the consequences of the wording would require the attention of the legislature regarding the possible need for amendment of the VAT Act and the harmonisation of legislation dealing with tax and other financial matters.

Conclusion

[31] As found by the Tribunal as well as the High Court, section 6(1)(c) exempts the preparation and registration of mortgage bonds from VAT, as these are transactions relating to bonds. In view of the finding on subsection (c), it is not necessary to deal with the interpretation of (a).

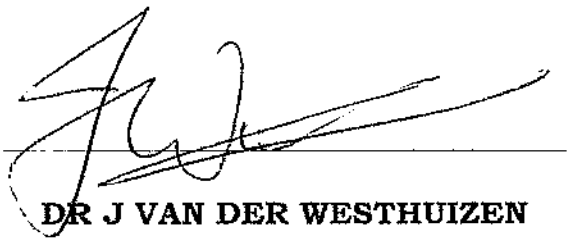
Costs

[32] Counsel for the appellant insisted on costs if the appeal succeeds, but later indicated that the appellant would not insist if the respondent does not insist, should the appeal fail. The respondent did insist; and is entitled to costs.

Order

(1) Condonation for the late filing of the notice of appeal is granted.

(2) The appeal is dismissed, with costs.



DR J VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

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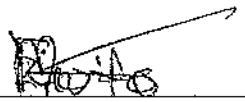
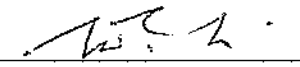


DR K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree:



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ACTING JUSTICE OF APPEAL

For Appellants: Adv M Dichaba

For Respondent: Adv P Shale