THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS CAUSE NO. 123 OF 2020

1. **SALIM ALIBHAI**
2. **MALEK BHALOO**
3. **AZIM VERJEE**
4. **ABDUL SAMJI**
5. **WILMONT INTERNATIONAL LIMITED ----------APPLICANTS**
6. **RASUL SHARIFF**
7. **FIROZ SHARIFF**
8. **NOORDEN SHARIFF**
9. **CHRIS NUGENT**
10. **JEANAL LIMITED**

VERSUS

UGANDA REVENUE AUTHORITY---------- RESPONDENT

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

This application is brought by way of Notice of Motion for judicial review under Section 36,& 38 of the Judicature Act and Rules 3, 3A, and 6 of the Judicature (Judicial Review) Rules 2009 & 2019 for the following prerogative and judicial reliefs;

1. A declaration that the Applicants' right to be treated fairly and justly was violated by the respondent when it unilaterally and arbitrarily revoked the Private Ruling Ref: URA/DTB/BP/1000026502 in respect of the sale of shares by the applicants to Kansai Plascon EA Proprietary Ltd:

2. A declaration that the respondent's revocation of a Private Ruling vide Ref; URA/DTB/BP/1000026502 dated 22nd April 2020 was unjust, erroneous, unlawful and accordingly of no legal effect;

3. An Order of Certiorari quashing the Revocation of the Private Ruling in respect of the sale of shares by the applicants to Kansai Plascon EA Proprietary Ltd;

4. An Order of Prohibition prohibiting the respondents agents, servants and all persons acting under its authority from enforcing the tax assessments arising from the impugned decision made on 22 April 2020;

5. A Permanent Injunction restraining the respondent from enforcing the tax assessments arising from the impugned decision made on 22nd April 2020 from acting contrary to the clear, valid, legal and binding provisions of the Private Ruling;

6. Costs of the application.

The grounds upon which this application is based are contained in the affidavits if AZIM VIRJEE, JOHN WALABYEKI and CHRIS NUGGET which have been approved by all the applicants and which shall be read and relied upon at the hearing of the application but briefly;

1. The first, second, third, fourth, fifth, sixth, seventh and eighth Applicants were shareholders in Shalvik Investments Limited ("Shalvik") a non-resident a company incorporated in Guernsey with no office, operations, activities or representation in Uganda. Shalvik also held 85% shares in Sadolin Uganda Limited ("Sadolin") now known as Kansai Plascon (Uganda) Linited (KPUL).

2. The ninth Applicant was the Managing Director of Sadolin until April 2019. while the tenth Applicant is also a non-resident company incorporated in Guernsey with no office, operations, activities or representation in Uganda. Shalvik. The tenth Applicant held 15% shares in Sadolin. Accordingly, Shalvik

and the Tenth Applicant were the only shareholders in Kansai Plascon Uganda Limited, formerly Sadolin Paints Uganda Limited.

3. On 7th February, 2017, Kansai Plascon East African Proprietary Limited ("Kansai") a company incorporated and registered in Mauritius, entered into a Sale of Shares Agreement with the first, second, third, fourth, fifth, sixth, seventh and eighth Applicants for the purchase of their 100% shareholding in Shalvik Investments Limited. On 7th February 2017, Kansai also executed a Sale of Shares Agreement with the tenth Applicant, wherein the tenth Applicant agreed to sell its shares in Sadolin Paints Uganda Limited to Kansai in two phases.

4. On 17th October, 2017, on the instructions of the Applicants, RSM (Eastern Africa) Consulting Limited, the Transaction Tax Advisor ("Advisor") submitted a formal application for a Private Ruling to the Respondent in respect of the disposal of 15% shares by the Tenth Applicant in KPUL to Kansai Plascon East Africa Proprietary Limited and the disposal of 100% shares in Shalvik Investments Limited by the First ,Second, Third, Fourth, Fifth, Sixth, Seventh and Eight Applicants to KPEAL, thereby vesting 100% ownership of KPUL in KPEAL on completion of the transaction. Further meetings and discussions were held between the Applicants, Advisor and the Respondent and additional information requested by the Respondent was provided to them.

5. On March 09, 2018, in response to the letter dated 17th October 2017 from the Advisor, the Respondent issued a Private Ruling vide a letter Ref: URA/DTD/BP/06/1000026502, wherein it confirmed that the sale of 100% shares by the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eight Applicants in Shalvik Investments Limited to KPEAL and the sale of 15% shares in KPUL by the 10th Applicant in two tranches to Kansai Plascon East Africa Proprietary Limited did not give rise to income sourced in Uganda under Section 79 (g) of the Income Tax Act and was therefore, not taxable in Uganda. The first phase of the transaction was completed as per the sale purchase agreements on 4th August 2017.

6. On 12th December, 2019, over two years after the transaction was completed and the sale proceeds distributed, the Respondent wrote a

demand letter to the Applicants demanding payment of capital gains tax and interest on late payment on account of a sale of their shares to Kansai Plascon East Africa Proprietary Limited to a tune of 110,769,678,960/= and Interest on late payment of 52, 430, 981,374/=. The respondent further wrote a demand letter to the 9th applicant demanding for payment of capital gains tax amounting to 20,052,890,400/= and Interest on late payment of 9,491,701,456/=

7. On February 21, 2020, the Applicants wrote a letter to the Respondent disputing the demand on grounds that the Respondent issued a Private Ruling by which it confirmed that the transaction was not subject to tax in Uganda. The 3rd and 9th applicant in their letter disputing the amount contended that all companies involved in the transactions are non-resident companies with no operations or activities in Uganda; the transaction was entirely concluded offshore; the transfer of shares was from one non-resident company to another non-resident company.

8. On 22nd April 2020, the Respondent wrote a letter notifying Kansai Plascon (Uganda) Limited of the revocation of the Private Ruling vide a letter Ref: URA/DTD/BP/27/1000026502. The revocation of the Private Ruling was done unilaterally without any prior notification or any form of communication to the Applicants. The Respondent did not give them an opportunity to be heard and present their case before the impugned revocation was made. This action is clearly in violation of the principles of natural justice.

9. The Applicants' right to be treated fairly and justly was violated by the Respondent when it unfairly, unilaterally and arbitrarily revoked the Private Ruling, hence this application for judicial review of the impugned revocation of the Private Ruling.

In opposition to this Application the Respondent through John Katungwensi Tinka Acting Assistant Commissioner Large Tax Payers Office in the Domestic Taxes Department filed an affidavit in reply wherein he opposed application briefly stating that;

1. The first 8 Applicants held shares in a non-resident company, Shalvik Investments Ltd, which in turn held 85% shares in Kansai Plascon Uganda Limited, formerly Sadolin Paints (Uganda) Limited. The 9th Applicant held shares in the 10th Applicant, a non-resident company, which held 15% shares in Kansai Plascon Uganda Limited.

2. Pursuant to a sale of shares agreement dated 7th February 2017, Kansai Plascon East Africa Proprietary Ltd purchased 100% shareholding in Shalvik Investments Limited from the first 8 Applicants. The 10th Applicant also executed a sale of shares agreement with Kansai Plascon East Africa Proprietary Limited for the disposal of its shares in Kansai Plascon Uganda Limited, which was to be sold in two tranches. The first tranche was sold at a consideration of USD 5,973,750 and concluded on 3rd August 2017.

3. As a result of the sale of shares agreements, the shareholding in Kansai Plascon Uganda Limited stood as follows; Shalvik Investments Ltd held 85%, Jeanal Ltd 7.5% while Kansai Plascon East Africa Proprietary Limited held 7.5% shares.

4. On 17th October 2017, Kansai Plascon Uganda Limited, a non-party to the present proceedings, sought for a private ruling from the Respondent, on whether the disposal of shares by a non-resident person to another non-resident person in a local entity would attract income tax. On 9th March, 2018, the Respondent rendered a private ruling to Kansai Plascon Uganda Ltd stating that the transaction did not result into income sourced in Uganda and thus no income tax would be payable. This decision was erroneous, and was later reversed, hence the revocation of the private Ruling.

5. Following the issuance of the private ruling, the Respondent received third party information that Sadolin Paints Uganda Limited (the predecessor of Kansai Plascon Uganda Ltd) was engaged in tax evasion schemes, for the period 2012 to 2017. The Respondent reviewed the tax affairs of Kansai

Plascon Uganda Limited, for the period 2012 to 2017, when the company was under the management of Sadolin Paints Uganda Limited.

6. Upon conclusion of the review, the Respondent confirmed that Kansai Plascon Uganda Limited was engaged in tax evasion schemes for the period 2012 to 2017. The Respondent reviewed the transactions involving the sale of shares and realised that the transactions gave rise to gains sourced in Uganda, thereby taxable and accordingly assessed the Applicants to tax. The Respondent thus informed the Applicants by letter dated 12th December 2019, that they had outstanding tax liabilities arising from gains from the disposal of shares in 2017 sourced in Uganda. Subsequently, administrative additional assessments were issued to the Applicants totalling to UGX 130,822,569,360.

In the interest of time the respective counsel were directed to file written submissions and i have considered the respective submissions.

The applicants were represented by *Mr Simon Peter Kinobe, Mr Ronald Tusingwire and Mr Benon Makumbi* whereas the respondent was represented *Mr Okello George Assistant Commissioner Litigation and Mr Kalungi Tonny*.

The applicant's counsel raised the two issues for determination;

1. ***Whether the revocation of the private ruling is tainted with illegality, irrationality and procedural impropriety?***

2. ***What remedies are available to the parties?***

The respondent raised the following as preliminary points of law;

1. ***Whether the court has jurisdiction?***
2. ***Whether the application is not appropriate for judicial review?***
3. ***Whether the application is premature?***
4. ***Whether the applicants have locus standi?***
5. ***Whether the application is incurably defective in respect of 1st, 2nd, 4th,5th, 6th, 7th, and 10th applicants?***

Whether the court has jurisdiction?

The respondent's counsel submitted that the Respondent was not, as a matter of fact and law charged with the performance of and never performed a public duty or acts towards the Applicants. Accordingly, this court is not clothed with judicial review jurisdiction to entertain the Applicants' complaints, on the facts.

The applicant submitted that this Honourable Court has the jurisdiction to entertain the matter before it and grant the reliefs sought by the Applicants. The Application is brought under the provisions of Article 42 of the 1995 Constitution of the Republic of Uganda (as Amended), Sections 36 and 38 of the Judicature Act, Rules 3 and 6 of the Judicature (Judicial Review) Rules, 2009 and pursuant to Rule 3A of the Judicature (Judicial Review) Amendment Rules, 2019 (S.I. 2019 No.32).

The application is challenging the process leading to the revocation by the Respondent of the Private Ruling issued to the Applicants without following due process and without according the Applicants a right to be heard and/or to present their case.

Rule 3 of the Judicature (Judicial Review) (Amendment) Rules, 2019 (S.I. 2019 No.32) defines "Judicial Review" as:

"*The process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties*."

This court is vested with judicial review jurisdiction and the inappropriateness of the matter brought before it cannot take away the jurisdiction. The respondent seems to have mixed up his points on *locus standi* to bring an action with jurisdiction of court.

The applicant is challenging the process of revocation of the private ruling made by the respondent and this is purely an administrative matter that is challengeable by way of judicial review.

The power of Judicial review may be defined as the jurisdiction of superior courts to review laws, decisions and omissions of public authorities in order to ensure that they act within their given powers.

Judicial review per the Judicature (Judicial Review) (Amendment) Rules, 2019 means the process by which the high Court exercises its supervisory jurisdiction over proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties;

Broadly speaking, it is the power of courts to keep public authorities within proper bounds and legality. The Court has power in a judicial review application, to declare as unconstitutional, law or governmental action which in inconsistent with the Constitution. This involves reviewing governmental action in form of laws or acts of executive for consistency with constitution.

Judicial review also establishes a clear nexus with the supremacy of the Constitution, in addition to placing a grave duty and responsibility on the judiciary. Therefore, judicial review is both a power and duty given to the courts to ensure supremacy of the Constitution. Judicial review is an incident of supremacy, and the supremacy is affirmed by judicial review.

This preliminary objection is baseless and devoid of any merit.

Whether the application is not appropriate for judicial review

The respondent also argued that the Internal administrative processes have not been exhausted by the Applicant, making the present application premature. It is an uncontested fact that the Applicants objected to the tax assessments and before the Respondent can make a decision in respect thereof, the Applicants now seek this court to stop the alleged enforcement of the tax assessments.

It was their submission that under s. 24 (6) of the Tax Procedure Code Act, the Respondent has Ninety days, from the date of receipt of the Applicants' objection, to make a decision.

The respondent further contended that the revoking of a private ruling result into a tax being payable and therefore this is not a matter for judicial review since it rotates around taxation question and assessments flowing therefrom.

The applicant contends that this application is challenging the decision-making process leading to the revocation of the Private Ruling dated April 22, 2020 Ref URA/DTD/BP/27/1000026502 which was made in violation of the principles of natural justice.

Analysis

The application before court is for judicial review and it is not about tax assessment as the respondent counsel contends. The arguments of the respondent counsel are misplaced and misleading in order to deny this court an opportunity to interrogate the circumstances surrounding the revocation of the Private ruling.

The actions of the respondent leading to the revocation of the Private Ruling is an administrative process which is challengeable by way of judicial review and any inference to a tax assessment is baseless. See ***Pauline Nakabuye v Uganda Revenue Authority HCMC No. 272 of 2019***

Whether the application is premature?

The respondent contended that no sooner had the objection been filed with the respondent than the applicant filed an application for judicial review without waiting for the objection decision to be rendered.

The applicants contended that the application is not premature since the decision has already been taken. According to counsel for the applicants, Section 45(9) of the Tax Procedures Code Act…Private Ruling is not a tax decision for purposes of the act.

Analysis

It is not in dispute that the respondent took a decision to revoke the Private Ruling and the applicants dissatisfied with the ruling made an objection to the said decision. The respondent's argument that the said decision will lead to a tax

assessment and therefore is a tax decision not fit for this court is completely flawed. Section 45(9) of the Tax Procedure Code Act is clear; *a private ruling is not a tax decision for purposes of this Act.*

The respondent further contends that it is premature since there is a pending objection decision to be made in accordance with the law. This court takes note that whereas the applicants had a pending ruling before the respondent, the same respondent went ahead to issue a Third Party Agency Notice. The respondent cannot be seen to fault the applicants for prematurely coming to court and yet they have also attempted to implement the decision by seeking to recover taxes before delivering an objection decision. What is good for the goose is good for the gander!!

The application is not premature since there was an eminent danger to the applicants and the only recourse was the court for judicial review and not the Tax Appeals Tribunal.

The rule of exhaustion of alterative remedies is not cast in stone and it applies with necessary modifications and circumstances of the particular case. The decision to tax is challengeable by way of judicial review if the party contends that he is not a taxpayer. In this case, the applicants are contending that due to the original tax Private ruling they were not liable to pay any tax. Therefore, the revocation of the private ruling in order to make them taxpayers is wholly administrative and challengeable by way of judicial review.

When an alternative remedy is available, the court may refrain from exercising its jurisdiction, when such alternative, adequate and efficacious legal remedy is available but to refrain from exercising jurisdiction is different from saying that it has no jurisdiction.

Therefore, the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of alternative remedy, the High Court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, (i) where the application seeks enforcement of any of the Fundamental rights; (ii) where there is failure of natural

justice; or (iii) the orders of proceedings are wholly without jurisdiction or the vires of an Act is challenged. See ***M.P State Agro Industries Development Corporation Ltd v Jahan Khan [2007] 10 SCC 88***

Therefore, even if an alternative remedy is available, it cannot be held that the application for judicial review is not maintainable. Similarly, it cannot be laid down as a preposition of law that once an application is entertained, it could never be dismissed on the ground of alternative remedy. The application for judicial review is admitted by looking at the facts and circumstances of the case and the relief claimed can be moulded to meet the ends of justice.

Whether the applicants have locus standi?

The respondent submitted that the Applicants have no *locus standi* to bring this application, because they were not parties to the private ruling that was revoked. There private ruling was to a tax payer not a group of tax payers. They are strangers and free riders.

The only party to the private ruling was Kansai Plascon Uganda Limited (KPU) a separate entity from the Applicants. The request was made on the letter head of Kansai Plascon Uganda Limited. She is clearly described as an entity that manufactures and sells a variety of paints in Uganda.

The applicants' counsel submitted that the Applicants have a direct interest in the process undertaken to revoke the private ruling by the Respondent as it affects the transactions executed by them and on this basis, they have locus to bring the present application before the court. Furthermore the application for private Ruling clearly outlined the facts of the matter, namely the sale of shares by the Applicants to KPEA, was made by KPUL at the request of the Applicants and for reasons of convenience, the supporting agreements provided related to the Applicants, meetings were attended by the Applicants representatives, KPUL was not a party to the transaction and was not affected in any way, the costs of the Advisor were borne by the Applicants and not KPUL.

The first, second, third, fourth, fifth, sixth, seventh & eighth Applicants are former shareholders in Shalvik Investments Ltd, a non-resident company incorporated in Guernsey with no office, operations, activities or representation in Uganda. Shalvik Investments Limited owned and continues to own 85% shares in Kansai Plascon Uganda Limited. The ninth Applicant was the Managing Director of KPUL and a shareholder in the tenth Applicant which owned 15% of shares in KPUL and which is a non-resident company incorporated in Guernsey with no office, operations, activities or representation in Uganda.

On February, 2017, Kansai Plascon East Africa Proprietary Limited, a company incorporated and registered in accordance with the laws of Mauritius, executed a Sale of Shares Agreement with the first eight Applicants for the purchase of their 100% shareholding in Shalvik Investments Limited and the tenth Applicant also agreed to dispose of its 15% shares in Kansai Plascon Uganda Limited to Kansai Plascon East Africa Proprietary Limited in two tranches.

The Private Ruling was applied for and was intended for and on behalf of the Applicants and for use and benefit of the Applicants only since SPUL had no interest in the matter nor was it selling any shares. The revocation of the Private Ruling also directly impacted each of the Applicants as they received tax assessments as a result of the revocation from the Respondent. On May 4, 2020, the Respondent issued assessments against each of the Applicants in furtherance of a decision made to revoke the Private Ruling in violation of the principles of natural justice. Therefore the revocation directly and individually affects the applicants. The applicants accordingly have a direct and sufficient interest in the matter.

In applying the aforementioned principles of law to the facts in the present case it is evident that the application for a private ruling was submitted and issued on behalf of and for the benefit of the Applicants. Its revocation equally affected the

applicants. The tax assessments on the Applicants for the colossal sums, in unpaid taxes, were raised on the applicants in furtherance of the impugned Revocation.

Analysis

The law on ***locus standi*** is provided for under the *Judicature (Judicial Review)(Amendment) Rules of 2019* which provide that;

3A. ***Any person who has a <u>direct</u> or <u>sufficient interest</u> in a matter may apply for judicial review***.

The above provision sets the yardstick for determining *locus standi* in an application for judicial review. An applicant must demonstrate that he or she has standing to apply for judicial review. The issue of standing arises when the applicant's interests have been directly or sufficiently affected by the decision, which he or she seeks to challenge. ***See page 71 Public Law in East Africa by Ssekaana Musa***

The interests of the applicants are not in dispute and they are all directly affected by the decision to revoke the private ruling out of which a tax obligation has arisen. The applicants are all directly affected since they were beneficiaries of the respondent Private Ruling. As a result the respondent is demanding taxes arising out of a transaction of sale of shares from all the applicants to a tune of 200,000,000,000/=. The argument by the respondent that the private ruling was by a different entity is very lame and crippled. I believe the same was made in ignorance of the above cited rule which allows any person with direct or sufficient interest to apply for judicial review.

The application for a private ruling was for the benefit of all the applicants in order to be informed about their tax obligations before the conclusion of the sale of shares and this fact is not disputed by the respondent.

Whether the application is incurably defective in respect of 1st, 2nd, 4th,5th, 6th, 7th, and 10th applicants?

The respondent submitted that this Application was by way of notice of motion and it was not supported by affidavits of the 1st, 2nd, 4th, 5th, 6th, 7th, 8th and 10th

Applicants. The affidavits in support of the application were deposed only by only Azim Virjee, John Walabyeki and Chris Nugent.

In none of the foregoing Affidavits in support did the deponents state that they were authorized to depone on behalf of the 1st, 2nd, 4th, 5th, 6th, 7th, 8th and 10th Applicants.

The applicants' counsel submitted that that the application is duly and properly supported by the affidavits of Azim Virjee the third applicant deposed on his behalf and on behalf of the 1st, 2nd, 4th, 5th, 6th, 7th and 8th Applicants while the affidavit of Chris Nugent the 9th Applicant is deposed on his own behalf and on behalf of the 10th Applicant.

It is submitted for the Applicants that both Azim Virjee and Chris Nugent were duly authorized to appear, plead and act for and in behalf of the other Applicants. The letters of authorization duly signed by the Applicants were filed in court as required by Order 1 Rule 12 of the Civil Procedure Rules.

Analysis

Order 52 rule 3 provides; *Every notice of motion shall state in general terms the grounds of the application, and, where any motion is grounded on evidence by affidavit….*

It therefore means that the other applicants could premise their application on grounds of law that would not require any evidence to support them. In addition any evidence of one would be enough to support the application.

The evidence adduced by the 3 deponents as persons who have sufficient knowledge of the facts would suffice and it would not be necessary to have additional affidavits by the other applicant in the circumstances of the case and this would not render their application incompetent.

Provisions of law are not mere formulae to be observed as rituals. Beneath the words of a provision of law, generally speaking, there lies a juristic principle. It is the duty of the Court to ascertain that principle and implement it. See ***Raj Narain v Indira Nehru Gandhi (1972)3 SCC 850***

Our laws of procedure are based on the principle that, as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities. The provisions of the Civil Procedure rules, therefore must be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it.

The modern trend is to regard a defect as an irregularity which can be remedied, rather than as a nullity. Every omission or mistake in practice or procedure is henceforth to be regarded as an irregularity which court can and should rectify, so long as it can do so without injustice and is not an abuse of court process. See ***Harkness v Bell's Asbestos Ltd [1966] All ER 843***

Therefore the failure by the rest of the applicants to depose affidavits and relying on the affidavit of the 3 deponents is a mere irregularity which would not defeat their application. This is premised on the fact that they are relying on the same facts and evidence. Otherwise it would have been very different if they were relying on different grounds that required different evidence to support them. This court is equally persuaded by the decision of Lady Justice Flavia Senoga Anglin in the case of ***Otim Talib & 1397 Others vs. URA & KCB Bank Ltd Misc. Application No. 94 of 2017,*** where she held that:- *"There is no required number of affidavits to support an application more so, if the would be deponents are going to be talking about the same thing*."

The application is valid and competently before court. This issue is resolved in the negative.

All the preliminary objections have failed and the same are dismissed and overruled with costs.

Whether the revocation of the private ruling is tainted with illegality, irrationality and procedural impropriety?

The applicants counsel submitted that on 9Th March, 2018, the Respondent issued a valid and binding Private Ruling in respect of the transaction entered into by the Applicants and legitimately relying on the said Ruling, the Applicants proceeded further to implement the transaction.

The Respondent nearly 12 months later wrote a demand to the 9th Applicant demanding for payment of capital gains tax amounting to UGX 20,052,890,400/= together with UGX 9,491,701, 456/= being interest on late payment on account of the income sourced upon disposal of the shares by the Applicants. The Applicants disputed the demand unpaid capital gains tax on grounds that the Respondent issued a Private Ruling by which it confirmed that the transaction was not subject to taxation in Uganda.

The revocation was done without any prior notice to the Applicants nor giving them an opportunity to be heard before the impugned decision was made. The respondent in their affidavit contended that ***"****the* *Respondent reviewed the transactions involving the sale of shares* ***and realized that the transactions gave rise to gains sourced in Uganda thereby taxable and accordingly assessed the Applicants to tax"***

It was the submission of the applicant that the Respondent is enjoined by law to observe principles of natural justice in the exercise of its statutory authority as provided for under Article 42 of the Constitution. Respondent condemned the Applicants unheard for the **alleged tax evasion schemes of Sadolin Paints Uganda Limited** which is a separate and independent legal entity from the Applicants both in fact and at law. Tax evasion is a serious offence punishable under the law, it was therefore wrong and contrary to the principals of natural justice enshrined under the 1995 Constitution of the Republic of Uganda to revoke the private ruling based on allegations of criminality committed by a party other than the Applicants.

The Respondent did not give the Applicant an opportunity to object to the decision leading to the revocation of the Private Ruling nor did it give them an opportunity to provide explanation why the private ruling ought not to have been revoked. By failing to observe Article 42, the Respondent did not give effect to the laws regulating the exercise of its powers as a public body before it revoked the Private Ruling.

The respondent submitted that there is ample evidence that the Respondent complied with Section 45 of the Tax Procedure Code Act, 2014, and exercised its powers judiciously towards Kansai Plascon Uganda Ltd.

The Respondent had no obligation towards the Applicants as far as prior notification of the decision to revoke the Private Ruling is concerned. The notice was given to the entity that sought for it.

The notice of revocation of the private ruling clearly highlighted that the transactions involving the sale of shares gave rise to gains sourced in Uganda and thereby taxable. The above actions thus show rationality and reasonableness on the part of the Respondent.

Analysis

The principle of natural justice or the right to be heard is built upon a well-known adage that no one should be condemned unheard. It is regarded as a fundamental principle of civilized jurisprudence that a person against whom some action is proposed to be taken, or whose right or interest is going to be adversely affected, ought to be given a reasonable opportunity to defend himself or herself.

Procedural fairness is thus regarded as an integral element of administrative process. Therefore, the right to be heard of an affected person becomes an important safeguard against any abuse, or arbitrary or wrong use, of its powers by decision makers.

Thus, giving a hearing to a person before taking a decision affecting him, leads to good decisions by the administration. This also furthers legitimate state purposes by insuring government against committing elementary blunders in decision-making due to ignorance which may mar its image as unjust government.

Therefore, fair hearing or natural justice is not only a canon of good legal procedure but also a canon of good administration.

Article 42 of the Constitution provides that;
Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.

It can be deduced from the above provision, that in every administrative action, there must be minimum standards that are to be maintained to avoid arbitrary actions. If there is a power to decide and decide detrimentally to the prejudice of a person, then the duty to act judicially is implicit in exercise of such power.

The respondent in this case argued that there was no duty to give a hearing to the applicants before revoking the Private Ruling since the law did not envisage or provide for such a process and it is permitted to revoke a private ruling under section 45(8) of the Tax Procedure Code Act.

Where there is nothing in the statute to actually prohibit the giving of an opportunity of being heard, the nature of the statutory duty imposed on the decision-maker itself implies an obligation to hear before deciding. Whenever an action of a public body results in civil consequences for the person against whom the action is directed, the duty to act fairly can be presumed and in such a case, the administrative authority must give a proper opportunity of a hearing to the affected person.

The respondent does not deny the fact that the applicants were given a hearing before the Private ruling which affected them was revoked. The respondent seems to make the justification for the failure to accord them a hearing on the premise that the Private ruling was made by a different party or that they were non- parties to the private ruling.

This court does not agree with the argument put forward by the respondent counsel since the effect of the Private ruling was wholly about the sale and acquisition of shares and this directly and formed the basis of concluding the transaction.

Any person or body having legal authority to determine questions affecting the rights of subjects has a duty to act judicially. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrary and capriciously.

"Fairness in action" is now an established test to judge the validity of the actions of the government or the government agencies. In the present case, the respondent decided to revoke a Private ruling which had a direct effect on the rights of the applicants. Such a decision ought to have been made after hearing out the affected parties. In ***R v Commission for Racial Equality [1982] AC 779***, Lord Diplock stated:

> *"Where an act of Parliament confers upon an administrative body, functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions."*

Therefore, section 45(8) of the Tax Procedure Code Act did not give the respondent blank cheque of authority or power to revoke private rulings without according the affected parties a hearing. In revoking the private ruling, the Respondent acted unfairly, did not observe the principles of natural justice by allowing the Applicants to present their case on why the Private Ruling ought to not have been revoked and this amounts to procedural impropriety, and abused the authority and powers vested in it.

The decision to revoke the private ruling by the respondent was therefore procedurally improper.

This issue is resolved in the affirmative.

What remedies are available to the parties?

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas *certiorari* was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558, R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652***

<u>Certiorari</u>

The applicant has sought an order of certiorari to quash and reverse the decision of the respondent revoking the private ruling.

Certiorari is one of the most powerful public law remedies available to an applicant. It lies to quash a decision of a public authority that is unlawful for one or more reasons. It is mainly designed to prevent abuse of power or unlawful exercise of power by a public authority. See ***Public in East Africa*** *by Ssekaana Musa page 229*

Certiorari is simply concerned with the decision-making process and only issues when the court is convinced that the decision challenged was reached without or in excess of jurisdiction, in breach of rules of natural justice or contrary to the law.

The effect of the order of certiorari is to restore *status quo ante*. Accordingly, when issued, an order of certiorari restores the situation that existed before the decision quashed was made.

This court therefore issues an Order of Certiorari quashing the decision revoking the Private Ruling in respect of the sale of shares by the applicants to Kansai Plascon EA Proprietary Ltd without according them a right to be heard.

Costs

The applicants are granted costs of the application.

I so Order.

Dated, signed and delivered be email and whatsApp at Kampala this 17th day of August 2020

SSEKAANA MUSA
JUDGE
17th/ 08/2020