was not maintainable as such claims were already time-barred. With regard to the order made to the respondents to find alternative grazing land for the successful appellants we concur with Mr Mchome's complaint that the trial High Court ought to have prescribed a period within which such land is to be made available to the successful appellants by the respondents. We shall rectify this defect.

In the final analysis, it seems that the successful appellants are in no better position than they were under the judgment of the trial High Court. The only changes in their favor is that we are going to prescribe a period within which the respondents are to find alternative grazing land for the successful appellants. The monetary award remains the same as in the High Court, except that the successful appellants are not required by law to resettle on self-help basis. They are to be treated in the same way as other pastoral Tanzanians for their needs as equal citizens of this country. But for these modifications of the outcome in the court below, we hereby dismiss the appeal with the following directions:

(i) Each successful appellant is to be paid a sum of TZS. 300 000 by the respondents.

(ii) The respondents are to provide alternative grazing land of comparatively the same standard as that used by other pastoralists in the country within 6 months from today except that any of the successful appellants who may not wish to be so provided with such alternative land is free to do otherwise according to law.

(iii) Each party to bear its costs of this case, which has been conducted for the Appellants on Legal Aid.

LEONARD CLEMENT MUSUSA *v.* ATTORNEY GENERAL AND ANOTHER

COURT OF APPEAL OF TANZANIA AT ARUSHA

(Nyalali, C.J., Ramadhani and Lubuva, JJ.A.)

CIVIL APPEAL No. 59 OF 1998

(Appeal from the judgment and decree of the High Court of Tanzania at Moshi, Munuo, J., dated 9 April 1998, in Civil Case No. 26 of 1994)

Company law – Appointment of Receiver and Manager – Effect of such appointment on tax liability of the company.

Tax law – Sales tax – Penalty on sales tax – Penalty due after appointment of Receiver – Whether such penalty collectable as preferential debt – Section 26(2) of the Sales Tax Act 1976 and sections 78 and 259(2) of the Companies Ordinance Chapter 212.

The appellant, who was appointed Receiver and Manager of Kibo Match Corporation, Ltd., having paid sales tax totalling TZS. 61 219 762, refused to treat the penalty thereon amounting to TZS. 21 888 397-25 as a preferential debt. Relying on sections 78 and 259 of the Companies Ordinance Chapter 212 he regarded the penalty as any other unsecured debt. The Commissioner of Sales Tax relying on section 26(2) of the Sales Tax Act 1976 argued that a penalty is a tax and therefore collectable as a preferential debt. The trial judge decided that the appointment of a Receiver and Manager does not alter tax liability of a company and that the penalty was collectable as a preferential debt. The Court of Appeal of Tanzania considered the relevant provisions of the Companies Ordinance and the Sales Tax Act in relation to whether or not a penalty on a sales tax was a preferential debt.

Held: (i) While under section 26(2) of the Sales Tax Act 1976 a penalty imposed on the tax, is a tax, under the Companies Ordinance a penalty which becomes due for payment after appointment of the Receiver is a preferential debt;

(ii) The penalty totalling TZS. 21 888 397-25 is not a preferential debt under sections 78 and 259(2) of the Companies Ordinance.

Appeal allowed

Statutory provisions referred to:

(i) Sales Tax Act, section 66, 26(1) and 26(2)

(ii) Companies Ordinance Chapter 212, sections 259(1), 259(6)(b), 78 and 259(2)

Dr. Nguluma, for the Appellant

Mrs. Sumari, for the Respondents

JUDGMENT

(Dated 29 March 1999)

RAMADHANI, J.A.: The appellant, Leonard Clement Mususa, was on 19 March 1994 appointed the Receiver and Manager of Kibo Match Corpage Ltd. Among the debts which he had to pay on behalf of the Corporation, were the sale taxes due for the month of February 1994 up to the 19 March 1994, the day he was appointed Receiver. The appellant paid the taxes totaling TZS. 61 219 762 but he refused to treat the penalty amount of TZS. 21 888 397-25 imposed for failing to pay the taxes in time, as a preferential debt. He regarded the penalty as any other debt which is not secured under sections 78 and 259 of the Companies Ordinance Chapter 212 (hereinafter referred to as the Ordinance). The Commissioner of Sales Tax, the second respondent, is of the view that a penalty is a tax under section 26(2) of the Sales Tax Act 1976 (Number 13 of 1976) (hereinafter referred to as the Act) and is collectable as a preferential debt just like the sales tax itself. Because of that difference of opinion, the appellant unsuccessfully sued the Commissioner of Sales Tax and the Attorney General, the first respondent. Hence this appeal by the Receiver.

In order to appreciate fully the legal point needing the determination of this court, it is absolutely necessary to provide the background factual information and the legal position so as to put the matter in its perspective.

Section 26(1) of the Act imposes a penalty on any amount of tax which "remains unpaid on the due date". The question is what is "the due date".

Section 66 of the Act empowers the Minister for Finance to make regulations. The Minister has done that. The Sales Tax Regulations 1969 G.N. Number 152 of 19 June 1969 as amended by the Sales Tax (Amendment) Regulations 1991 G.N. Number 211 of 13 June 1991. Let us pose there for a second and observe that section 72(1) of the Act repealed the Sales Tax Act 1969 but subsection (2) thereof saved all subsidiary legislation. After saying so for the avoidance of doubt, let us proceed to look at Regulation 10(2) which provides:

> A manufacturer of scheduled articles may, save where it is otherwise provided in any order made under section 6 of the Act, pay tax in respect of scheduled articles sold by him on a day not later than the thirtieth or thirty-first day of the month following the month in which the sale takes place.

So, "the due date" is "a day not later than the thirtieth or thirty first day of the month following the month in which the sale takes place". To come down to concrete terms; for the sales tax of matches sold by the Receiver in the month of February, 1994, the due date was 31 March 1994. Likewise, for the goods sold in March, 1994, the due date was 30 April 1994. Again, for the avoidance of doubt matches are scheduled articles under Tariff number 36.06 of the First Schedule.

Now, since on those two due dates the sales taxes were not paid, a penalty totaling TZS. 21 888 397-25 was imposed under section 26 of the Act.

As already said, the appellant as the Receiver, has already paid the sales tax due but has not paid the penalty. His ground is that

A section 259(1) of the ordinance provides for the legal position regarding debts of a company under receivership and/or liquidation into preferential and non-preferential debts. That subsection provides:

> B In a winding up there shall be paid in priority to all other debts:
>
> (a) all taxes and rates whether payable to the crown or to the local authority, due from the company at the relevant date and having become due and payable within twelve months next before that date".

C The "relevant date" here is the date when the appellant was appointed Receiver, that is on 19 March 1994. That is provided in section 259(6)(b) and also section 78(2) of the ordinance.

The argument of the appellant is that under sections 78 and 259
D of the ordinance, all debts which became due for payment within twelve months before the relevant date, that is before 19 March 1994 are preferential. Thus according to the appellant, the sales taxes became due for payment before 19 March 1994, hence preferential. On the
E other hand, the penalties became due after 19 March 1994, to be precise, they became due on 31 March and 30 April 1994 respectively. These therefore, are not preferential as they did not become due for payment within twelve months before his appointment, that is,
F 19 March 1994.

The argument of the respondents is that section 26 of the Act, which imposes penalties, does not make the distinction made by the appellant as between a tax and a penalty on a tax. Both are regarded
G by subsection (2) of that section as taxes. When hearing the appeal Mr Nguluma, learned counsel, advocated for the appellant, and Mrs. Sumari, Senior State Attorney, appeared for the respondents.

Mrs Sumari conceded that the whole issue rests on the proper
H interpretation of section 26(2) of the Act. That subsection provides as follows:

> Any sum payable by way of penalty under this section shall, *for the purposes*
> I *of this Act*, be deemed to be tax and shall be collected and received accordingly. [emphasis supplied]

By using the underlined words, that is, "for the purposes of this Act", A
the Sales Tax Act, 1976 did not impose the inseparable unity of a tax and a penalty provided in that subsection on other legislations, the Ordinance included. For the purposes of the Sales Tax, 1976, there is no distinction between a tax and a penalty imposed on the B
tax. However, for the purposes of other legislations, there could be a distinction depending on the provisions of those legislation.

Thus, under the Ordinance, a penalty which becomes due for payment before the date of the appointment of the Receiver, that is, the relevant C
date, is not distinguishable. However, a penalty which becomes due for payment after the appointment of the Receiver is distinguishable.

Another way of looking at it is that the Sales Tax Act, 1976 defines what is a tax in section 26(2) while the Companies Ordinance categorizes D
which taxes are preferential debts and which are not.

So, as the penalty totaling TZS. 21 888 397-25 became due for payment after the relevant date, even though under section 26(2) of the Act it is a tax, nevertheless, it is not a preferential debt under E
sections 78 and 259(2) of the ordinance.

The learned trial judge, Munuo, J. was right in saying that "the appointment of a Receiver does not alter the tax liability of the company". F
However, the appointment of the Receiver does determine which tax liability is preferential and which is not and that is what is in issue here.

Therefore, the appeal is allowed. The penalty totaling TZS. G
21 888 397-25 is not a preferential debt.

In view of the nature of litigation itself, each party to bear its own costs. We may as well observe here that though there was a prayer for costs in the plaint, none were given in the Memorandum H
of Appeal, on the other hand, there is no prayer for costs.

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