

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110922**

**Docket: A-315-10**

**Citation: 2011 FCA 265**

**CORAM: SHARLOW J.A.  
LAYDEN-STEVENSON J.A.  
STRATAS J.A.**

**BETWEEN:**

**PAUL LUBEGA-MATOVU**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on September 20, 2011.

Judgment delivered at Toronto, Ontario, on September 22, 2011.

**REASONS FOR JUDGMENT BY:**

**SHARLOW J.A.**

**CONCURRED IN BY:**

**LAYDEN-STEVENSON J.A.  
STRATAS J.A.**

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**REASONS FOR JUDGMENT**

**SHARLOW J.A.**

[1] This is an appeal of the judgment of the Tax Court of Canada dismissing the appeal of Mr. Lubega-Matovu from reassessments under the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) for 2004 and 2005. The judgment was rendered by Justice Campbell orally on April 30, 2010 after a one day trial on the previous day (2010 TCC 291).

### Background

[2] When filing his income tax returns for 2004 and 2005, Mr. Lubega-Matovu reported income from employment from which he deducted rental losses of \$2,402 (2004) and \$2,717 (2005) relating to the rental of rooms in his own home, and business losses totalling \$21,305 (2004) and \$24,673 (2005). During those years Mr. Lubega-Matovu was employed as an auditor with the Canada Revenue Agency on a full-time basis. He says that he was also carrying on five businesses during those years: marketing “panel form technology” in Africa, marketing generators in Africa, marketing vitamin products (Market America), marketing clothing at a flea market called MidTown Flea Market, and selling life insurance on commission (Primerica).

[3] After an audit, Mr. Lubega-Matovu was reassessed to disallow the deduction of many of the expenses he had claimed. His rental losses were disallowed entirely on the basis that the rental of the rooms in his house was not a commercial enterprise, but an attempt to defray the costs of his residence. Most of the deductions claimed in relation to Mr. Lubega-Matovu’s businesses were disallowed on the basis that they had not been incurred, or alternatively they had not been incurred for the purpose of earning business income. The reassessments also imposed penalties under subsection 163(2) of the *Income Tax Act* in the amounts of \$2,629.77 for 2004 and \$3,319.49 for 2005. The record is not clear as to the basis upon which those penalties were assessed.

[4] It appears that at the time of the audit, the Minister was of the view that all of the business expenses claimed by Mr. Lubega-Matovu were related to Market America, Primerica and the MidTown Flea Market. The record is not clear as to when the Minister was informed or ought to

have become aware that Mr. Lubega-Matovu was also claiming expenses relating to the marketing of panel form technology and generators in Africa, but in my view nothing turns on that.

[5] Mr. Lubega-Matovu filed a notice of objection. After considering the objections the Minister maintained his position that the rental losses were not deductible, but he issued further reassessments to allow the deduction of some of the previously disallowed business expense deductions, and to reduce the penalties to \$589.61 for 2004 and \$552.14 for 2005. These are the reassessments that Mr. Lubega-Matovu appealed to the Tax Court.

[6] The following table summarizes the net amounts of disallowed business expense deductions as reflected in the reassessments under appeal (see paragraph 13 of the Crown's reply as filed in the Tax Court):

|                                    | <u>Market America</u> |                  | <u>Primerica</u> |                  | <u>MidTown</u>   |
|------------------------------------|-----------------------|------------------|------------------|------------------|------------------|
|                                    | <u>2004 (\$)</u>      | <u>2005 (\$)</u> | <u>2004 (\$)</u> | <u>2005 (\$)</u> | <u>2004 (\$)</u> |
| <u>Disallowed expenses</u>         |                       |                  |                  |                  |                  |
| Advertising                        | 100                   | 450              |                  | 600              |                  |
| Interest                           |                       |                  | 5,020            | 2,070            |                  |
| Motor vehicle                      |                       |                  | 5,651            | 6,201            |                  |
| Fees                               |                       |                  | 6,000            | 5,000            |                  |
| Meals, entertainment               | 300                   | 79               | 125              | 300              |                  |
| Business tax, licence              |                       | 240              | 600              | 300              |                  |
| Travel                             | 1,500                 |                  |                  |                  |                  |
| Legal, accounting                  |                       | 312              |                  |                  |                  |
| Telephone, utilities               |                       |                  | 265              |                  |                  |
| Capital cost allowance             |                       |                  | 600              | <u>420</u>       |                  |
| Other                              | <u>850</u>            | <u>1,750</u>     | <u>50</u>        |                  | <u>1,440</u>     |
| Total                              | <u>2,750</u>          | <u>2,831</u>     | <u>18,311</u>    | <u>14,891</u>    | <u>1,440</u>     |
| <u>Additional expenses allowed</u> |                       |                  |                  |                  |                  |
| Office                             |                       |                  | 191              | 1                |                  |
| Business tax, licence              | 110                   |                  |                  |                  |                  |

|                                     |                |                |                 |                 |                |
|-------------------------------------|----------------|----------------|-----------------|-----------------|----------------|
| Capital cost allowance              | 140            | 216            |                 |                 |                |
| Cost of goods sold                  | 3,267          | 4,367          |                 |                 |                |
| Motor vehicle                       | <u>1,200</u>   | <u>1,200</u>   |                 |                 |                |
| Total                               | <u>4,717</u>   | <u>5,783</u>   | <u>191</u>      | <u>1</u>        |                |
| Net expense adjustment              | <u>+ 1,967</u> | <u>+ 2,952</u> | <u>- 18,120</u> | <u>- 14,890</u> | <u>- 1,440</u> |
| Appellant's share                   | <u>+ 1,180</u> | + 2,361        |                 |                 |                |
| Unidentified expense disallowed     |                | <u>- 5,805</u> |                 |                 |                |
| Net amount of deductions disallowed | <u>+ 1,180</u> | <u>- 3,444</u> | <u>- 18,120</u> | <u>- 14,890</u> | <u>- 1,440</u> |

[7] The Tax Court appeals were filed under the informal procedure. Mr. Lubega-Matovu represented himself. The appeals did not succeed, basically because the judge found Mr. Lubega-Matovu's evidence to be so vague as to be incapable of proving that the Minister had incorrectly disallowed any of the business expenses in issue. The judge said this at paragraph 18 of her reasons:

The present hearing lasted a full day and I must confess that, at the end of the hearing, I was left with the impression that I had only partial truths, conflicting evidence and still not a particle of proof from the appellant to substantiate that these expenditures were actually related to his business activities.

[8] The judge also upheld the penalties because she concluded (at paragraph 32 of her reasons) that the Minister had met the onus of establishing that Mr. Lubega-Matovu had been grossly negligent in the filing of his income tax returns.

### Appeal

[9] The grounds of appeal fall into three categories. Mr. Lubega-Matovu alleges (1) breaches of procedural fairness in the conduct of the trial, (2) palpable and overriding errors of fact, and (3) an error of law in not setting aside penalties assessed under subsection 163(2) of the *Income Tax Act*.

#### First ground of appeal: procedural fairness

[10] Mr. Lubega-Matovu argues that he was not given a full opportunity to present his case because the judge was too focussed on completing the trial within the allotted day, that the judge promised not to be influenced by the auditor and broke that promise by giving weight to the testimony of an auditor called by the Crown, and that the judge decided the case on facts not pleaded and which Mr. Lubega-Matovu had no fair opportunity to address.

#### (a) Appellant's opportunity to present his case

[11] My review of the transcript and the voluminous documentary record produced by Mr. Lubega-Matovu in the Tax Court indicates that Mr. Lubega-Matovu was given a full opportunity to present all of the documents and explanations he wished to present. The judge did exhort him on several occasions to speed things up, but that occurred when the proceedings were at risk of being hopelessly bogged down by the disorganized state of Mr. Lubega-Matovu's documentation. I can discern from the record no basis upon which this Court could reasonably conclude that anything Mr. Lubega-Matovu wished to say was left unsaid.

(b) The judge's acceptance of the auditor's evidence

[12] At approximately the mid-point of the trial, Mr. Lubega-Matovu expressed concern that the judge would depend on what the auditor had said in her audit report (which was not produced in evidence and is not in the record). The judge said:

... [This] is your hearing; I make an independent decision. I am not influenced by anyone out there, all right – least of all the auditors.

[13] It was argued for Mr. Lubega-Matovu that he could reasonably have understood this statement to be a promise to disregard the auditor's evidence. This, it is argued, could have led him to decide not to produce evidence to rebut certain points made by the auditor. In particular, the auditor said that she was unable to discern how much of the claimed motor vehicle expenses were related to Mr. Lubega-Matovu's business activities, and that Mr. Lubega-Matovu did not provide the customer lists to allow her to verify his claims that he had meetings with a client base.

[14] This ground of appeal cannot succeed because it is based on an unreasonable interpretation of the judge's comment. The judge was obviously attempting to explain in lay terms that she would decide the case impartially on the basis of the evidence presented to her. It cannot reasonably be interpreted as a promise to ignore or reject the auditor's sworn evidence.

[15] Further, there is no evidence that Mr. Lubega-Matovu interpreted the judge's comment as suggested by his counsel. In that regard, Mr. Lubega-Matovu was granted leave to present an affidavit as new evidence in this appeal. His affidavit is in the record, but it says nothing about the judge's comment.

(c) Whether the case was decided on facts not pleaded

[16] It is argued for Mr. Lubega-Matovu that the judge dismissed the appeal on the basis that Mr. Lubega-Matovu had no reasonable expectation of profit and that he had failed to keep proper books and records, but those were not the basis upon which the reassessments under appeal had been issued. There is no merit to this ground of appeal. As indicated above, the principal basis upon which the judge dismissed the appeal was that that none of the disallowed claims had been substantiated, and that is essentially the basis upon which the reassessments had been issued.

(d) Other points on procedural fairness

[17] In his submissions relating to procedural fairness, counsel for Mr. Lubega-Matovu stressed that Mr. Lubega-Matovu was self-represented in the Tax Court and that he was inexperienced in court matters. He clearly was inexperienced, but so are most appellants in the Tax Court who proceed without counsel in an informal income tax appeal. While the principles of procedural fairness are the same for all litigants, whether represented or not, judges may and often do give self-represented litigants more leeway than they might give counsel. Certainly that occurred in this case. The record discloses that the judge made particular efforts to explain the trial procedure to Mr. Lubega-Matovu, and permitted him considerable latitude in adducing documentary evidence of little or no relevance, despite the objections of counsel.

[18] Counsel also submitted that for personal reasons Mr. Lubega-Matovu was under particular stress on the day of the Tax Court hearing. However, there is no evidence that the judge was



informed of any such special circumstances, and no evidence that any request was made for an adjournment or other accommodation.

Second ground of appeal: palpable and overriding error

[19] I do not consider it necessary to comment on every factual error alleged by Mr. Lubega-Matovu, but I will make five observations.

[20] First, the judge said at paragraph 29 of her reasons that much of the evidence presented by Mr. Lubega-Matovu was contradictory and not sufficiently coherent for her to draw conclusions. Having reviewed the record, I agree with this description of the evidence. Even taking into account the fact that Mr. Lubega-Matovu did not have the assistance of counsel in the Tax Court, it was unusually difficult to follow his oral testimony or to understand what method he had followed, if any, to determine what his expenses were and how they should be allocated between his various business activities.

[21] Second, the judge made no error in observing that Mr. Lubega-Matovu had failed to keep proper books and records. Nor did she err in taking that failure into account in finding his evidence to be unreliable.

[22] Third, the judge did not misinterpret or put undue weight on Mr. Lubega-Matovu's comment to the effect that "we (apparently meaning persons carrying on business in Africa) don't do business the way you do". In the context in which that statement was made, it was reasonable

for the judge to interpret it as an attempt to explain Mr. Lubega-Matovu's method of operation, including the lack of appropriate documentation. That explanation was appropriately rejected.

[23] Fourth, the judge made no error in finding that Mr. Lubega-Matovu had failed to prove the proportion of his motor vehicle expenses that were incurred for business purposes. That conclusion was reasonably open to the judge on the record.

[24] Fifth, the judge did not err in noting that Mr. Lubega-Matovu's tenant was not called to testify. The fact that Mr. Lubega-Matovu offered an explanation for her absence did not alter the fact that she was not called. More importantly, her absence did not make Mr. Lubega-Matovu's evidence about his claimed rental losses more reliable or probative.

#### Penalties

[25] Mr. Lubega-Matovu's challenge to the penalty is based essentially on the allegation that the Crown's pleadings in the Tax Court do not set out a sufficient factual foundation for the imposition of the penalty, given that subsection 163(3) imposes on the Minister the burden of establishing the facts justifying the assessment.

[26] The Crown's pleadings on this point are sparse. According to the Crown's pleadings in the Tax Court, the penalties (as reassessed after the objection) were imposed on the following basis (my emphasis):

15. In imposing penalties for the 2004 and 2005 taxation years, the Minister relied on the following further facts:

- (a) in claiming motor vehicle expenses which he did not incur in the 2004 and 2005 taxation years, the Appellant knowingly, or under circumstances amounting to gross negligence, made ... false statements ... in his income tax returns for the 2004 and 2005 taxation years.

[27] On a plain reading, this indicates that the penalized amounts were motor vehicle expense deductions that Mr. Lubega-Matovu claimed as deductions but did not incur.

[28] The Crown argued that paragraph 15(a) of the Crown's reply should be interpreted to mean that the penalized amounts were motor vehicle expense deductions that Mr. Lubega-Matovu claimed but did not incur for the purpose of earning business income. I cannot accept that interpretation of paragraph 15(a) because it is inconsistent with the words. If the penalties had been imposed on the basis suggested by counsel, the pleadings could easily have said so.

[29] Having interpreted paragraph 15(a) on the basis of the language alone, it is apparent that the penalties were imposed on the basis of a factual allegation in the pleadings that is not substantiated in the record. Indeed, the Crown's own evidence is inconsistent with the factual allegation. The Crown called the auditor as a witness. The following exchange appears in the transcript, in the direct examination of the auditor (my emphasis):

Q. In regards to the business expense for the car use, what was your conclusion?

A. We had a very difficult time deriving what was business use. We are not disputing the fact that he spent the money, we are not disputing the fact of the number of kilometres driven; we needed to clarify what was used for business purposes.

[30] I would allow the appeal in relation to the penalties.

Conclusion

[31] For these reasons, I would allow the appeal in part, set aside the judgment of the Tax Court, and allow Mr. Lubega-Matovu's appeals from the reassessments only in relation to the penalties, which should be vacated. I would refer the reassessments back to the Minister for reassessment in accordance with these reasons. In view of the mixed success I would award no costs.

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"K. Sharlow"

J.A.

"I agree  
Carolyn Layden-Stevenson J.A."

"I agree  
David Stratas J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

A-315-10

**AN APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE DIANE CAMPBELL OF THE TAX COURT OF CANADA, DATED JANUARY 27, 2011, IN COURT FILE NO.: 2009-3942(IT)I.**

**STYLE OF CAUSE:**

PAUL LUBEGA-MATOVU v.  
HER MAJESTY THE QUEEN

**PLACE OF HEARING:**

Toronto, Ontario

**DATE OF HEARING:**

SEPTEMBER 20, 2011

**REASONS FOR JUDGMENT BY:**

SHARLOW J.A.

**CONCURRED IN BY:**

LAYDEN-STEVENSON J.A.  
STRATAS J.A.

**DATED:**

SEPTEMBER 22, 2011

**APPEARANCES:**

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