IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: A642/2010

COURT A QUO NO: 1671/2010

In the matter between:

The Commissioner **South African Revenue Services**	**Appellant**
and	
Fastmould Specialist CC	**Respondent**

JUDGMENT DELIVERED ON 28 JULY 2011

Baartman, J

[1] On 18 February 2010, the Commissioner, South African Revenue Services (**the appellant**) obtained judgment against Fastmould Specialist CC (**the respondent**) by way of an entry in terms of section 40 of the Value Added Tax Act 89 of 1991 (**the VAT Act**) and section 91 of the Income Tax Act 58 of 1962 (**the Income Tax Act**) for the sum of R1 604 998.12 in respect of value added tax and employees' tax claimed by the appellant. On 28 July 2010, the

magistrate at Goodwood rescinded that judgment. This is an appeal against that rescission.

[2] The respondent is a manufacturer of plastic injection mould products and a taxpayer responsible for the submission of VAT and PAYE returns. It was common cause that the respondent had submitted such returns in which it had indicated amounts due by it to the appellant; however, the respondent had failed to pay the amounts indicated.

[3] In August 2009, Lyzette Horstmann (**Horstmann**), an official in the appellant's Enforcement: Debt Management Department, called on the respondent to settle the amounts due in terms of its submitted returns and to submit outstanding returns. On 3 September, Horstmann informed the respondent that interest was accumulating daily on the amounts outstanding in respect of PAYE, SDL and UIF. On 4 September 2009, the respondent filed the outstanding returns but failed to make the payments due in respect of its returns. It was common cause that Karl Barend Smit (**Smit**), the respondent's financial manager, had entered into negotiations with Horstmann in an attempt to reach a repayment structure that would accommodate the respondent's then limited cash flow situation. In addition to extensive correspondence, they met on 22 September 2009. The respondent's proposal did not find favour with the appellant.

[4] Despite the failed process, on 15 and 17 September, the respondent paid R59 125.54, R67 945.78 respectively, totalling R127 071.32, in part payment of the debt due in respect of the submitted returns. On 4 December 2009, Horstmann informed Smit that the appellant intended to obtain judgment for the outstanding debt in terms of section 91(1)(b) of the Income Tax Act and section 40(2)(a) of the VAT Act, which judgment the appellant duly took on 18 February 2010. The appellant did not raise an assessment prior to taking judgment.

[5] Two issues arise for decision in this appeal:

(a) Whether there was a dispute about the amount of VAT payable by the respondent.

(b) Whether the appellant was entitled in terms of the VAT Act and the Income Tax Act to obtain judgment without raising an assessment.

The appellant allocated the amounts paid as directed by the respondent

[6] The respondent alleged that the appellant had unilaterally allocated the amounts it had paid. There is no merit in that allegation. On 30 September, in email correspondence to Horstmann, Smit indicated how the amounts were to be allocated. Horstmann allocated the amounts paid in accordance with that request. The following appears from that correspondence:

"...As per your suggestion, the payments made on 15 and 17 September 2009, totalling R127 07-.30 be used to settle the outstanding SDL and UIF and the balance to set of the oldest amount outstanding in respect of PAYE. ... Please note that I have submitted the 2009/08 return this morning as the result of the increased zero rated turnover ... the return has resulted in refund of roughly R13 000.00. This amount together with any future refunds is also to be set off against the amount owe in respect of VAT."

[7] Similarly, there is no merit in the submission that the respondent disputed the remaining sum owing to the appellant. When called upon to pay the amount outstanding, the respondent entered into negotiations with the appellant to secure favourable deferred payment terms. Horstmann informed the respondent that the outstanding amounts had attracted interest and penalties. In these proceedings, the respondent did not allege that the calculation of the

interest and penalties was incorrect. I deal in more detail with the calculation method below.

An assessment was not required in this matter

Court a quo found

[8] The court *a quo* only dealt with one issue in its judgment, namely, whether the appellant was obliged to issue an assessment prior to invoking the provisions of sections 40(2)(a) and 91(1)(b) of the relevant Acts. The court found that the appellant was not entitled to have invoked the recovery provisions of the relevant acts without raising an assessment as envisaged in section 31 of the VAT Act and section 77 of the Income Tax Act.

[9] It is so that the machinery of the VAT and the Income Tax Act are similar; accordingly, I confine myself primarily to the provisions of the VAT Act but make findings applicable to both acts.

The scheme of the relevant acts

The effect of section 28 of the VAT Act is to turn VAT vendors into involuntary tax collectors. Kriegler J described the duty which the section imposes on VAT vendors in the matter of **Metcash Trading Limited vs Commissioner for the South African Revenue Services and Another** 2001 (1) BCIR 1 (CC) at 1121 para 15.

> *"[15] ... the Act provides a detailed mechanism for vendors to keep certain kinds of records and periodically to calculate, account for and pay VAT to the Commissioner. In broad outline the mechanism provides how the deduction of input tax from output tax is to be made and specifies the kinds of vouchers that have to be kept; and then when and how vendors are to make their payments and complete their supporting returns to the Commissioner. In the result vendors*

are entrusted with a number of important duties in relation to VAT. First there is the duty to calculate and levy VAT on each supply of goods; then to calculate the output tax and the input tax on that transaction correctly; also to keep proper records supported by the prescribed vouchers, periodically to add up the sum of output and input taxes attributable to that period and appropriately deducting the total of the input taxes from those of the output taxes; and, ultimately and crucially, to make due and timeous return and payment of the VAT that is payable in accordance with the vendor's allocated tax period."

[10] Section 28 of the VAT Act provides that:

"(1) Every vendor shall, within the period ending on the twenty-fifth day of the first month commencing after the end of a tax period relating to such vendor or, where such tax period ends on or after the first day and before the twenty-fifth day of a month, within the period ending on such twenty-fifth day –

(a) Furnish the commissioner with a return reflecting such information as may be required for the purpose of calculation of tax in terms of section 16; and

(b) Calculate the amount of the tax in accordance with the set section and pay the tax payable to the Commissioner or calculate the amount of the refund due to the vendor."

[11] The section places an obligation on each VAT vendor to keep records of the tax payable to the appellant and to submit returns to the appellant in which that information is contained, at the intervals stipulated in the Act. The VAT Act, therefore creates a system whereby the vendor "assesses" its own VAT liability. Olivier JA described the duty imposed on the VAT vendor as follows in the matter of **Singh vs Commissioner, South African Revenue Services** 2003(4) SA 520 SCA at page 529 Paras 36 and 37:

"[36] Every registered vendor must, at a certain date, furnish the respondent with a return, containing information as to the output and input tax pertaining to the preceding tax period, calculate the amount of the tax payable to the respondent or the amount of any return due to the vendor (s28), and pay the respondent the amount which, ex facie the said return, is payable."

[12] The VAT Act does not envisage any further process if the appellant is satisfied with the return and corresponding payment. (See the Singh matter at 530 para 37)

[13] In compliance with the aforesaid provisions, the respondent submitted returns reflecting the amounts due by it to the appellant. The appellant accepted the correctness of the returns. There was accordingly no dispute and none of the considerations contained in section 31, which provides for the circumstance in which the appellant may raise an assessment, of the VAT Act arose. There was therefore no obligation on the appellant to make an assessment. The respondent assessed its own liability which assessment the appellant accepted as correct. Any additional assessment would, as a matter of common sense, be superfluous.

[14] The court *a quo* found that the provisions of section 31 of the VAT Act and section 77 of the Income Tax Act provide an opportunity for the taxpayer, such as the respondent, to exercise his constitutional rights before judgment is taken. Section 31 of the VAT Act provides that:

"31. Assessments (1) Where –

(a) any person fails to furnish any return as required by section 28, 29 or 30 or fails to furnish any declaration as required by section 14; or

(b) the Commissioner is not satisfied with any return or declaration which any person is required to furnish under a section referred to in paragraph (a); or

(c) the Commissioner has reason to believe that any person has become liable for the payment of any amount of tax but has not paid such amount; or

(d) any person, not being a vendor, supplies goods or services and represents that tax is charged on that supply; or

(e) any vendor supplies goods or services and such supply is not a taxable supply or such supply is a taxable supply in respect of which tax is chargeable at a rate of zero per cent, and in either case that vendor represents that tax is charge on such supply at a rate in excess of zero per cent;

(f) any person who holds himself out as a person entitled to a refund…

the Commissioner may,… make an assessment of the amount of tax payable by the person liable for the payment of such amount of tax, and the amount of tax so assessed shall be paid by the person concerned to the Commissioner."

[15] Advocate van Rooyen SC, the respondent's counsel, relied on section 31(c) for his submission that the appellant had to have raised an assessment prior to taking judgment. In my view, the section does not assist the respondent because the debt became due when the appellant accepted the correctness of the respondent's returns. Cloete JA and Heher AJA, in the Singh matter found that the appellant may collect a debt that is payable or due. The learned judges said that (See 524 para 10):

"[10] In the context of the Act an amount is due when the correctness of the amount has been ascertained either because

it is reflected as due in the taxpayer's return or because the circumstances set out in s32(5) have become applicable (in both of which cases it is both due and payable) or, if there is a dispute, after the procedures relating to objection and appeal have been exhausted..."

[16] Olivier JA at 534 para 55 in the Singh matter said:

"...Thus: the amount reflected in the return must be paid immediately because it is, in the sense described above 'due'; however, there may be a future or contingent liability to pay more than that reflected in the return depending on the final decisions of the respondent or a court. Such contingent liability is not 'due' because it is not yet liquidated by a court or by agreement..."

[17] Section 39 of the VAT Act imposes a penalty on a taxpayer who fails to make payment due in terms of his return concurrently with the submission of the return. It was not disputed that the appellant was entitled, as it did, to have levied penalties and interest on the amounts due.

[18] Once a debt is due, the enforcement/recovery procedure must follow. It would completely frustrate the entire scheme of the Act, namely the prompt collection of tax due to the fiscus in terms of the taxpayers' own records, if it was not entitled in those circumstances to invoke the tax recovery procedure provided for in the relevant acts. Section 40 of the VAT Act is termed "Recovery of tax" and the relevant portion provides the following: (See page 524 H–I of the Singh matter)

"(1) Any amount of any tax, additional tax, penalty or interest payable in terms of this act shall, when it becomes due or if payable, be a debt due to the State and shall be recoverable by the Commissioner in the manner herein provided.

2 (a) If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken there on as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement...

(5) It shall not be competent for any person in proceedings in connection with any statement filed in terms of subsection (2)(a) to question the correctness of any assessment upon which such statement is based, notwithstanding that objection and appeal may have been lodged against such assessment."

[19] In certain circumstances, the appellant has a discretion whether to raise an assessment. (See section 31(1) of the VAT Act) Therefore, the reference in section 40(5) to "any assessment" must be reference to those instances where the appellant exercises its discretion in favour of raising an assessment. To hold otherwise would negate the taxpayer's duty "to crucially make...payment" of a debt not in dispute.

[20] It follows that I differ from the court *a quo* who found that the appellant had to have raised an assessment prior to invoking the provisions of section 40. In my view, the taxpayer's rights in terms of the Constitution are not compromised when a self-assessed debt is collected in the manner provided for in section 40.

[21] The court *a quo* based its finding on the premise that the Singh case dealt with the same issue. But the Singh case is in my view distinguishable in that in that matter an assessment was raised prior to taking judgment in terms of section 40(2) of the VAT Act and the

sole question for determination was whether notice of the assessment should have been given to the taxpayer. In this case the assessment emanated from the taxpayer and therefore self-evidently notice was not required.

[22] The fact that judgment was obtained in an amount in excess of the amount reflected in the respondent's returns is irrelevant. It is common cause that interest accumulated and penalties were incurred on the due amounts. These were calculated in accordance with the provisions of the Act. It does not have an impact on the correctness or otherwise of the respondent's assessment of its own tax liability. In addition to which, as indicated above, Horstmann had previously informed the respondent that "interest was accumulating daily" on the outstanding amounts.

[23] Section 39 of the VAT Act read with section 45A provides for a relatively simple method of calculating interest and penalties. In terms of section 39, a single penalty of 10% of the amount of the tax due is levied, irrespective of the period that the debt remains unsatisfied. On the other hand, interest is levied at the prescribed rate for every month or part thereof in which the VAT remains unpaid. (See CG De Wet: **Commentary on Value-Added Tax Act** (Juta) RS 6 (2010) at 39–3 and AP de Koker: **Value-Added Tax – VAT in SA** chapter 20)

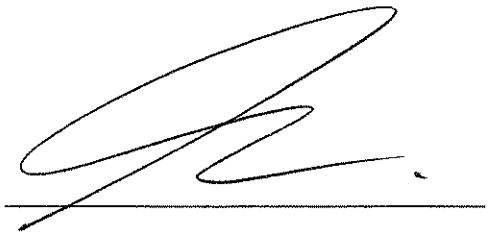
[24] In terms of section 39, the penalties and interest become due when the VAT becomes due. Consequently, the appellant need not have raised an assessment to calculate the interest and penalties in the circumstances of this matter.

CONCLUSION

[25] I, for the reasons set out above, propose that the appeal be upheld in the following terms:

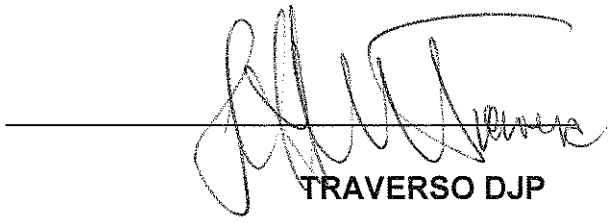
(a) The judgment of the court *a quo* rescinding the judgment taken on 18 February 2010, in terms of section 91(1)(b) of the Income Tax Act 58 of 1962 and in terms of section 40(2)(b) of the Value Added Tax Act 89 of 1991 by the Commissioner, South African Revenue Services, is set aside;

(b) The respondent is directed to pay the costs of the appeal, such costs to include the costs occasioned by the employ of 2 counsel.



BAARTMAN J

I agree, it is so ordered.



TRAVERSO DJP