IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO: 399/2017

Heard on: 06 February 2020

Delivered on: 11 February 2020

In the matter between:

ALFDAV CONSTRUCTION CC **APPLICANT**

and

THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

JUDGMENT

GQAMANA J:

[1] This is an application brought in terms of rule 42 of the Uniform Rules of Court. The order sought by the applicant is that, the judgment handed down by Chetty J on 10 October 2017 by amended to read as follows:

"The applicant is ordered to res-ubmit, without incurring any penalties or interest in respect of such re-submission, the VAT returns for the said period within 60 business days of this order."[1]

[2] A short background to the main application is that, the applicant filed an application seeking an order reviewing and setting aside the VAT assessments for the periods 07/2009 to 12/2013 as listed in annexure "DZ1" therein. In addition the applicant sought an order that it be ordered to re-submit the VAT returns for the said periods within 60 business days from the date of the order. The applicant was successful and obtained the order sought before Chetty J.[2] The order granted by Chetty J was exactly in the same terms as set out by the applicant in its amended notice.

[3] The applicant then filed the present application purportedly in terms of rule 42 of the Uniform Rules of Court. For comprehensive sake, rule 42 (1) reads:

"(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any affected party thereby;

(b) An order or judgment in which there is ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) An order or judgment granted as a result of mistake common to the parties."

[4] In its founding affidavit in support of the relief in the present application, the applicant states that, in its understanding the effect of the judgment by Chetty J is that, the VAT 201 returns in respect of the periods 07/2009 to 12/2013 were

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[1] See: Index p 1 prayer 1.
[2] Index page 8, annexure "R42A" is the copy of the Order by Chetty J.

re-submitted in compliance with the court order and therefore the respondent could not claim penalties and interest, because they were submitted timeously in terms of the court order. The crux of its argument is that: the legal consequence of the order of Chetty J could never have intended that penalties and interest should be incurred in re-submission of the returns. The argument was further developed that once the assessment which was challenged before Chetty J was set aside inherently is that, the penalties and interest were also set aside and it would be absurd to penalise afresh the applicant to comply with the court order.

[5] In opposition to the present application, the respondent argued firstly that interest and penalties arises because of late payment and not because of compliance with the judgment and in any event the issue of penalties and interest was never raised before Chetty J. It was also argued by the respondent that the procedure adopted by the applicant is entirely inappropriate and impermissible because the provisions of rule 42 cannot be utilised to supplement the original order as the issues of penalty and interest did not arise in the original application. It was however conceded that the provisions of rule 42 could be utilised for clarification of a judgment where there is ambiguity, error or omission.

[6] Indeed a court may clarify its judgment or order if on proper interpretation the meaning thereof remains obscure, ambiguous or otherwise uncertain so as to give effect to its true intention, provided it does not thereby alter the sense and substance of the judgment or order.[3]

[7] Both counsel for the parties are in agreement that the principles relating to the interpretation of judgments are the same as those on interpretation of a contract as set out in **Natal Joint Municipal Pension Fund v Endumeni Municipality.**[4]

[8] In advancing its case, the applicant argued that the judgment of Chetty J has to be read in context of the pleadings. As indicated above, in the main application before Chetty J, the applicant approached the court for an order to rectify the

[3] See: Firestone SA (Pty) Ltd v Gentiruco AJ 1977 (4) SA 298 (A) at 307 (A), Thompson v South African Broadcasting Co-Operation 2001 (3) SA 746 (SCA) at 748 H – 749 C.
[4] 2012 (4) SA 593 (SCA) at 603 F – 610 C.

incorrect assessment for the VAT for the relevant periods and such assessment were reviewed and set aside. The applicant was ordered to re-submit VAT returns for the said periods within 60 days from the date of that order.

[9] The argument went on to state that it will be absurd to penalise the applicant for complying with the order, which compliance was within the time period set out in the said order.

[10] I have had the benefit of reading the pleadings in the main application. The issues of penalties and interest were not raised. It was not an issue before Chetty J. Correctly so, as pointed out by Mr Buchanan SC, counsel for the respondent, that while there is room for the court to clarify its judgment, however, such clarification should not alter the sense and substance of the judgment or order.

[11] As indicated hereinbefore, on reading of the pleadings in the main action before Chetty J, the issue of penalties and interest was not raised and accordingly it will be impermissible to vary the order of Chetty J to incorporate interest and penalties.

[12] Accordingly this application must fail on this leg. However, for sake for comprehensiveness, I deal also with the argument raised by the respondent that the entire application has become moot. In the supplementary affidavit filed by the respondents,[5] the respondent brought to the attention of the court that, the issue of penalties and interest has since been resolved between the parties wherein the applicant admitted liability to the respondent for the penalties and interest regarding the VAT periods relevant herein and requested a deferred payment arrangement.

[5] Index: pp 74 – 88.

[13] Generally, courts do not decide issues of academic interest only. It is only in exceptional circumstances that a court will hear and determine a dispute which has become moot.[6]

[14] As indicated in paragraph 12 above, the applicant admitted liability and entered into an agreement to pay the said amounts to the respondent. Therefore the relief sought in this present application will have no practical effect and has become moot.

[15] Mr Barnard, counsel for the applicant screeched about the manner in which the respondent's filed its supplementary affidavit. I do accept that, there was no leave sought to file a further affidavit by the respondent. However, as correctly pointed out by Mr Buchanan SC, the respondent has an obligation towards the court to bring such facts as they are relevant to the issues before court. In any event, it is evident from the annexures attached to this supplementary affidavit that the applicant was called upon to indicate its stance in that regard as to whether it intends to file further supplementary affidavits but no response was received from it.

[16] This belated cry by the applicant that in the event this court is amenable to admit the respondent's supplementary affidavit, it should also be given an opportunity to respond thereto is opportunistic. I cannot accede to it especially in the light of the overwhelming evidence before me. The applicant was given the opportunity to respond to it and in any event there was indeed an obligation on the respondent to bring such facts to the attention of the court. Filing of a further affidavit will simple delay the matter because the facts cannot be changed and especially that an agreement was reached between the parties in respect of the penalties and interest for the VAT period relevant hereto and that the applicant admitted liability for such penalties and interest.

[17] In the circumstances the following order is issued:

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[6] See: Notyawa v Makhanda Municipality and Others 2020 (2) BCLR 136 (CC).

The application is dismissed with costs.

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N W GQAMANA

JUDGE OF THE HIGH COURT

APPEARANCES:

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