THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 162/10

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**Appellant**
and	
SAIRA ESSA PRODUCTIONS CC	**1st Respondent**
SAIRA ESSA	**2nd Respondent**
MARK CORLETT	**3rd Respondent**

Neutral citation: **The Commissioner for the SA Revenue Service v Saira Essa Productions CC (162/10) [2010] ZASCA 154 (30 November 2010)**

Coram: HARMS DP, NUGENT, CLOETE, MAYA AND TSHIQI JJA

Heard: **17 November 2010**

Delivered: **30 November 2010**

Summary: Small Business Tax Amnesty and Amendment of Taxation Laws Act 9 of 2006 – whether the respondents were granted amnesty from criminal prosecution – whether the regional court should have interrupted criminal proceedings pending a declaration order by the high court.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Potterill AJ sitting as court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court below is set aside and is substituted with the following:

'1. The application is dismissed.
2. The applicants are ordered to pay the costs of the application on an attorney and client scale, including the costs of two counsel, jointly and severally.'

JUDGMENT

TSHIQI JA (Harms DP, Nugent, Cloete and Maya JJA concurring):

[1] This is an appeal against an order in terms of which the North Gauteng High Court, Pretoria (Potterill AJ) declared that the respondents had duly complied with their obligations under the Small Business Tax Amnesty and Amendment of Taxation Laws Act No 9 of 2006 ('the Act') and were accordingly exempt from prosecution on charges pending against them in the regional court, Germiston. The application was launched after the criminal proceedings were postponed, by agreement, to enable the respondents to approach the high court for a declaratory order on whether the respondents qualified for amnesty against prosecution with regard to the pending criminal charges. The appeal is brought with leave of the court below.

[2] The Act came into operation on 25 July 2006. The purpose of the Act was to encourage small businesses which were not registered for tax and those which were registered, but where business income for the years preceding the 2006 year of assessment had not been declared or was

understated or outstanding, to declare their income and apply for amnesty. In terms of s 8(c), taxpayers were entitled to relief for payment of any VAT in terms of the VAT Act in respect of (inter alia) any supply of services during the 'qualifying periods' ie up to 28 February 2006. The relief was, however, subject to certain exclusions in terms of ss 5(2) and 10(a) of the Act which provide as follows:

'5(2) The Commissioner may not, subject to subsection (4), approve an application in terms of subsection (1) if the Commissioner, at any time before the submission of the application for tax amnesty, delivered a notice to that applicant or that applicant's representative informing that applicant of an audit, investigation or other enforcement action relating to any failure by that applicant to comply with any Act in respect of which application for tax amnesty is made.'

(Subsection 5(4) is irrelevant for present purposes.)

'10 The tax amnesty relief does not apply in respect of any amount of tax, levy, contribution, interest, penalty or additional tax, to the extent that it –

(a) had already been paid before the submission of the application…'

[3] In terms of s 5 of the Second Small Business Tax Amnesty and Amendment of Taxation Laws Act 10 of 2006 (Second Amnesty Act), an applicant whose application for amnesty has been approved in terms of s 5 is deemed not to have committed an offence in terms of any Act to which the amnesty Act relates. Consequently such a person would not be liable for criminal prosecution.

[4] Two pertinent issues arise in this appeal. The first is a jurisdictional issue and it is whether the criminal proceedings in the regional court should have been suspended pending the determination of the question of law by the high court. The second pertains to the merits of the order granted by the court below. I shall deal with the second question first.

[5] The second respondent (Ms Essa) and third respondent (Mr Corlett) are husband and wife and joint members of the first respondent, Saira Essa Productions CC ('the CC'). Ms Essa is an actress and producer and uses the

CC as a vehicle to carry on business, the bulk of which comprises of services rendered to the South African Broadcasting Corporation.

[6] In July 2003, SARS commenced with criminal investigations against the respondents for non-payment of PAYE, under-declaration of VAT and non-filing of tax returns for the 2003/2004 tax years. On 11 August 2004, the respondents were duly notified about the investigations and were afforded an opportunity to liaise further with SARS with a view to submitting all outstanding returns and for a discussion of possible criminal charges arising out of the investigations. In response to this letter, the respondents submitted the relevant tax returns. They subsequently between August 2004 and September 2005 paid the monies due to SARS for VAT and also paid admission of guilt fines in respect of PAYE. SARS proceeded with criminal charges with regard to the VAT. It is these charges which formed the subject matter of the application in the court below.

[7] From 12 September 2005, the respondents made at least seven appearances in the regional court, Germiston, before the proceedings were postponed pending the application before the high court. The magistrate agreed to postpone the criminal proceedings because the Act had in the meantime come into operation on 25 July 2006. The respondents' legal representative referred the magistrate to the Act. The magistrate indicated that it was not clear to him whether the respondents could rely on the Act to escape prosecution. He agreed to postpone the criminal proceedings to enable the respondents to bring an application to the high court for a declaratory order to clarify the legal implications of the Act. The application was issued on 20 February 2008.

[8] When the issue of the amnesty was raised with the magistrate, and when the application for a declaratory order was made in the high court, SARS had already communicated its stance on the issue of the amnesty for the VAT to the respondents in writing. The sequence of the correspondence between SARS and the respondents was as follows: On 27 October 2006, Ms Essa and Mr Corlett submitted individual applications, and one on behalf of

the CC, for amnesty to SARS in terms of the Act, inter alia in respect of income tax and VAT. It seems that on 10 January 2007, the respondents communicated with SARS, because on 26 January 2007, SARS addressed a letter to their attorney in reply to a letter from him dated 10 January 2007. In that letter the respondents were informed unambiguously that the summons in the criminal prosecution dealt with amounts that were excluded from amnesty. A further letter dated 12 March 2007 from SARS to the respondents' attorneys re-stated SARS' position in this regard.

[9] SARS responded to all three applications for amnesty. It is on the three responses which the respondents place reliance for their immunity from prosecution. All three responses are contained in a pro forma amnesty approval form, and are addressed to the individual respondents. They all state that: 'In terms of the Small Business Tax Amnesty Legislation, you are hereby advised that your application has been approved subject to receipt of full payment of the amnesty levy.' All the approvals contain the individual income tax numbers of the respondents and state that the assessment information was for '2006 Taxable Business Income'. What is glaringly absent in all three approvals is any reference to VAT and in the case of the CC, the VAT reference number of the CC. Counsel for the respondents sought to place reliance on the single sentence quoted above as constituting approval of the applications for VAT amnesty. It patently was not – both because of the terms of the responses themselves to which I have just referred, and because of the letters quoted in the previous paragraph of this judgment which preceded the responses. The court a quo erred in finding that, as a fact, amnesty had been granted in respect of VAT.

[10] In terms of the provisions of s 5(2), SARS was precluded from approving an application for amnesty in circumstances like the present, where a notice of investigation had been issued 'relating to any failure to comply with a tax related Act in respect of which the application for amnesty is made', and SARS was further precluded from doing so because of the terms of the provisions of s 10(a), inasmuch as the VAT had been paid before the application for amnesty had been submitted. The provisions of the Act are

clear and unambiguous. It is not clear why the magistrate felt the need to refer this issue to the high court.

[11] The jurisdictional issue:

This court has on several occasions discouraged the practice of interrupting criminal proceedings in magistrates' courts for the purpose of clarifying a question of law in the high court and has cautioned courts on the consequences of such a practice. The most recent reported judgment is *National Director of Public Prosecutions v King*[1] where Harms DP said at 152b-c:

'The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation – a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation.'

The undesirable consequence which arose in this matter was that the order of the high court amounted to an acquittal of the respondents (accused in a pending criminal matter) by a civil court on a basis which was not supported by the evidence, and which was incompetent in law.

[12] Section 319 of the Criminal Procedure Act 51 of 1977 provides for a systematic manner in which a superior court may reserve questions of law for consideration by this court.[2]

---

[1] 2010 (2) SACR 146 (SCA).

[2] Section 319 provides: '(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.

(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.

(3) The provisions of sections 317(2), (4) and (5) and 318(2) shall apply *mutatis mutandis* with reference to all proceedings under this section.'

See also ss 317 and 318 of the Criminal Procedure Act.

[13] So far as proceedings in magistrates' courts are concerned, in *Wahlhaus v Additional Magistrate, Johannesburg*[3] Nicholas JA stated:

'It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief – by way of review, interdict, or *mandamus* - against the decision of a magistrate's court given before conviction. (See *Ellis v Visser and Another*, 1956 (2) SA 117 (W), and *R v Marais*, 1959 (1) SA 98 (T), where most of the decisions are collated). This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of *Gardiner and Lansdown* (6th ed., vol. I p. 750) state:

"While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained. . . . In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available."

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts. I would merely add two observations. The first is that, while the attitude of the Attorney-General is obviously a material element, his consent does not relieve the Superior Court from the necessity of deciding whether or not the particular case is an appropriate one for intervention. Secondly, the prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not *per se* necessarily justify the Supreme Court in granting relief before conviction (see too the observation of MURRAY, J., at pp. 123 - 4 of *Ellis'* case, *supra)* . As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal.'

One of the fundamental considerations for not reserving questions of law until the criminal proceedings have been finalised, is that the question would be

[3] 1959 (3) SA 113 (A) at 119H; 120A-E.

academic if no conviction follows at the end of the trial: *R v Adams & others*.[4] In the present matter, since there was no question of illegality in the regional court, the high court could not exercise its inherent power to 'review' by way of declaratory order.

[14] SARS had asked in its answering affidavit for a punitive costs order. Counsel for the respondents could not offer any basis on which such an order would not be appropriate in the circumstances and it clearly is. As stated, the proceedings in the regional court should not have been interrupted. The only inference is that the request to suspend the criminal proceedings was aimed at delaying them still further. This is the only inference, because apart from the fact that there was no basis for this, the position with regard to VAT had been made patently clear by SARS in their two letters in January and March 2007, even before the letters of approval were sent to the respondents. The omission of any reference to VAT in the letters of approval merely confirmed the stance of SARS. In the circumstances the application to the high court was vexatious and this is ample justification for a punitive costs order against the respondents.

[15] The following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court below is set aside and is substituted with the following:

'1. The application is dismissed.
2. The applicants are ordered to pay the costs of the application on an attorney and client scale, including the costs of two counsel, jointly and severally.'

_____

Z L L Tshiqi

Judge of Appeal

[4] 1959 (3) SA 753 (A) at 761.

APPEARANCES

APPELLANT:	J J GAUNTLETT SC (with him H G A SNYMAN) Instructed by Mketsu & Associates Inc Pretoria; Matsepes Inc, Bloemfontein.
RESPONDENTS:	A E BHAM SC Instructed by Garlicke & Bousfield Inc Pretoria; Webbers, Bloemfontein.