THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 36/2010

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **Appellant**

and

SPRIGG INVESTMENT 117 CC t/a GLOBAL INVESTMENT **Respondent**

Neutral citation: CSARS v Sprigg Investment 117 CC (36/10) [2010] ZASCA 172 (1 December 2010)

Coram: HARMS DP, MAYA, CACHALIA, SHONGWE et TSHIQI JJA

Heard: 05 November 2010

Delivered: 1 December 2010

Summary: Income Tax Act 58 of 1962 – Appealability of orders of the tax court under Tax Court Rule 26(1) – s 86A(1) read with ss 83(13)(d) and – adequacy of the reasons for a tax assessment furnished by the Commissioner – composition of the tax court under s 83(4) and effect of failure to comply therewith.

ORDER

On appeal from: Tax Court, (Cape Town) (NC Erasmus J, sitting as court of first instance).

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

'The matter is struck from the roll. The applicant is ordered to pay the costs including the costs consequent upon the employment of two counsel (to the extent employed).'

JUDGMENT

MAYA JA (concurring Harms DP, Cachalia, Shongwe et Tshiqi JJA)

[1] The Commissioner for the South African Revenue Service (the commissioner) appeals against a judgment of the tax court ordering him, principally, to furnish the respondent with adequate reasons for assessments made relating to employees' tax, income tax and Value-Added Tax (VAT). The matter comes before us in terms of an order made by the court below under the provisions of s 86A(5) of the Income Tax Act 58 of 1962 (the Act),[1] subject to the reservation of the respondent's right to challenge the appealability of the judgment.

[1] Section 86A(5) empowers the President of the tax court to make a final order, granting or refusing leave to appeal against its order, to a party desirous of having his appeal heard by the Supreme Court of Appeal directly from the tax court without an intermediate appeal to the provincial division.

[2] The facts relevant to the dispute may be summarized as follows. The respondent has been in operation since March 2001. It is a close corporation and registered vendor for purposes of the Value-Added Tax Act 89 of 1991 (the VAT Act). It describes itself as an exclusive importer of branded electric home products which it imports from Taiwan and sells through distributors in South Africa and Namibia. At the material time it sold an electricity-saving device called Electro Smart (the device).

[3] The real tussle between the parties (this however relates to the merits which are not before us, as will become apparent, and I refer to it and the surrounding facts merely to provide context) relates to the precise nature of the relationship between the respondents and its distributors. The respondent alleges that it sold the device to distributors who in turn, as principals, sold it to consumers for their own account. The commissioner, on the other hand, contends that the sales to consumers were the respondent's own sales because the distributors were its 'employees' for purposes of the 4th Schedule of the Act.

[4] The genesis of the dispute can be traced to September 2004, when the South African Revenue Service (SARS) commenced a tax audit on the respondent's business under the provisions of the Act and the VAT Act. Consequently, SARS auditors sought various information and documents from the respondent and a chain of correspondence flowed between the parties in this regard. The exchange culminated in a letter containing the commissioner's findings which was dated 14 December 2006. The letter emphasized that it did not constitute a tax assessment and merely contained 'findings based on a limited scope audit of [the respondent's] tax affairs'. It set out what SARS believed formed evidence in support of the findings and its legal conclusions.

[5] The key findings were that:

(a) in respect of employees' tax, the respondent's distribution agents, consultants and electricians who installed the devices, were paid commissions and incentives which constituted 'remuneration' from which employees' tax was not deducted in breach of paragraph 2 of the Fourth Schedule, read with s 79 of the Act;

(b) in respect of income tax, the price paid by consumers to the distributors formed part of the respondent's gross income, ie the distributors' product sales constituted 'gross income' of the respondent as defined in s 1 of the Act;

(c) in respect of VAT, the distributors' product sales, by virtue of being the respondent's gross income, were taxable supplies constituting 'consideration' as defined in s 1 of the VAT Act on which output tax was leviable under s 7(1)(a) of the VAT Act; and

(d) it was competent for the commissioner to impose additional tax, penalties and interest in terms of various sections of the Act and the VAT Act.

[6] The respondent's written response dated 2 February 2007 was lengthy and detailed and it vehemently denied the main conclusions that the distributors and electricians were its employees and the distributors' sales its own sales. However, SARS was not swayed. On 14 June 2007 it issued a 'letter of assessment', followed by formal assessments dated 15 June and 26 July 2007, in respect of employees' tax, VAT and income tax. But for the income tax item, SARS confirmed its earlier findings and imposed certain additional penalties in respect of VAT on the basis that the respondent's management had 'caused an evasion of tax and/or improper refunds … alternatively they failed to perform the duties imposed upon them by the

[VAT] Act'. No revised assessments were issued regarding income tax. This was caused by the fact that although the sales to consumers were still considered part of the respondent's gross income, the difference between its gross sales and the amounts paid to its distributors as commission or otherwise would be allowed as corresponding deductible expenses in terms of s 11(a) of the Act, thus bringing about no change to the respondent's taxable income.

[7] The respondent did not accept the assessment. As a result, it invoked its rights under rule 3 of the rules of the tax court[2] and requested the commissioner to furnish reasons for the assessment. The request was contained in two letters dated 25 and 26 July 2007, which bore 97 detailed questions targeted at the three items of assessment. SARS was not inclined to indulge the respondent. In its view, the 'request require[d] a response of such extraordinary nature that any response would be akin to responding to questions usually asked in a court of law'. It then gave brief explanations in respect of each tax item assessed and referred the respondent to its 'letter of assessment' dated 14 June 2007 which incorporated the reasoning set out in the letter of findings.

[8] The respondent joined issue with SARS' attitude and consequently

[2] The tax court rules were promulgated under s 107A of the Act and prescribe the procedures to be observed in lodging objections and noting appeals against assessments, procedures for alternative dispute resolution and the conduct and hearing of appeals before a tax court. Rule 3(1)(a) allows '[a]ny taxpayer who is aggrieved by any assessment …by written notice delivered to the Commissioner within 30 days after the date of the assessment, [to] request the Commissioner to furnish reasons for the assessment'.

launched an application under tax court rule 26(1)[3] which empowers the tax court to compel the commissioner to furnish adequate reasons as contemplated in rule 3. It sought an order that its requests for reasons be remitted to the commissioner for reconsideration with directions issued by the tax court to ensure that the commissioner provided adequate reasons therefor.

[9] The tax court found in the respondent's favour and ordered a remittal of the letters of assessment to the commissioner for reconsideration. Its order further directed the commissioner to give adequate reasons for the assessments that were structured 'so as to motivate his assessment clearly and set out the findings of fact on which his conclusions depend; the relevant law upon which his conclusions are based; and the reasoning process which led to those conclusions.'

[10] On appeal, the respondent did not content itself merely with defending the tax court's finding on the adequacy of the commissioner's reasons. It also raised preliminary objections and questioned this court's jurisdiction to entertain the matter, the Commissioner' *locus standi* to appeal directly to this court and the appealability of the order of the tax court.

Adequacy of the commissioner's reasons

[11] I deal first with the question whether the commissioner's reasons were adequate as it may be disposed of shortly. In developing his argument that

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[3] The relevant portion of Rule 26 reads:
'(1)(a) Any decision by the Commissioner in the exercise of his or her discretion under rules 3(1)(b), 3(2), 3(3), 5(1) and 5(2)(c) will be subject to objection and appeal, and may notwithstanding the procedures contemplated in rules 6 to 18 be brought before the Court by application on notice.
(b) The court may upon application on notice under this subrule and on good cause shown, in respect of a decision by the Commissioner under:
(i) …;
(ii) rule 3(2) or 3(3), make an order remitting the matter for reconsideration by the Commissioner with or without directions to provide such reasons as in the opinion of the Court are adequate'.

the commissioner's reasons were inadequate, counsel for the respondent submitted that the commissioner's response to the request for reasons constituted administrative action. Thus, he argued, the response fell within the purview of s 5(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which requires the administrator to whom the request for reasons is made to give adequate reasons in writing for the administrative action.

[12] Reference was then made to the judgment of this court in *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd*[4] which endorsed the standard for what constitutes 'adequate reasons' laid down by the Federal Court of Australia in *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others*[5] as follows:

'[T]he decision-maker [must] explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging." This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.'[6]

[13] I am in respectful agreement with these views. But I do not think that they have the meaning that the respondent ascribes to them for present

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[4] 2003 (6) SA 407 (SCA) at para 40.
[5] (1983) 48 ALR 500 at 507.
[6] See also Hoexter *The New Constitutional and Administrative Law* vol 2 at 244; *Nkondo v Minister of Law and Order* 1986 (2) SA 756 (A) at 772I-773A.

purposes. It was contended on its behalf that the commissioner's reasons did not meet the above test. This was so, it was argued, because the commissioner, whose perception of the facts differed dramatically to that of the respondent, had failed to disclose the reasoning process which led to his conclusion. The duty to give reasons, proceeded the argument, requires more than furnishing actual reasons; it entails a duty to rationalise the decision and obliges the decision-maker to 'apply his mind to the decisional referents which ought to have been taken into account' where, as here, the actual reasons given fell short of the *Phambili* test. It was clear from counsel's submissions that what was actually being challenged by the respondent were the very merits of the assessments and that it understood the order of tax court to entail, in its words, 'the Commissioner's reconsideration of the decisions embodied in his assessments'.

[14] The respondent clearly misconceived the nature of the proceedings. We are not here reviewing the commissioner's reasons for the assessments but merely adjudicating an application antecedent to that process. Thus, the cogency or rationality of the reasons is not yet in the balance. As appears from the above-quoted dictum in *Phambili*, the test envisages that the decision in issue may involve 'an unwarranted finding of fact, or an error of law, which is worth challenging' and merely requires the decision-maker to explain why he decided the way he did to enable the requester of reasons to launch his challenge. It is only when the objection itself is adjudicated under judicial review that the PAJA test which the respondent wants imposed comes into play. The question now is simply whether the respondent has sufficiently been furnished with the commissioner's actual reasons for the assessments to enable it to formulate its objection thereto.

[15] Interestingly, the respondent's counsel conceded in argument that the volume of the respondent's questions which demanded exacting specificity from SARS was unwarranted, and, in his words the product of 'an attorney being over-enthusiastic'. More significant though is what the respondent's own deponent, Mr Dirk Hamish Fyfe, its financial manager, said in the founding affidavit. He stated that 'the [respondent's] response [to the letter of findings] was lengthy and answered in substance the Commissioner's queries'. Later, in the same affidavit, he said that 'the [respondent] dealt with [the letter of findings] comprehensively in its letter dated 2 February 2007, setting out its disagreement with the conclusions and on that basis declined to provide the required documentation and information.'

[16] It will be recalled that the letter of findings formed the basis of the assessments which, as previously indicated, incorporated the reasoning it contained. Notably, the respondent did not, at that stage, complain about the quality of SARS' factual findings or that it did not understand why they had been made. What it did instead, as Fyfe properly acknowledged, was reply in fine detail as to why it disagreed with the reasoning and findings and clearly had no difficulty responding to them.

[17] The letter of assessment, which the respondent was urged to read in conjunction with the letter of findings, stated in plain terms that the respondent was being assessed for income tax, employees' tax and VAT. It explained the reasons for the imposition of employees' tax, VAT and the ancillary penalties and interest. It explained further why no revised assessments would be issued in respect of income tax. The evidential basis for SARS' main factual findings, those findings and the legal consequences that flowed from them were clearly set out – that because the distributors were the respondent's employees they therefore sold the device on its behalf

and that those sales formed part of the respondent's gross for which it should have accounted for output tax. There is absolutely no reason why the respondent would be unable to formulate its objection, if it has any, in the circumstances. And I am inclined to agree with the commissioner that this litigation is merely a delaying tactic. Accordingly, I find that the commissioner's reasons for the assessment are adequate for the purpose for which they were sought.

Appealability and related issues

[18] Appeals against decisions of the tax court are governed by the provisions of s 86A of the Act. The relevant parts of the section read:

'(1) The appellant in the tax court or the Commissioner may in the manner hereinafter provided appeal under this section against any decision of that court.

(2) Such appeal shall lie–

(a) to the provincial division of the High Court having jurisdiction in the area in which the sitting of the special court was held; or

(b) where–

(i) the President of the tax court has granted leave under subsection (5); or

(ii) the appeal was heard by the tax court constituted in terms of section 83(4B),

to the Supreme Court of Appeal, without any intermediate appeal to such provincial division.'

[19] It was contended for the respondent that the order of the tax court was interlocutory because it was made pursuant to a simple interlocutory application concerning a preliminary matter of a procedural nature in terms of s 83(13)(d) and rule 26(1)(b)(ii)[7] and would be appealable only if it is a 'decision' as contemplated in section 86A(1). It was argued further that the order was not appealable because it did not meet the criterion of a 'decision'

[7] Footnote 3.

under s 86A(1) set out in *Hassim v Commissioner, South African Revenue Service*.[8]

[20] In the *Hassim* matter, this court interpreted the words 'any decision' in s 86A(1) as follows:

'The words "any decision" are also used in s 21 of the Supreme Court Act 59 of 1959. In the case of s 21 it was held that the "decision" referred to must be a decision of the same nature as a "judgment" or "order" in the sense in which those terms are used in s 20 of the Supreme Court Act 59 of 1959 … A "judgment" or "order" referred to in s 20 does not in general include "a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings" (see *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536B) … I do not think that the phrase "any decision" in s 86A(1) should be interpreted differently … To interpret the phrase literally would be at odds with the generally accepted view that it is in general undesirable to have a piecemeal appellate disposal of the issues in litigation and that it is advisable to limit appeals in certain respects'.[9]

[21] Section 83(13)(d) was inserted in the Act in April 2003 to give taxpayers an additional right to challenge the commissioner's furnishing of reasons. It gives the tax court power, subject to the provisions of the Act, to 'hear any interlocutory application and decide on procedural matters as provided for in the rules of the tax court contemplated in section 107A'.

[22] The provision contemplates two types of 'decisions': those pursuant to interlocutory applications' and those that decide 'procedural matters' that are necessarily not interlocutory. Many decisions relating to 'procedural

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[8] 2003 (2) SA 246 (SCA).

[9] At paras 10 and 11. It is not necessary to decide for purposes of this judgment whether the effect of this judgment was undone by the insertion of s 83(18), which provides that '[a]ny decision of the court under [s83] shall, subject to the provisions of section 86A, be final.'

matters' are not necessarily interlocutory and they may, by their very nature, be final in effect.

[23] The question is then whether the application for 'adequate reasons' was an interlocutory application. An 'interlocutory application', in its widest meaning, is one made at any stage between the inception and the conclusion of the litigation in respect of any incidental matter and the consequent order which does not finally determine the original dispute.[10] It must be borne in mind that in this matter the application was brought as a fore-runner to possible judicial review proceedings. There is as yet no dispute between the parties over the merits of the assessment. The respondent sought reasons for the commissioner's decision to determine if it was assailable. It remains uncertain if the matter will proceed to the objection stage. And if further litigation should eventuate, it would have no bearing whatsoever on the order of the tax court. Another relevant fact is that the tax court cannot alter its order; it is, therefore, final in that regard. It follows from this that the application was not interlocutory but concerned other procedural matters, which brings the tax court's order squarely within the category of decisions contemplated in the latter half of s 83(13)(d).

[28] I believe it relevant too that it is now firmly established that matters involving procedural issues such as requests made in contemplation of future litigation, for example, for access to information under the Promotion of Access to Information Act 2 of 2000 or requests for decision-makers' reasons for administrative action under PAJA, such as in this case, may be

[10] *Bell v Bell* 1908 TS 887 at 890.

appealable.[11] Counsel for the respondent was unable to distinguish the present matter from these instances. I find, in all these circumstances, that the order granted by the tax court is appealable.

[29] Having come to the conclusion that the order was inherently appealable, there is a further problem relating to the order. The composition of the tax court was flawed and its order was thus not a valid decision. As indicated above, the matter was heard by the President of the tax court, sitting alone. Section 83(4) makes provision for the composition of the tax court and prescribes when the President may sit alone. It reads:

'Subject to subsection (4B), every tax court established in terms of this Act shall consist of a judge or an acting judge of the High Court, who shall be the President of the court, an accountant and a representative of the commercial community who shall be of good standing and who have appropriate experience: Provided that–

…

(c) when an appeal before the court involves a matter of law only or constitutes an application for condonation, the court shall consist of the President of the court sitting alone.'

[30] The question which then arises is whether the determination of whether the reasons furnished by the commissioner were adequate is a matter of law only. The answer is in the negative. The enquiry involved both questions of law and fact and should have been conducted by the Full Court in terms of s 83(4). The proceedings were, therefore, a nullity and the tax court's order is, for that reason, of no force or effect. To the extent that tax court rule 26(8) provides otherwise it must be ultra vires.

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[11] See, for example, *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA); *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA).

[31] There is another matter that requires comment – the manner in which the tax court dealt with the application. The sum of the court's reasoning, which follows a long narration of the factual background of the matter and the submissions made on behalf of the parties, is set out in a single sentence which reads:

'I am in agreement with the argument of the applicant and am consequently of the view that the respondent did not comply with the Rules in its response to applicant's request for reasons.'

[32] One understands that the court chose the argument that it found persuasive. But merely setting out that argument exhaustively is no substitute for the court's own reasoning, without which it is impossible to fathom why it decided as it did. The tax court's judgment – which, ironically, requires the commissioner to explain his reasoning process – whilst comprising 66 paragraphs covered in 32 typed pages, is as good as a bare order and quite meaningless. It did not tell the Commissioner in which respects the reasons were inadequate and the Commissioner was, accordingly, unable to know how to comply with the order. That is lamentable.

[33] The Constitutional Court recently reiterated the importance of a court's written reasons in the matter of *Strategic Liquor Services v Mvumbi NO*.[12] There, the court said:

'It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process. In *Botes and Another v Nedbank Ltd* [1983 (3) SA 27 (A) at 28], Corbett JA pointed out that "a reasoned judgment may well discourage an appeal by the loser":

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[12] 2010 (2) SA 92 (CC) para 15.

"The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this case, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order he did.'"

[34] The Constitutional Court then cautioned that a court's failure to furnish reasons for its decision may well violate the right of access to courts; a grave consequence. The court pointed out another critical consideration – that the rule of law obliges judges not to act arbitrarily and to be accountable, which they ordinarily do by giving reasons for their decisions, despite there being no express constitutional or statutory requirement to do so.[13] Providing reasons therefore serves several critical roles, including explaining to the litigants and the public at large, who have an interest in courts being open and transparent, why a case is decided as it is, thus curbing arbitrary judicial decisions, and provides guidance to the public in respect of similar matters.[14]

[35] In the result the appeal is upheld with costs of two counsel. Because the court below was not properly constituted the matter had to be struck from the roll. And because the application was in any event mischievous it is appropriate to make a costs order in terms of s 83(17)(b) of the Act. The order of the court below is accordingly substituted with the following:

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[13] Ibid in para 17.
[14] *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) para 12.

‘The application is struck from the roll with costs of two counsel (to the extent employed).’

MML MAYA
JUDGE OF APPEAL

APPEARANCES:

For appellants: Owen Rogers SC (with him Renata Williams SC)

Instructed by the State Attorney

For Respondent: TS Emslie SC (with him JL Van Dorstein)

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