THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20725/2014

In the matter between:

ANGLO PLATINUM MANAGEMENT SERVICES (PTY) LTD **APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN **RESPONDENT**

REVENUE SERVICE

Neutral Citation: *Anglo Platinum Management Services v SARS* (20725/2014) [2015] ZASCA 180 (30 November 2015)

Coram: Cachalia, Leach, Tshiqi, Pillay and Mbha JJA

Heard: **5 November 2015**

Delivered: **30 November 2015**

Summary: Income Tax Act 58 of 1962 – whether valid and binding salary sacrifice agreement achieved.

ORDER

On appeal from: Tax Court, Johannesburg (Mavundla J sitting with two assessors as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the Tax Court is set aside and replaced with the following:

'The appeal is allowed.'

JUDGMENT

Cachalia JA (Leach, Tshiqi, Pillay and Mbha JJA concurring)

[1] This appeal involves a salary sacrifice scheme whereby the appellant, Anglo Platinum Management Services (Pty) Ltd (the taxpayer), gave its employees an opportunity to participate in what it believed, and still believes, was a legitimate arrangement. The scheme involved its employees sacrificing or foregoing a portion of their cash remuneration 'packages' in return for their use of company-owned motor vehicles.

[2] The issue in the appeal is whether, for the years of assessment 2004 to 2008, the use of the motor vehicles ought to be taxed at a reduced scale as a taxable benefit under para *(i)* of the definition of 'gross income' in s 1 of the Income Tax Act 58 of 1962 (the Act) read with the Seventh Schedule, and para *(b)* of the definition of 'remuneration' in para 1 of the Fourth Schedule, as the taxpayer contends it should be, or on the normal scale under para *(c)* of the definition instead, which is how the

Commissioner assessed the taxpayer. The Commissioner raised an assessment of R11 543 041 after determining that the amounts the taxpayer allocated to the motor vehicle scheme did not qualify to be dealt with as a valid and binding salary sacrifice agreement as envisaged in para *(i)*.

[3] It is necessary to set out the legislative framework applicable to the dispute fully:

Paragraph *(c)* of the definition of 'gross income' in s 1 of the Act, upon which the Commissioner relies, includes:

'any amount, including any voluntary award, *received or accrued* in respect of services rendered or to be rendered or any amount . . . *received or accrued* in respect of or by virtue of any employment or the holding of any office:

Provided that –

(i) *the provisions of this paragraph shall not apply in respect of any benefit or advantage in respect of which the provisions of paragraph (i) apply.*'

Paragraph *(i)* of the definition of 'gross income' includes:

'the *cash equivalent*, as determined under the provisions of the Seventh Schedule, *of the value* during the year of assessment of any benefit or advantage granted in respect of employment or to the holder of any office, being a *taxable benefit* as defined in the said Schedule.' (My emphasis)

Paragraph 2 of the Seventh Schedule provides as follows:

'For the purposes of this Schedule and of paragraph (i) of the definition of 'gross income' in section 1 of this Act, *a taxable benefit shall be deemed to have been granted* by an employer to his employee in respect of the employee's employment with the employer, if as a benefit or advantage of or by virtue of such employment or as a reward for services rendered or to be rendered by the employee to the employer –

. . .

(b) the employee has been granted the right to use any asset . . . for his or her private or domestic purposes either free of charge or for a consideration payable by the

employee which is less than the value of such use, *as determined . . . under paragraph 7(4) or (7) in the case of a motor vehicle*.' (My emphasis)

Paragraphs 3(1) and (2) of the Seventh Schedule provide that:

'(1) The cash equivalent of the value of a taxable benefit shall, for the purposes of paragraph *(i)* of the definition of 'gross income' in section 1 of this Act, be determined in accordance with the provisions of this Schedule by the employer by whom the taxable benefit has been granted.

(2) The Commissioner may, if such determination appears to him to be incorrect, re-determine such cash equivalent upon the assessment of the liability for normal tax of the employee to whom such taxable benefit has been granted.'

Before para *(b)* of the definition of 'remuneration' in para 1 of the Fourth Schedule, which governed the employers' liability to withhold from and to pay employees' tax to the tax authority, was amended, it included within its ambit:

'any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered, including –

(a) any amount referred to in paragraph . . . *(c)* . . . of the definition of 'gross income' in section one of this Act;

(b) any amount required to be included in such person's gross income under paragraph *(i)* of that definition.'

[4] For present purposes the effect of these provisions is that where any amount is received or accrued for services rendered by virtue of any employment, it is included in the employee's gross income under para *(c)* and is thus fully taxable. However, the proviso in para *(c)* precludes any benefit, in respect of which the provisions of para *(i)* apply, from being dealt with as having been received or accrued for services in respect of any employment under para *(c)*. Paragraph *(i)* of the definition of 'gross income' includes the 'cash equivalent' as determined under the Seventh Schedule, of the value of any benefit or advantage – henceforth referred to simply as a benefit – granted to the employee as part of his employment. As I

have indicated, the benefit in issue in this case was the use of a company-owned motor vehicle.

[5] So, if the benefit meets the requirements of the definition of 'gross income' in para *(i)*, it, and not para *(c)* applies. The employer, who grants the benefit to the employee, must then determine the 'cash equivalent' of the value of the benefit according to the Seventh Schedule, and having done so, may withhold and pay employees' tax on the cash equivalent as determined.

[6] In this matter the taxpayer determined the cash equivalent of the motor vehicles and paid employees' tax on this amount. It is not an issue in this appeal that this determination was correctly done. What is in issue is whether the scheme constituted a valid and binding salary sacrifice arrangement that gave rise to a cash equivalent to be determined in accordance with the Seventh Schedule under para *(i)*.

[7] The Tax Court, in which Mavundla J presided, seems to have misunderstood the taxpayer's case to be that because it had devised a legitimate salary sacrifice scheme, which did not attract liability for income tax under para *(c)* of the definition of 'gross income', no tax liability on its part arose at all. It thus proceeded to adjudicate the dispute without considering whether the relevant paragraphs of the Seventh Schedule, para *(i)* of the definition of 'gross income', proviso *(i)* to para *(c)* and para *(b)* of the definition of 'remuneration' in the Fourth Schedule, applied. And, having overlooked these provisions, it seems to have approached the taxpayer's evidence on the unarticulated premise that the scheme was a sham, disguised to conceal its true nature. It consequently dismissed the taxpayer's appeal against the assessment and ordered the taxpayer to pay the costs of the appeal, implicitly finding that its grounds of appeal had been unreasonable.

[8] In this court, the Commissioner eschews reliance on the Tax Court's judgment. Instead he approaches the matter on a firmer and proper foundation that

in commercial practice and in the commercial world employers and employees are entitled to structure salary packages in a tax efficient manner. And that salary sacrifice arrangements, whereby employees sacrifice or forego a portion of their cash salaries in return for some quid pro quo or fringe benefit from the employer that reduces their tax liability, are perfectly lawful.

[9] In addition, the Commissioner does not contend that the scheme was a sham or disguised to appear to be genuine, whereas in truth it was not. In other words he does not invoke the substance over form doctrine. Instead his case is that the taxpayer and its employees did not achieve what they purported to achieve, namely, a valid and binding salary sacrifice agreement. And therefore, that the use of the vehicles, was, in reality, a consideration the employees received as part of their employment and formed part of their gross remuneration.

[10] It is a question of fact in each case whether a salary sacrifice agreement was achieved. In this regard a court is not concerned with the subjective belief of the parties to the agreement – no matter how genuine this belief may be – but with whether the facts, objectively viewed, establish that this result was attained.[1] It must thus consider the oral and documentary evidence to assess the probabilities. The taxpayer bears the burden of proving that the Commissioner's decision to disallow its objection to the assessments was wrong. And where, as in this case, the taxpayer's is the only oral evidence, it must be considered carefully in the light of the available documentary evidence before a court is able to conclude whether or not the taxpayer has discharged the onus.

[11] So, to succeed in this appeal, the taxpayer must establish, on the evidence of Mr Dolf Broodryk, who testified on its behalf, and the documents on which it relies, that a genuine salary sacrifice was concluded as a matter of fact. It would thus have to show that the employees' remuneration packages were structured in a manner

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[1] *Erf 3183/1 Ladysmith (Pty) Ltd & another v Commissioner for Inland Revenue* 1996 (3) SA 942 (A) at 950I-951C.

that they received their remuneration partly by way of cash and the balance by way of a fringe benefit; and that the taxpayer unconditionally assumed liability for payments and contributions for the motor vehicles that were part of the scheme, thereby releasing its employees from any such obligation. In other words by foregoing part of their remuneration package in return for the use of a motor vehicle, the employees divested themselves of their right to this amount of money. The implication of such divestment is that the amount would not have been received or accrued for services to be rendered by the employees as contemplated in para *(c)* of the definition of 'gross income'.

[12] I now consider the evidence. Mr Broodryk, who devised the scheme for the taxpayer, was taken through the documents and explained to the Tax Court how the scheme worked. The relevant documents are:

Policy and Procedures of the Motor Vehicle Scheme ('the policy document');

The Motor Vehicle Use Agreement ('the MVA');

The Notional Instalment Sale Agreement ('the NISA');

The Annual Total Package Allocation Agreement ('the AA');

The Notional Account.

[13] The employees, he explained, had to complete the AA indicating how they wished their 'cost to the company' remuneration packages to be structured flexibly as between cash and other benefits, which included the use of a motor vehicle. This choice was available to new and to existing employees when they were offered annual increases.

[14] Once an employee had chosen to participate in the scheme and had selected a vehicle of his choice, the taxpayer purchased it, and paid the dealer in cash. It then entered the vehicle in its asset register, and claimed depreciation on it. The vehicle

was registered in the employee's name, but the taxpayer owned the vehicle until the employee had settled the finance obligation and paid the related fringe benefit tax on it. The cost of the purchase was recovered from the employee through a monthly deduction – predetermined at the time he elected to participate in the scheme – from the portion of his salary he had to forego in return for the use of the vehicle.

[15] If this was all there was to the scheme there would have been no dispute between the taxpayer and the taxing authority regarding its efficacy. This is because the cost of the motor vehicle would have been deducted from each employee's monthly salary in return for its use. Under para 2 of the Seventh Schedule the taxpayer would thus be deemed to have given a taxable benefit to the employee. In terms of para 3(1) of the Seventh Schedule the taxpayer would then have determined the cash equivalent of the value of the motor vehicle as contemplated in para 7 of the Seventh Schedule, for the purposes of paragraph *(i)* of the definition of 'gross income'. This was correctly done in this case.

[16] It is the manner in which the scheme was implemented: in particular the entitlement of the employees to claim an amount of credit in the notional account, which I discuss below, and their contractual obligation to pay insurance premiums on the motor vehicles that lie at the heart of this dispute. The Commissioner contends that the entitlement to this credit and the obligation to pay the premiums are inconsistent with a genuine salary sacrifice scheme as, in substance, the employees retain their power over their salary packages.

[17] The method used to recover the cost of the motor vehicle, was the subject of considerable disagreement between the taxpayer and the Commissioner. The evidence was that the taxpayer and the relevant employees entered into a NISA, as envisaged in the policy document. This served as a mechanism whereby 'notional interest' on the amount paid to the car-dealer would be calculated over the period of the operation of the scheme, for example 48 months.

[18] In the Tax Court, the Commissioner contended that this agreement amounted to the taxpayer extending a credit facility to the employees, which was ultimately deducted from their monthly salary. But it is important to understand that the interest so calculated was not actual interest since the taxpayer had paid for the vehicle in cash. It was instead a theoretical calculation of what the vehicle would have cost the taxpayer had it purchased the vehicle on credit; hence the description of the interest as 'notional'. The taxpayer added this notional interest to the capital cost of the motor vehicle. Before us, the Commissioner, correctly in my view, did not persist with this contention.

[19] So, if the taxpayer had financed the vehicle through a finance house, instead of paying for it in cash, this amount – capital plus notional interest – would have been the 'real' cost. The taxpayer included this 'real' amount in the calculation of the salary sacrifice it recovered through monthly deductions from its employees' salaries.

[20] Mr Broodryk testified that the taxpayer prepared 'notional accounts' it sent to its employees who chose the taxable benefit of the use of their motor vehicles. These accounts, which I have indicated lie at the heart of this dispute, set out the 'optimal value' of the motor vehicle, defined as the 'theoretical representation' of the capital amount outstanding at the end of each month determined according to the reducing cap method. This was part of the methodology used to determine the actual value of the motor vehicle, taking into account the finance costs from the NISA. In addition to being represented as part of the capital cost of the motor vehicle, notional interest was recorded separately in the notional accounts.

[21] The accounts also detailed actual payments the taxpayer made for maintenance and running expenses, insurance premiums and licensing fees. These payments were debited to the notional account, as was the notional interest. The predetermined monthly deduction from the employees' salary appeared from month to month as a credit in the notional account.

[22] The evidence, both documentary and oral, was that, from time to time, there would be a shortfall in the notional account where the actual expenditure plus notional interest exceeded the amounts credited to an employee through the monthly deduction. Where this occurred, the outstanding amounts would be recovered from the employee. Where, however, the amount credited to the employee exceeded the expenditure, the policy allowed the employee to withdraw the money from the credit available once every quarter. Any amount so withdrawn was, subject to normal taxation, part of his gross income.

[23] What emerges from Mr Broodryk's evidence is that the notional accounts were for the taxpayer's internal recordkeeping – to keep track of the cost of providing the taxable benefit to its employees – and not for any other purpose. Its aim was to correlate the amounts that became available through the salary sacrifice with the taxpayer's own actual expenditure plus notional interest.

[24] In response to a question from the presiding judge in the Tax Court as to whether the accounts were fictitious, Mr Broodryk answered in the affirmative, which the Tax Court seems to have misconstrued as a concession that there was something untoward in their creation and management. The Commissioner vigorously contests the characterisation of these accounts as fictitious or notional. It was submitted on his behalf that the use of either of these terms was an unjustified gloss on the true role of both the NISA and the notional accounts because they were part and parcel of the exercise of calculating the *actual* amount that the employees – not the taxpayer – were required to pay each month to cover the costs of the scheme. The notional accounts, it was contended, therefore recorded real facts – not fictional amounts.

[25] Two of the 'real facts' so recorded were the insurance premiums for the vehicles debited to the notional account and the monthly amount overspent or underspent for each employee, as mentioned above. The Commissioner points particularly to these features of the scheme as being inconsistent with a genuine

salary sacrifice. It is therefore important to properly understand the evidence in this regard.

[26] There appears to be no dispute between the parties that the policy entitled each employee to withdraw the credit – the amount underspent – in the notional account every quarter. If the amount was not withdrawn it would be rolled over into the following month or quarter. At the end of the financial year this amount would be paid to the employee if there was still a credit balance subject, to normal income tax.

[27] Mr Broodryk's testimony in this regard was that the employee could elect whether or not to withdraw the money quarterly. Under cross-examination he was pressed to concede that what he referred to as an election was in truth a contractual right to claim the credit, which would be irreconcilable with an antecedent divestment of the right to the money making up the sacrificed portion. But Mr Broodryk stood his ground reiterating that the policy gave the employee an election, a response counsel for the Commissioner sought to stigmatise as being evasive.

[28] I accept that the employees had a right to claim any credit in accordance with the policy. The import of Broodryk's evidence was simply that they could elect not to claim it quarterly in which case they could still claim whatever credit remained at the end of the financial year. But the fact remains that the amounts that became available to be claimed quarterly were both unanticipated and insignificant simply because it was not possible to predetermine future running expenses and notional interest for the motor vehicles. The running costs varied from month to month and from employee to employee.

[29] And, as I have mentioned, when there were small amounts owing by employees, they paid in the difference, and conversely, they were entitled to claim the credit, subject to normal taxation, when such amounts were owed to them. In this way the taxpayer was able to ensure, as Mr Broodryk put it, that the cost of the

benefit (to the taxpayer) was 'in sync' with the predetermined amount that was allocated to the scheme. So, the fact that these insignificant and unanticipated amounts could (not would) become available to the employee in the future because of inevitable future adjustments to the predetermined cost of the benefit cannot and does not detract from the efficacy of the scheme.[2]

[30] One may test this by asking what the Commissioner's response would have been if the scheme was able to achieve a perfect symmetry between the cost of the benefit and the amount the employee gave up, which is what the scheme in substance sought to achieve? The answer is evident; he would have accepted that this was a genuine salary sacrifice. I see no reason why on the facts of this case we should come to a different conclusion.

[31] So, properly understood, the credit to which an employee became entitled when he elected to participate in the scheme was not unconditional. It was a contingent right, exercisable at a later date and on the occurrence of an uncertain future event: a quarterly credit balance in the notional account. If the event did not materialise there was no right to be exercised and until it was exercised there could not have been an accrual of this income as contemplated in para *(c)* of the definition of 'gross income'. The Commissioner's contention that the employees retained their right to claim such moneys 'on demand' and therefore did not unconditionally divest themselves of this right rests on the incorrect premise that the right had vested when the AA was concluded, whereas it was in truth a contingent right.[3]

[32] Similarly, in regard to the insurance premiums for the motor vehicles, counsel for the Commissioner attempted to demonstrate, by reference to the documents, that payments debited to the notional account were deducted from the employee's monthly salary and were not part of a salary sacrifice. In this respect the policy

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[2] Compare with *ITC* 1682 62 SATC 380 at 401E-F.
[3] See *Family Benefit Friendly Society v Commissioner for Inland Revenue* 1995 (4) SA 120 (T) 125A-C; *Mooi v Secretary for Inland Revenue* 1972 (1) SA 675 (A) 683F-H.

document provided that the employees had to insure their cars and the premiums would be reflected as having been deducted from their notional accounts. The MVA also said that employees would be liable for the payment of the premiums.

[33] But under robust cross-examination Mr Broodryk insisted that the taxpayer, and not the employees, was liable for the premiums; the employees only needed to ensure the premiums were paid. The taxpayer, he maintained, therefore assumed this obligation and paid for the premiums from the salary sacrifice. In this instance too, counsel for the Commissioner criticised his response harshly as being at odds with the documents.

[34] Again, I think the criticism of Mr Broodryk's evidence was unfair: First, the AA, which was the agreement confirming the employee's total package, specifically says that the taxpayer – not the employee – is liable for insurance costs. Secondly, Mr Broodryk's uncontested testimony was that the taxpayer assumed this obligation and paid for the premiums from the amount the employee had foregone. Thirdly, even though the documents appear to be equivocal as to whether the taxpayer or employee had this obligation, the parties implemented their agreements as Mr Broodryk explained they had done. In other words they intended the taxpayer to be liable for these costs, despite what some of the documents said. The Commissioner, who is a stranger to these agreements, cannot gainsay this evidence.[4]

[35] To conclude: the parties sought to fund a taxable benefit from a salary sacrifice. They were entitled to do so in accordance with the relevant provisions of the Act. And they achieved this through the scheme they agreed on and implemented. The following features of the scheme indicate that it was properly designed and implemented: The taxpayer purchased the motor vehicles, owned and claimed depreciation on them. The recovery of their total cost, including their running

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[4] *Rane Investments Trust v Commissioner, South African Revenue Service* 2003 (6) SA 332 (SCA) 346 para 27.

expenses was obtained from the salary sacrifice, not from the employees. In return for the amount they had foregone the employees received a taxable benefit; ie, the use of the vehicles.

[36] Neither the employees' right to claim a credit, which the Commissioner argued was inimical to an antecedent divestment of a right, nor the provisions of some of the agreements making the employees responsible for insurance premiums on the motor vehicles undermines the efficacy of the scheme. The credit claimable arose from a small unpredicted and unanticipated future contingency, and the insurance premiums were in fact paid for by the taxpayer. Therefore, the Commissioner's argument that the use of the vehicles was in reality a consideration received by each employee as part of their employment and thus taxable under para *(c)* of the definition 'gross income', as opposed to para *(i)* as a taxable benefit by virtue of a valid salary sacrifice, must fail.

[37] In the result the appeal is upheld. The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the Tax Court is set aside and replaced with the following:

'The appeal is allowed.'

A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For Appellant:	T S Emslie SC Instructed by: Webber Wentzel, Johannesburg Honey Attorneys, Bloemfontein
For Respondent:	D M Fine SC (with him H A Mpshe) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein