CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 208/17

In the matter between:

ALAN GEORGE MARSHALL N.O.	First Applicant
RENE PIETER DE WET N.O.	Second Applicant
KNOWLEDGE LWAZI MBOYI N.O.	Third Applicant
JOHN ANDREW DE BLAQUIERE MARTIN N.O.	Fourth Applicant
RAY SIPHOSOMHLE SITHEMBELE MSENGANA N.O.	Fifth Applicant
KOVIN SHUNMUGAN NAIDOO N.O.	Sixth Applicant
SAMSON MAKHUDU GULUBE N.O.	Seventh Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Respondent

Neutral citation: *Marshall and Others v Commissioner, South African Revenue Service* [2018] ZACC 11

Coram: Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgments: Froneman J (unanimous)

Decided on: 25 April 2018

Summary: Interpretation of statutes — value Added Tax Act — appropriateness of Judicial deference.

ORDER

On appeal from the Supreme Court of Appeal:

1. Condonation is granted for the late filing of the application for leave to appeal.
2. The application for leave to appeal is dismissed.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring):

[1] This is an application for leave to appeal against a decision of the Supreme Court of Appeal[1] on the proper interpretation of sections 8(5) and 11(2)(n) of the Value Added Tax Act.[2] The effect of the Supreme Court of Appeal decision is that the South African Red Cross Air Mercy Service Trust (Trust)[3] is not exempt from paying Value Added

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[1] *Commissioner, South African Revenue Service v Marshall NO* [2016] ZASCA 158; 2017 (1) SA 114 (SCA) (SCA judgment).

[2] 89 of 1991.

[3] On behalf of which the seven applicant trustees sought leave in this Court.

Tax (VAT) on payments it receives for actual services it renders to provincial health departments.

[2] In the course of coming to her conclusion on the proper interpretation of the relevant sections of the Act, Dambuza JA, writing for a unanimous court, referred to Interpretation Notes issued by the South African Revenue Services on 8 February 2013, setting out the VAT treatment of public authorities before and after April 2005.[4] She commented:

> "These Interpretation Notes, though not binding on the courts or a taxpayer, constitute persuasive explanations in relation to the interpretation and application of the statutory provision in question. Interpretation Note 39 has been in circulation for years and has not been brought into contention until now."[5] (Footnote omitted.)

The note accorded with the interpretation she gave to the relevant sections of the Act.

[3] The parties were invited to file written submissions on the extent to which a court may consider or defer to an administrative body's interpretation of legislation, such as the Interpretation Note, and whether the approach of the Supreme Court of Appeal was in accordance with this.

[4] The Trust contends that no consideration should have been given to the Interpretation Note. Once a dispute arises, the courts must independently determine the meaning of the legislation. To consider the Interpretation Notes as legally relevant to the proper interpretation of legislation would offend sections 9 and 34 of the Constitution in that it would give rise to unequal treatment of the litigating parties and fly in the face of the right to a fair hearing. In addition, the Trust argues that reliance on the Interpretation Note would offend the interpretative anti-taxation (*contra fiscum*)

[4] SCA judgment above n 1 at paras 31-33.

[5] SCA Judgment above n 1 at para 33.

rule;[6] is, in reality, inadmissible opinion evidence; is inconsistent with the analogous principle that the content of a regulation made under powers derived from a statute may not be relied upon as an aid to the construction of the statute itself; and is a relic of an outdated approach to interpretation, namely to seek to ascertain the subjective intention of the legislature rather than to adopt the proper purposive interpretation, which is concerned with the objective purpose of the legislation.

[5] The respondent submitted that a court may have regard to an administrative body's interpretation of legislation only to the extent that this interpretation constitutes evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for its administration, in order to tip the balance in the case of marginal statutory interpretation. The Supreme Court of Appeal first interpreted the relevant provisions independently of the Interpretation Note and its reference to it only served to confirm its interpretation.

[6] In *CSARS v Bosch*[7] Wallis JA stated:

> "There is authority that in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation. This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question. As such it would be a valuable pointer to the correct interpretation. In the present case the clear evidence that for at least eight years the revenue authorities accepted that . . . fortifies the taxpayers' contentions."[8] (Footnotes omitted.)

[6] The 'rule' indicates that, in cases of ambiguity, a taxation-imposing provision should be interpreted in favour of the taxpayer and against the fiscus or tax-collecting authorities.

[7] *Commissioner, South African Revenue Service v Bosch* [2014] ZASCA 171; 2015 (2) SA 174 (SCA) (*Bosch*)

[8] Id para 17.

[7] *Bosch* illustrates that evidence of the interpretive practice need not necessarily conflict with the *contra fiscum* rule, but that in all other respects, it accords with the approach taken by the Supreme Court of Appeal in this case. Is there any reason to re-examine an approach referred to with apparent approval almost a century ago in *Rex v Detody,*[9] and applied in varying degrees ever since?[10] I think so.

[8] In the course of holding in *Detody* that the pass laws under the then Transvaal Ordinance did not apply to females, Innes CJ made it clear that what was at stake was ascertaining the intention of the legislature[11] and that some weight must be accorded to custom in the interpretation of ambiguous legislation.[12]

[9] The rule thus originated in the context of legislative supremacy where statutory interpretation was aimed at ascertaining the intention of the legislature. In that particular context custom could "tip the balance" in cases of ambiguous legislation.

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[9] 1926 AD 198.

[10] See for example *Ellert v Commissioner for Inland Revenue* 1957 (1) SA 483 (A); *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* [1998] ZASCA 59; 1998 (4) SA 860 (SCA); *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice* [1999] ZASCA 72; 2000 (1) SA 113 (SCA); *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); *Master Currency (Pty) Ltd v Commissioner, South African Revenue Service* [2013] ZASCA 17; 2014 (6) SA 66 (SCA); and *Commissioner, South African Revenue Service v Bosch* [2014] ZASCA 171; 2015 (2) SA 174 (SCA).

[11] See *Detody* above n 9 at p 202:

> "But where the Court is satisfied that the Legislature did not intend that females should be so included then the statutory rule would not apply. It is all a question of intention."

[12] See *Detody* above n 9 at p 202-203:

> "It will be proper also to pay some regard to the manner in which the Ordinance in question and the law which preceded it upon the subject of native passes have been administered by successive Governments and succeeding sets of officials. Custom, of course, cannot prevail over the plain and unambiguous meaning of a statute, but where language is open to two constructions, then the fact that it has been uniformly read in one sense by those entrusted with the administration of the measure cannot be ignored. The *Civil Law* attached great importance to prior custom as a factor in the interpretation of statutes. . . . But the tendency of modern decisions is greatly to restrict the weight to be attached to contemporaneous exposition. . . . Yet some weight it must retain. . . . The weight to be attached to custom as an element in the construction of statutes was discussed by this Court in *Rex v Lloyd*, where it was remarked by Juta, JA, that when the language was capable of two constructions, then the fact *that it had been construed by all concerned* in a certain way ever since it came into operation, was an element to be considered and Mason, AJA, said in the same case that 'Where a statute may fairly be interpreted in either of two ways, *custom may well be invoked to tip the balance'*." (Emphasis added.) (References omitted.)

Bosch recognised that the rule had to be adapted to contextual statutory interpretation.[13] The rationale for relying on consistent interpretation by those responsible for the administration of legislation also changed from "custom" to the assistance that could be gained from their evidence in determining "the meaning that should reasonably be placed upon those words".[14]

[10] Missing from this reformulation is any explicit mention of a further fundamental contextual change, that from legislative supremacy to constitutional democracy. Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned,[15] but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided.

[11] The respondent submitted that the Supreme Court of Appeal in any event first interpreted the relevant provisions independently of the Interpretation Notes and that its independent interpretation is correct. I agree that an objective, independent interpretation of the relevant sections of the Act leads to the conclusion that the Supreme Court of Appeal came to. Section 7(1) of the Act attracts payment of VAT on actual

[13] *Bosch* above n7 at para 17

[14] Id.

[15] See the remark of Juta JA in *R v Lloyd*, quoted in n 12 above "that when the language was capable of two constructions, then the fact *that it had been construed by all concerned* in a certain way ever since it came into operation, was an element to be considered". The reference to subsequent contractual conduct made in *Bosch*, above n 7, in footnote 11 to para 17 does not necessarily assist in interpreting legislation through a constitutional lens either.

services supplied by vendors.[16] The deeming provision in section 8(5)[17] extends payment of VAT to services that are not covered by section 7(1). The designated entities to which section 8(5) applies are government-subsidised entities. A government subsidy is not an actual supply of services that attracts payment of VAT under section 7(1). Section 8(5) deems the subsidy to be a taxable supply subject to the payment of VAT. The zero rating provided for in section 11(2)(n)[18] assists only one of the designated entities covered by the deeming provision in section 8(5), namely welfare organisations.

[12] The Trust provides actual services to provincial departments in terms of its agreements with them, and is liable to payment of VAT on those actual services. Any

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[16] Section 7(1) states that:

> "Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax—
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> (*a*) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;
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> (*b*) on the importation of any goods into the Republic by any person on or after the commencement date; and
>
> (*c*) on the supply of any imported services by any person on or after the commencement date,
>
> calculated at the rate of 14 per cent on the value of the supply concerned or the importation, as the case may be."

[17] Section 8(5) states that:

> "For the purposes of this Act a designated entity shall be deemed to supply services to any public authority or municipality to the extent of any payment made by the public authority or municipality concerned to or on behalf of that designated entity in the course or furtherance of an enterprise carried on by that designated entity."

[18] Section 11(2)(n) states that:

> "(2) Where, but for this section, a supply of services, other than services contemplated in section 11(2)(*k*) that are electronic services, would be charged with tax at the rate referred to in section 7(1), such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where—
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> . . .
>
> (n) the services comprise the carrying on by a welfare organisation of the activities referred to in the definition of 'welfare organisation' in section 1 and to the extent that any payment in respect of those services is made in terms of section 8(5) those services shall be deemed to be supplied by that organisation to a public authority or municipality."

payment of subsidies to it by a public authority deemed to be taxable supply of services under section 8(5) is however subject to zero rating by virtue of the Trust being a welfare organisation under the Act.

[13] The application for leave to appeal was brought some ten months late, but the Trust sought to explain that by referring to its financial situation and change of legal representation. The respondent is not prejudiced. Condonation is granted.

[14] Nevertheless, the application for leave to appeal must be refused. As indicated the prospects of success are not good and it is not normally in the interests of justice to grant leave. In the end the application was made to advance the Trust's interests, which are ultimately directed to the public good. The interpretive issue was, despite the refusal of leave to appeal, worthy of this Court's attention. *Biowatch* accordingly applies.[19] There will be no costs order in this Court.

Order

[15] The following order is made:

1. Condonation is granted for the late filing of the application for leave to appeal.
2. The application for leave to appeal is dismissed.

[19] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at paras 23-4.

For the Applicants	DC Mpofu SC, TN Ngcukaitobi and R Naidoo instructed by Mathew Moodley & Associates Inc.
For the Respondent	AR Sholto-Douglas SC and H Cassim instructed by Mothle Jooma Sabdia Inc.