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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

CASE NO: 12508/02

2002-05-14

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 16/5/2002 SIGNATURE

In the matter between

DAVID C KING 1st Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE (SARS) Respondent

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JUDGMENT

DE VOS J: The first applicant, an adult businessman and director of companies, seeks urgent interim relief pending a revue application which he intends bringing against the respondent, the Commissioner for the South African Revenue Service.

The interim relief relates to the respondent's intention to file a statement with the Registrar in terms of Section 9(1)(b) of the Income Tax Act 58 of 1962 ("the Act") in respect of normal income tax,

additional income tax in terms of Section 76 of the Act in the amount of 200 per cent and interest on the deemed value of the first applicant's living expenses for the years 1998 to 2001. The effect of the Commissioner filing such a statement would be to elevate the Commissioner's claim in the amount of R16 783 670,25 cents to the status of a civil judgment.

According to the applicant the Commissioner would thereafter probably seek to execute such judgment and would then inevitably invoke Section 91(c) of the Act and institute sequestration proceedings against the first applicant. It is precisely because of this that the first applicant applied in terms of Section 88 of the Act to the Commissioner for the deferment of the payment of the additional taxes and interest on the value of his living expenses for the particular years. This application was refused. The first applicant now asks that the decision by the respondent to refuse the deferment be suspended pending the finalisation of the revue application.

Since approximately March 2000 an investigation was conducted by the respondent into the tax affairs of the first applicant. This investigation, *inter alia*, revealed that the first applicant, whilst he only declared a total amount of approximately R890 924,00 as income for the 1999 to 2001 income tax years, in fact received according the respondent, undeclared income in an amount of approximately R600 million. This resulted in the respondent issuing additional assessments for the particular period as well as an original assessment for the 2001 year of assessments. In terms of these assessments the first applicant is now indebted to the respondent in

an amount of approximately R900 million for normal tax, additional tax and interest. The respondent at this stage suspended the obligation to pay this amount, excluding a portion of just over R16 million thereof pending the finalisation of the first applicant's objection.

It needs to be stated that the investigation included an inquiry into the affairs during which the first applicant gave evidence. He gave particulars of his income for the years ending 28 February 2000 and 28 February 2001 and for a certain period thereafter which is not relevant here. He admitted that similar schedules which he made available to the respondent could be drawn up for the years prior to that but stated that, that had not been done. He further testified that he was entitled to receive a considerable income for the services he rendered to the second applicant in South Africa. He alleged however that the income as set out in the schedules which he gave to the respondent, was specifically agreed between himself and the second applicant to be for his services to the second applicant only for services rendered in foreign countries, and more particularly in relation to certain investments of the second applicant overseas. This was specifically agreed in order that, according to the first applicant, he would not be liable to pay income tax in South Africa.

The assessment that was raised by the respondent included not only the tax on the income in the amount of nearly R17 million but also additional tax and interest. According to a note that accompanied the assessment certain amounts are regarded by the respondent as undeclared income of the first applicant. One of these,

being Item 15, is called 'Living Expenses' and is just over an amount of R17 million. The note as far as the living expenses are concerned reads as follows:

> "Details for 2000 and 2001 provided by Mr King on the assumption that from 1990 to 1994 living expenses increased by 10% and by 25% from 1995 to 2000. The above amounts have been arrived at by a process of regression."

It is against this that the first applicant objected and applied for the deferment. The objection against the inclusion of the living expenses by the first applicant, or the relevant parts of the objection, read as follows:

> "1. During 1998 and as Ben Nevis' authorised representative, our client had procured significant profits for the investors in Ben Nevis. Accordingly at that stage Ben Nevis became prepared to make available significantly increased sums to support our client's lifestyle.
>
> 2. Without prejudice to our client's contention that he is not liable to tax on the value of living expenses, our client has instructed us to confirm that he is prepared to accept that the amounts of R1 761 714,00, R2 202 142,00, R2 752 678,00 and R3 661 664,00 in respect of the 1998 to 2000 years of assessment respectively, maybe deemed to be included in our client's gross income. Our client tenders to pay income tax at the prescribed rate in respect of these amounts.
>
> 3. Our client objects to the balance of the amounts being

included in his gross income. It is factually incorrect to assume as the Commissioner purports to do, that our client's living expenses for the years 1990 to 1997 can be derived from the level of his lifestyle during to 2000 and 2002. In the circumstances of this case there is no logical relationship between our client's lifestyle during the years 1990 to 1997 and his lifestyle thereafter. Our client's circumstances altered materially. During the years 1990 to 1997 our client's income from a source within, or deemed to be within the Republic, was adequately disclosed. Any further amounts utilised to defray living expenses did not constitute gross income as they were not from a source within or deemed to be within the Republic, in particular and without derogating from the generality aforesaid objection, the sums in question were not deemed to be from a source within the Republic by virtue of Sections 9(d) and 9(d) *bis,* of the Act. Because:

(i) The services rendered by our client by virtue of which the aforesaid amount were received were not in the carrying on in the Republic of any trade, and;

(ii) The services were rendered by our client outside the Republic but not for or on behalf of any employer by whom our client was employed in the Republic."

The normal tax as tendered by the first applicant and the interest thereon in terms of Section 89(qd) of the Act, amounts to an amount of R5 594 556,68. This amount in terms of the offer made by the first applicant, was payable by the 30 April 2002 but has at yet not been paid.

It is the respondent's contention that the first applicant has not complied with his duty to reflect the amounts as mentioned in his gross income and because it is now conceded by him, the respondent was entitled or fully justified to impose the 200 per cent additional tax on this particular amount. That is why the notice in terms of Section 9(1)(b) was sent.

The first applicant objected to the raising of the additional assessment in terms of Section 76 and the objection is set out as follows:

"1. Our client did not commit any act or omission as aforesaid with intent to evade taxation.

2. Our client's income tax returns were rendered by his wife and errors therein (which are in any even irrelevant for present purposes) only came to his intention at a much later stage once the Commissioner's representatives brought them to his attention.

3. Save for the omissions in respect of his living expenses for the years 1998 to 2001 the omissions from our client's returns did not effect the amount of tax for which our client was

properly chargeable, and;

4. There are extenuating circumstances which justified the remission of the additional tax. In this regard our client was advised by reputable professional advisors that his affairs were structured in such a way as to avoid South African income tax and that he was not liable for income tax beyond the amounts he in fact paid."

The respondent based his decision not to defer the payment of R16 million on the tender contained in the objection.

The first applicant now contends that because he has offered to pay the original tax based on the living expenses this does not mean that he admitted to the fact that originally these amounts should have been included in the gross income. It is therefore not for the respondent to charge additional tax and therefore the payment of the said amount should be deferred.

The requirements for the granting of interim interdicts are well-known and I only wish to point out to the one aspect and that is the right which is the subject matter of the main action and which an applicant seeks to protect by means of interim relief should be at least *prima facie* established, although open to some doubt. In this regard in the matter of *Knox D'Arcy Ltd v Jamieson* 1996 3 SA 348 (A) at 372E-C it was held that:

"It is sufficient for an applicant in interdict proceedings being *dente lite* as in this matter, to satisfy the Court that he had a reasonable prospect of success in the main action, although

there was no definite preponderance of probabilities in his favour."

The first question it seems to me, is therefore whether it can be said that in the papers before me that the first applicant has shown that he has a reasonable prospect of success to succeed with his objection, whether by way of a review, the original objection or an appeal against that part of the assessment that deals with his living expenses, namely Item 15 of the assessment. In this regard it should be noted that the principle 'pay now argue later' was approved as a general principle of our tax system and this is the case in many open and democratic societies. See *Metcash Trading Ltd v The Commissioner SARS* 2001 1 SA 1109 and more importantly paragraph 42 at page 1134 where the court said the following:

"The Act gives the Commissioner the discretion to suspend an obligation to pay. It contemplates therefore that notwithstanding the 'pay now argue later' rule there will be circumstances in which in will be just of the Commissioner to suspend the obligation to make payment of the tax pending the determination of the appeal. What those circumstances are will depend on the facts of each particular case. The Commissioner must however be able to justify his decision as being rational. The action must also constitute just administrative action as required by Section 33 of the Constitution and be in compliance with any legislation governing the review of administrative action."

The first applicant based its case on various grounds of review,

including the following:

"1. The decision by the Respondent is inconsistent by the evidence given by the First Applicant at the inquiry and is incompatible with the request for further information that the Respondent sent to the First Applicant after the objection was received. Furthermore, the decision is an abuse of the good faith tender of immediate settlement of normal tax on the deemed income and is glaringly inconsistent with the treatment with the balance of the amounts assessed to tax against the First Applicant. According to the First Applicant the only explanation for the differential treatment is the good faith tender which has been misunderstood and accordingly it is respectfully submitted on behalf of the First Applicant that the Commissioner has misdirected himself."

The matter was argued on this basis before me. As far as I am concerned however, all of this will make no difference if the first applicant does not have a prospect of success with his objection against Item 15 because in the end if it is found that he should have included the living expenses in his gross income, the respondent will be entitled to raise the assessment to the tune of approximately R16 million.

A careful examination of the first applicant's letters to the respondent when the original inquiry started, his evidence at the

inquiry itself, the objection and his affidavit in this application show in my view a distinct possibility that the first applicant will not succeed because the first applicant's version that the living expenses were paid for work done outside South Africa will not be accepted. There are various differences and discrepancies in the versions given by the applicant. To my mind there is not any probabilities in favour of the applicant that the objection as far as that particular item is concerned, will be upheld.

On that basis the application before me cannot succeed and the application is refused with costs.

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