Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: 26078/2010

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

CAPSTONE 556 (PTY) LTD Applicant

and

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICES First Respondent
THE MINISTER OF FINANCE Second Respondent

and

CASE NO: 8274/2011

In the matter between:

KLUH INVESTMENTS (PTY) LTD Applicant

and

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICES First Respondent
THE MINISTER OF FINANCE Second Respondent

JUDGMENT DELIVERED: 22 JUNE 2011

BINNS-WARD, J:

[1] The current proceedings comprise of two applications which were heard together pursuant to an order made by the Deputy Judge President, by agreement between the parties. In each application the substantive relief sought by the respective applicants - both of which are taxpayers with an assessed tax liability under the Income Tax Act 58 of 1962 ('the IT Act') - goes as follows:

2. Pending the [determination of] Applicant's appeal, dated ..., [to the special tax court established in terms of s 83(2) of the IT Act] against the adjustments made in respect of its [YYYY] year of assessment, [an order that] First Respondent is interdicted and restrained from taking any steps to enforce payment of the tax amount, including but not limited to the following:

   2.1 taking judgment against the Applicant and filing a certificate with the Registrar of Court in order to attach the Applicant's assets;

   2.2 attaching the bank account of the Applicant and removing monies therefrom; and

   2.3 taking any steps against the public officer of the Applicant.

3. In the alternative to paragraph 2 above, pending the review of the First Respondent's decision purportedly taken in terms of section 88 of the Income Tax Act 58 of 1962 (*"the ITA"*), to refuse to suspend the obligation to pay the tax amount of Rxxx in respect of the adjustments made in respect of the YYYY year of assessment and the review of the constitutional validity of sections 82 and 88 of the ITA, [an order that] First Respondent is interdicted and restrained from taking any steps to enforce payment of the tax amount, including but not limited to the following:

   3.1 taking judgment against the Applicant and filing a certificate with the Registrar of Court in order to attach the Applicant's assets;

   3.2 attaching the bank account of the Applicant and removing monies therefrom;

   3.3 taking any steps against the public officer of the Applicant;

provided that if the review proceedings are not instituted within 10 days after the date of this order, the interdictory relief granted shall lapse.[1]

The relief has been sought because the Commissioner of the South African Revenue Service, who is the first respondent in both matters,[2] has refused the taxpayers' request that he should direct that the obligation on them to pay the assessed tax should be suspended pending the determination of the appeals noted against the assessments.

[2] The concept of 'pay now, argue later' understandably does not rest easily with taxpayers who find themselves in dispute with the revenue authorities in respect of the amount of tax which the authorities are determined is exactable from them. It is, however, a concept applied in the taxation dispensations of many countries in the world.[3] The legality of the concept survived scrutiny by the Constitutional Court in the context of this country's Value-Added Tax Act 89 of 1991 ('the VAT Act'), when a taxpayer sought to impugn the legislation in terms of which it is applied, contending it to be incompatible with s 34 of the Bill of Rights. See *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* 2002 (4) SA 317 (CC); 2002 (5) BCLR 454.

[3] The provisions under consideration in *Metcash* were those of ss 36(1), 40(2)(a) and 40(5) of the VAT Act. The judgment of the Constitutional Court

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[1] The notice of motion in case no. 8274/11 included an additional paragraph amplifying the relief quoted from paragraph 2.1 of the notice of motion in case no. 26078/10 in a respect that is not material for present purposes. The tax years involved in the two cases also differ, but that is also not material.

[2] The second respondent in both matters is the Minister of Finance. No relief is sought against the Minister, who abides the judgment of the court.

[3] See *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 fn. 93 at para 61.

in *Metcash* was written by Kriegler J. The learned judge summarised the import of those provisions thus:

> In substance section 36(1) of the Act says that upon assessment by the Commissioner for the South African Revenue Service (the Commissioner), and notwithstanding the noting of an "appeal", a taxpayer is obliged to pay the assessed tax, called value added tax (VAT) plus consequential imposts there and then, possible adjustments and refunds being left for dispute and determination later. Concomitantly the other two impugned provisions of the Act empower the Commissioner to exact summary payment of the assessed amounts: section 40(2)(a) empowers the Commissioner, where payment of an assessment is overdue, to file a statement at court which has the effect of an exigible civil judgment for a liquid debt; and subsection (5) puts the correctness of the assessment beyond challenge in such execution.[4]

[4] The provisions in the VAT Act which the taxpayer in *Metcash* sought to impugn have direct equivalents in the IT Act. Section 88 of the IT Act mirrors s 36 of the VAT Act in all material respects; as does s 91(1)(b) of the IT Act, s 40(2)(a) of the VAT Act; and s 92 of the IT Act, s 40(5) of the VAT Act.[5] Section 91(1)(b) of the IT Act provides:

> If any person fails to pay any tax or any interest payable in terms of section 89(2) or 89*quat* when such tax or interest becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount of the tax or interest so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.

Section 89 of the IT Act determines when assessed tax becomes payable. It provides:

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[4] *Metcash* supra, at para 1.
[5] In *Metcash* supra, at para 44, Kriegler J observed '*it is evident .... that the drafters of the* [VAT] *Act borrowed freely from the Income Tax Act, the terminology of which is frequently echoed*'.

(1) Subject to the provisions of section eighty-nine *bis* any tax chargeable shall be paid on such days and at such places as may be notified by the Commissioner or as specified in this Act, and may be paid in one sum or in instalments of equal or varying amounts as may be determined by the Commissioner having regard to the circumstances of the case.

(2) If the taxpayer fails to pay any tax in full within the period for payment notified by the Commissioner in the notice of assessment or within the period for payment prescribed by this Act, as the case may be, interest shall, unless the Commissioner having regard to the circumstances of the case grants an extension of such period and otherwise directs, be paid by the taxpayer at the prescribed rate on the outstanding balance of such tax in respect of each completed month (reckoned from the date for payment specified in the notice of assessment or the date on which the tax has become payable in terms of this Act, as the case may be) during which any portion of the tax has remained unpaid.

[5] Both s 36 of the VAT Act and its equivalent, s 88 of the IT Act, make the obligation on the taxpayer to make payment of the tax chargeable before the determination of any appeal against the relevant assessment subject to the power of the Commissioner to direct otherwise.

[6] Immediately prior to its substitution, with effect from 1 February 2011, in terms of s 13(1) of the Taxation Laws Second Amendment Act 18 of 2009, s 88 of the IT Act[6] provided, insofar as currently relevant:

(1) The-

(a) obligation to pay any tax chargeable under this Act shall not; and

(b) the right to receive and recover any tax chargeable under this Act, shall not, unless the Commissioner so directs,

be suspended by any appeal or pending the decision of a court of law under section 86A, but if any assessment is altered on appeal or in conformity with

[6] The 'long legislative history' of s 88 of the IT Act, going back to s 85 of the Income Tax (Consolidation) Act 41 of 1917, is reviewed by Corbett JA in *Commissioner for Inland Revenue v NCR Corporation of South Africa (Pty) Ltd* 1988 (2) SA 765 (A) at 774C – 775C.

any such decision or a decision by the Commissioner to concede the appeal to the tax board or the tax court or that court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate, the interest being calculated from the date proved to the satisfaction of the Commissioner to be the date on which that excess was received and amounts short-paid being recoverable with interest calculated as provided in section 89.

(2) ....

(3) .....

As from 1 February 2011, that part of s 88 of the IT Act which is currently relevant has provided as follows:

(1) Unless the Commissioner otherwise directs in terms of subsection (4)[7]-

(a) the obligation to pay any tax chargeable under this Act; and

(b) the right to receive and recover any tax chargeable under this Act,

shall not be suspended by any objection or appeal or pending the decision of a court of law under section 86A.

(2) A taxpayer may request the Commissioner to suspend the payment of any tax or a portion thereof due under an assessment where the liability to pay that tax is disputed.

(3) The Commissioner may suspend payment of the disputed tax having regard to-

(a) the compliance history of the taxpayer;

(b) the amount of tax involved;

(c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension;

(d) whether the taxpayer is able to provide adequate security for the payment of the amount involved;

(e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;

(f) whether sequestration or liquidation proceedings are imminent;

[7] The reference to subsection (4) is obviously a drafting error and falls, in context, to be read as a reference to subsection 3.

(g) whether fraud is involved in the origin of the dispute; or

(h) whether the taxpayer has failed to furnish any information requested by the Commissioner in terms of this Act for purposes of a decision under this section.

(4) The Commissioner may deny a request in terms of subsection (3) or revoke a decision to suspend payment in terms of that subsection with immediate effect whenever he or she is satisfied that-

(a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;

(b) the taxpayer is employing dilatory tactics in conducting the objection or appeal;

(c) on further consideration of the factors contemplated in subsection (3), the suspension should not have been given; or

(d) there is a material change in any of the factors described in subsection (3), upon which the decision to suspend the amount involved was based.

(5) Where any assessment is altered in accordance with-

(a) an objection or appeal;

(b) a decision by a court of law under section 86A; or

(c) a decision by the Commissioner to concede the appeal to the tax board or the tax court or that court of law,

a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by the Commissioner to the date the refunded tax is paid, and amounts short-paid being recoverable with interest calculated as provided in section 89.

[7] Subsection (1) of s 13 of Act 18 of 2009 set out the provisions that have been substituted for the previous version of s 88 of the IT Act, and subsection (2) provided, as follows, for their coming into operation and for the consequences of the substitution on suspensions already granted:

> Subsection (1) shall come into operation on a date to be determined by the Minister of Finance in the Gazette [1 February 2011] and will apply to all amounts payable by or to the Commissioner on or after such date, and where payment was already suspended on such date, that suspension will lapse on the earlier of the expiry date thereof or six months from the date so determined by the Minister.

[8] It has been necessary to set out the relevant provisions of s 88 of the IT Act as they read before and after 1 February 2011 because it is in issue between the parties whether the substituted provisions constituted a substantive amendment of the previously subsisting provisions of the section, or merely amounted, to the extent currently relevant, to a textual or expositionary adjustment.[8] In this regard it needs to be noted that the long title to Act 18 of 2009 described the amending statute as being an Act '[T]o [amongst other matters] *amend the Income Tax Act, 1962, so as to insert new provisions; to amend the calculation of interest; to amend a definition; and to effect textual and consequential amendments*'.

[9] The considerations underpinning the 'pay now, argue later' concept include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes. There are material differences distinguishing the position of self-regulating vendors under the value-added tax system and taxpayers under the entirely revenue authority-regulated income tax dispensation. Thus the considerations which

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[8] The purpose of expositionary legislation is not to alter the effect of an existing statutory provision, but merely to express it more clearly and to put its meaning and effect beyond debate. Cf. e.g. *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) at para 66; *Patel v Minister of the Interior and Another* 1955 (2) SA 485 (A) at 493A-F. It is therefore merely textual in effect.

persuaded the Constitutional Court to reject the attack on the aforementioned provisions of the VAT Act in *Metcash* might not apply altogether equally in any scrutiny of the constitutionality of the equivalent provisions in the IT Act. In this respect I have the effect of the 'pay first, argue later' provisions pending the determination of the Commissioner of an objection (as distinct from pending the determination by the Tax Court of an appeal) to an income tax assessment particularly in mind as an aspect that might well receive a different treatment if challenged, particularly in the context of the fundamental right to administrative justice. The current cases do not, however, require a consideration of whether, and, if so, to what extent the approach in *Metcash* to the provisions of the VAT Act might fall to be adapted in the context of the provisions of the income tax legislation – in particular, because the relief currently sought is asked for pending the determination of income tax appeals, the taxpayers' objections to the assessments in question having already been dismissed.

[10] The ameliorating effect of the Commissioner's power to suspend the operation of the 'pay now, argue later' provision in circumstances considered by him or her to be appropriate was regarded by the Constitutional Court as one of the factors that justified the provisions of s 40(5) of the VAT Act, even if they do constitute a limitation of the rights afforded in terms of s 34 of the Bill of Rights.[9] The same considerations would apply in respect of s 92 of the IT Act.

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[9] See *Metcash* supra, at para 62.

[11] The exercise of the power to grant a suspension in terms of s 88 of the IT (which, conceptually, includes any decision by the Commissioner to refuse a request by a taxpayer to exercise it, or to cancel any suspension previously granted) constitutes administrative action within the meaning of s 33 of the Constitution and of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). Any decision by the Commissioner in the exercise of the power is accordingly susceptible to judicial review in terms of s 6 of PAJA; cf. *Metcash* supra, at para 42.[10]

[12] There are relevant differences between the factual circumstances in which the two applications were brought and it is therefore necessary to summarise them individually.

The facts in case no. 26078/10

[13] The taxpayer in case no. 26078/10 was informed by the Commissioner in February 2010 that, consequent upon a tax audit, the Revenue Service proposed to reassess the taxpayer's income tax liability in respect of the YYYY tax year. The proposed reassessment went to the characterisation of the proceeds of certain shares realised by the taxpayer as revenue rather than capital and the disallowance as deductions from income of certain expenses incurred in connection with the relevant share transaction. After considering the taxpayer's response to its proposals, SARS issued a notice of assessment on 31 March 2010 imposing certain tax adjustments which resulted in an amount of income tax becoming payable. On 17 May 2010 the

[10] *Metcash* was decided before the enactment of the Promotion of Administrative Justice Act.

taxpayer lodged an objection to the assessment, in terms of s 81 of the IT Act. The taxpayer included a request for suspension in terms of s 88 of the IT Act of its obligation to pay the assessed tax in its letter of objection. It is not altogether clear from the objection letter whether the suspension of the obligation to make payment was sought pending the determination of the objection, or pending the exhaustion of all internal remedies, including an appeal to the special tax court. The objection was disallowed in terms of a letter from SARS dated 21 June 2010. There was, however, no response from SARS of any kind to the request made for a suspension in terms of s 88 of the IT Act.

[14] By a letter from its attorneys, dated 2 August 2010, the taxpayer noted an appeal in terms of s 83 of the Act to the special tax court against the assessment. The appeal is yet to be heard. I was informed by counsel that it is hoped that arrangements can be made for the hearing of the appeal in October this year, but as of the date on which the applications were heard by me at the end of May 2011, that was by no means certain. On 17 November 2010, SARS wrote to the taxpayer informing it that unless the tax in dispute, including interest thereon at the prescribed rate, was paid within 14 days a statement would be filed in terms of s 91(1)(b) of the IT Act and a warrant of execution issued against the taxpayer without further notice.

[15] The taxpayer responded to SARS's demand for payment by way of a letter from its attorneys, also dated 17 November 2010. In this letter it was contended that SARS had undertaken in a telephone conversation between

one of its officials and the taxpayer's attorney that it would revert on the request for a suspension of the taxpayer's obligation to make payment, but had failed to do so. The letter proceeded:

> 5. It is submitted that any attempt by SARS to obtain judgment in the circumstances described above will be contrary to section 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and be subject to review.
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> 6. In a recent judgment [since reported as *Mokoena v Commissioner, South African Revenue Service* 2011 (2) SA 556 (GSJ)] the South Gauteng High Court held that:
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> > *"It is self-evidently incompetent, having regard to the rights of objection and appeal, to obtain judgment in the interim. It is inconsistent with the framework of the Act and its provisions, e.g. the express right to collect tax despite an objection and appeal would be unnecessary if judgment could be obtained in the interim."*
>
> 7. ...
>
> 8. We therefore request that you withdraw your letter of demand dated 17 November 2010, proceed with our request for deferment of payment and thereafter to advise us of the outcome of your decision.

[16] A further exchange of correspondence ensued, with SARS maintaining that a suspension could only be considered pending the determination of an objection and then, when the fallaciousness of that contention was pointed out by the taxpayer's attorneys, indicating that a further request for suspension for payment was required subsequent to the disallowance of the objection. When SARS failed to give the taxpayer the assurance that it would not enforce payment pending the determination of the pending appeal to the Tax Court, the taxpayer instituted proceedings as a matter of urgency for interim prohibitory interdictal relief pending either the determination of the appeal or

the determination by the Commissioner of the taxpayer's request for a suspension of payment obligation until the determination of the appeal. The urgency was resolved by the making (by Griesel J) of a holding order by agreement between the parties. The holding order postponed the application to 10 February 2011 and recorded that the Commissioner would suspend the taxpayer's payment obligation until that date. The order also recorded an undertaking by the taxpayer not to dissipate its assets, or otherwise negatively alter its financial position pending the determination of the tax appeal. The order furthermore directed the taxpayer to furnish the Commissioner with (a) its most recently available financial statements and (b) '*full and complete details regarding any security which* [the taxpayer] *may wish to tender to secure its potential tax liability to* [the Commissioner] *so as to enable* [the Commissioner] *properly to consider the* [taxpayer's] *request in terms of s 88(1) of* [the IT Act] *for the suspension of the obligation to pay assessed tax pending the outcome of the appeal lodged by the* [taxpayer] *against the* [YYYY] *assessment*'. Costs were stood over.

[17] When the matter came before court on 10 February 2011, the order described above was extended pending the hearing of the application on the opposed motion roll on papers to be exchanged in accordance with a determined timetable. The postponement of the application on that basis was precipitated by the decision of SARS, communicated to the taxpayer on 7 February 2011, to decline the taxpayer's request for a suspension of payment pending the determination of the tax appeal.

The facts in case no. 8274/11

[18] In this matter SARS issued the taxpayer with revised assessments in respect of the [YYYY], [YYYY] and [YYYY] years of assessment. The taxpayer lodged an objection to the revised assessments on 23 September 2010 and requested a suspension of its obligation to make payment until the objection, or, if necessary, any subsequent appeal had been determined. SARS subsequently disallowed the objection and informed the Applicant accordingly in a letter dated 19 November 2010. It would appear that the taxpayer's request for a suspension of payment obligation was renewed pending the determination of an appeal. By letter dated 20 December 2010, SARS granted the suspension. The suspension was granted subject to the lodging of the appeal within the prescribed time, and also subject to the condition that it might '*be reviewed at any time*'.

[19] Correspondence addressed by SARS to the taxpayer's attorneys in late January 2011 suggested that SARS had reconsidered its grant of a suspension of payment and required the provision of security against its continuance. There is an indication that the issue was to be discussed at a meeting to be held between representatives of the respective parties in counsel's chambers in February 2011. A meeting was convened, but what transpired there in the sense relevant to the current matter is a matter of dispute. The impression that SARS had in principle determined to withdraw the suspension was confirmed when SARS, in a letter dated 3 March 2011, demanded payment of the tax chargeable in terms of the revised assessment.

The demand gave rise to the institution of proceedings (under case no. 5709/11) for a prohibitory interdict. The application came before court as a matter of urgency on 17 March 2011. It was withdrawn after SARS withdrew its letter of demand and agreed to pay the taxpayer's costs. In its answering affidavit in the current proceedings SARS sought to explain the course of events by averring that the demand had been withdrawn because it had not yet reviewed or reconsidered its earlier decision to grant the suspension.

[20] Thereafter, on 29 March 2011, SARS wrote to the taxpayer's attorneys stating in material part:

> The decision on the suspension of payment of tax has been reviewed after receiving copies of the financial statements for the year ended 31 December 2010.
>
> You are hereby advised that on review, the decision to suspend payment is now denied. (sic)

The taxpayer points out in its founding papers that the financial statements referred to by SARS were those which had been provided by the taxpayer in case no. 26078/10 on 15 March 2011 in respect of its request for a suspension of payment obligation. The Commissioner denies this averring that the both taxpayers are represented by the same attorneys and alleging that the statements were submitted on the taxpayer in case no. 8274/11's behalf subsequent to discussions held at the February meeting mentioned earlier. It is not in dispute, however, that the financial statements considered by SARS were the taxpayer's and not those of the other party. There was also no complaint by the taxpayer's attorneys about the content of a letter

addressed to them by SARS dated 16 March 2011 recording, amongst other things, the receipt by it from the attorneys of the relevant financial statements on behalf of the taxpayer in case no. 8274/11.

[21] SARS provided reasons for its decision in a letter to the taxpayer's attorneys, dated 4 April 2011. The attorneys responded to SARS's letters of 29 March and 4 April, on 8 April. They indicated the taxpayer's intention to approach court urgently for interim relief. The letter contained proposals for the appeals of the taxpayers in both matters which have now come before me to be set down and determined on an expedited basis and for any court proceedings that might require determination also to be heard together.

The applicant's main submissions in case no. 26078/10

[22] At the hearing, the applicant's counsel - without abandoning the submissions in the heads of argument filed earlier in compliance with this court's practice notes - relied principally on the argument set out in supplementary heads of argument handed up in court. The first argument advanced was that because the taxpayer's request for a suspension of its payment obligation had been made before s 88 of the IT Act was substituted, the Commissioner's power to determine the request could be exercised only under the previously subsisting provisions of the section. The applicant's counsel argued that the Commissioner's power to determine the request had disappeared along with the previous version of the section on 1 February 2011. The argument proceeded that the Commissioner's powers under the current version of s 88 vested only in respect of requests for payment

suspensions submitted on or after 1 February 2011. It concluded with the submission that the tax payable in terms of the contested revised assessment could not be exacted from the taxpayer while its request for a suspension remained undetermined. As the power to determine it had been removed by reason of the substitution of the section, the taxpayer therefore enjoyed the advantage of the Commissioner's failure to make a decision before 1 February 2011, and could not now be subject to the IT Act's payment enforcement measures, including s 91(1)(b). The Commissioner, so said the applicant's counsel, had only himself to blame for not acting expeditiously before the effective removal of the old s 88 from the statute book.

[23] That the legislature could have intended such fortuitousness to attend the determination of a taxpayer's exemption from the generally applicable obligation to pay now and argue later is inherently most unlikely. Counsel, however, sought to press upon the court that the consequence contended for followed clearly upon a proper construction of s 13 of Act 18 of 2009, in terms of which the substitution of s 88 of the IT Act had been effected. Counsel relied in particular on the provisions of s 13(2) of the amending Act.[11]

[24] The applicant's counsel argued that it would be prejudicial to the applicant if its request for a suspension of its obligation to pay were determined under the current provisions of s 88 of the IT. It was submitted in this connection that whereas the version of s 88 that was in operation when the request had been submitted required the Commissioner to consider the prospects of success of the intended appeal, the current version did not.

[11] The provisions have been quoted above, at para [7].

Counsel sought support for this argument in the absence of any reference to a consideration of the merits of the appeal in the list of factors in s 88(3) of the IT Act to which the Commissioner is enjoined to have regard in determining a request from a taxpayer for a suspension of the obligation to pay.

[25] A further argument, apparently advanced in the alternative to the argument that the Commissioner's power to determine the request for suspension submitted prior to 1 February 2011 has fallen away with the removal of the old section from the statute book, was that the taxpayer's request had to be decided under the old section (which for such purposes continued to operate alongside the current version) and that the purported determination by SARS of the request under the current provision was therefore invalid. This argument culminated in the contention that because the request had thus not yet been validly determined, payment of the assessed tax was not exigible.

[26] It was also argued that the taxpayer was in any event entitled to an interdict prohibiting the Commissioner from implementing the enforcement measures provided in terms of s 91(1)(b) of the IT Act against the applicant while its appeal to the special tax court was still pending. In this regard the taxpayer relied on the dictum at para 16 of the judgment of Spilg J in *Mokoena v Commissioner for South African Revenue Service* 2011 (2) SA 556 (GSJ), which had been quoted in the section of the taxpayer's attorneys' letter set out in para [15], above.

Evaluation of the applicant's main submissions in case no. 26078/10

[27] In my judgment there is no merit in the arguments advanced on behalf of the applicant that have just been described.

[28] The provisions of s 13(2) of Act 18 of 2009 make it plain that the provisions of the substituted s 88 of the IT Act are to apply to any determination of a request for suspension of payment obligation made by the Commissioner on or after 1 February 2011. This follows because the subsection expressly states that the provisions of the section in its current form '*will apply to all amounts payable by or to the Commissioner on or after such date*'. The assessed tax in respect of which the applicant requested a suspension of its obligation to make payment is undeniably an amount that was payable to the Commissioner on 1 February 2011. Absent the intervention of an incident like extinctive prescription, an amount that was payable to the Commissioner on 31 January 2011, but which was not settled before midnight on that date, remained so payable on 1 February 2011. It therefore matters not that the request for the suspension was submitted before 1 February 2011.

[29] A request for the suspension of the obligation to make payment does not detract from nature of the assessed tax in question as payable. If the amount in question were not payable an obligation to make payment would not exist and any request for its suspension would be nonsensical. Furthermore, the mere submission of a request for a suspension does not alter the position. It might well be that pending the determination by the

Commissioner of a *bona fide* request for the suspension of an obligation to make payment, it would be grossly unreasonable, and therefore unlawful, for the Commissioner to avail of any of the enforcement measures available under the IT Act to exact payment, but even so, any such contingent fetter on the Commissioner's right to enforce payment would not detract from the fact that the assessed tax had become payable on the date determined in terms of the IT Act, and remained so. That any suspension granted by the Commissioner, whether under the previous, or under the current, version of s 88, could, and can, be unilaterally withdrawn (a matter I shall discuss in detail later) highlights that a suspension goes to exigibility, not payability.

[30] The current provision deals discretely with requests that had been positively determined by the Commissioner before 1 February 2011. Any suspensions granted before that date will lapse on the earlier of the expiry date thereof or on 1 August 2011, being six months from 1 February 2011.

[31] No prejudice is occasioned to a taxpayer which had submitted its request for a suspension before 1 February 2011 by the incidence of the current version of s 88 of the IT Act in the determination of the request, rather than its predecessor on the statute book. In my view the current version of the provision is, in the respects that are relevant, just a more explicitly expressed iteration of the Commissioner's powers under the previously subsisting version of the section. The itemised prescription of the factors to which the Commissioner is enjoined to have regard in the current version makes the manner in which the power must be exercised more transparent

and thereby, if anything, potentially facilitates the taxpayer's ability to challenge the exercise of the power on review, if so advised. I have difficulty, however, conceiving that the Commissioner would not have had regard to some or all of the factors listed in the current version of s 88(3) when making a determination under the previous version of the section. Indeed, somewhat ironically - in the context of the contentions now advanced on the taxpayer's behalf before this court - the applicant's attorneys acknowledged as much in correspondence with SARS before the commencement of the current version of s 88. In the letter of 17 May 2010 written on the taxpayer's behalf, which was referred to earlier,[12] its attorneys made the following observation (at para 34) in the course of motivating the taxpayer's request for a suspension of payment obligation: '*The amended version of section 88 has not yet come into effect. However, on the understanding that subsections 88(3) and (4)* [of the version then still to be introduced] *set out the current practice of the Commissioner, we briefly note the below the application of these principles in the current circumstances.*' The allegation as to the Commissioner's 'practice' under the old s 88 at the relevant time is repeated in the applicant's founding affidavit.

[32] The previous version of s 88 did not expressly enjoin the Commissioner to have regard to the merits of the appeal when determining a request for a suspension of payment. By contrast, the current version of the section expressly refers to the merits of the appeal as a relevant consideration. That follows from the provision in subsection (4) which authorises the

[12] See para [13], above.

Commissioner to refuse a request if he or she is satisfied that the appeal is frivolous or vexatious. I have no doubt, however, that the Commissioner would always have refused a request under the old s 88 if he thought that the taxpayer's appeal was frivolous or vexatious.

[33] For the reasons just discussed, the alternative argument that the determination of the request - made as it was in terms of the current provisions of s 88 - was invalid because the request fell properly to be decided under the earlier version of the provision must also fail. In my view, the substitution of the new s 88 for its predecessor was, in the respects currently relevant, merely expositionary in effect.

[34] Turning then to address the applicant's reliance on the judgment *Mokoena*'s case: That matter concerned an application by a taxpayer for the rescission of what was referred to as having been a 'judgment'[13] taken by the Commissioner against the taxpayer in terms of s 91(1)(b) of the IT Act. There was no appearance on behalf of the Commissioner in the proceedings and the learned judge (Spilg J) was thereby deprived of the benefit of argument in the case from any perspective other than that of the applicant. The applicant in *Mokoena* had been the recipient, in April 2004, of an additional assessment in terms of which he became obliged to pay an amount in income tax. He formally objected to the additional assessment. Thereafter, and apparently

[13] I have set the word 'judgment' within inverted commas advisedly because, while a statement filed in terms of s 91(1)(b) has all the effects of a judgment, it is, in itself, not a judgment, properly so called. This is so even though the effects of the filed statement might, in subsequent proceedings, be addressed as if there had been a judgment. See *Kruger v Commissioner for Inland Revenue* 1966 (1) SA 457 (C) at 462A and *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A) at 411H-413E. (In both the aforementioned judgments the word 'judgment' or 'vonnis' in the relevant sense was also expressed between inverted commas.)

without any notice to the taxpayer, the Commissioner filed a statement in terms of s 91(1)(b) with the registrar of the High Court. It is not clear from the judgment if a warrant of execution was ever issued on the strength of the statement, but, as will appear, the context suggests probably not. The Commissioner subsequently upheld the taxpayer's objection in 2007, but neglected until March 2010 to file a notice with the registrar in terms of s 91(1)(bA) of the IT Act withdrawing the statement. Mr Mokoena then applied, in or about August 2010, for a rescission of the 'judgment' because he had previously been unaware of its existence, having learned about it only when it showed up as a black mark on his credit record when he made application to a bank for a mortgage loan.

[35] Mr Justice Spilg's finding that he had jurisdiction to rescind the 'judgment' was premised on the judgment of this court in *Kruger v Commissioner for Inland Revenue* 1966 (1) SA 457 (C)[14] and the treatment thereof, and of the judgment of the late Appellate Division in *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A), in *Metcash*, at para 65 and 66. It is unnecessary for present purposes to investigate or reach any conclusion whether those cases in fact afford authority for the proposition that a 'judgment' that had already been withdrawn in terms of s 91(1)(bA) (and thereupon '*ceases to have any effect*') is susceptible to rescission by a court. Nevertheless, I can readily appreciate why the learned judge was amenable to granting the relief sought and why the Commissioner did not oppose it, in the

[14] Incorrectly cited in *Mokoena* - apparently as a result of a typographical error - as a judgment of the late Appellate Division.

face of the demonstrated continuing practical effect of the filing of the statement on Mr Mokoena, notwithstanding the provisions of s 91(1)(bA).[15]

[36] However, as evident from the passage from para 16 of the judgment referred to earlier,[16] in the course of giving judgment Spilg J held it to be incompetent for the Commissioner to file a statement in terms of s 91(1)(b) of the IT Act when there was an undetermined appeal by the taxpayer in terms of s 83 of the Act still pending before the tax court. If the judgment is sound in this respect the applicant would undoubtedly be entitled, in the face of the threats by the Commissioner to make use of s 91(1)(b) against it, to a prohibitory interdict pending the determination of its appeal. However, with respect to the learned judge, I find myself unable to agree with the statements at para 16 of *Mokoena*. In my judgment Spilg J's view that the Commissioner cannot have resort to s 91(1)(b) when an appeal is pending is not supported by a proper construction of the pertinent provisions of the statute, or by relevant precedential authority.

[37] The point of departure must be an acceptance that the tax in issue is payable on the date fixed in terms of s 89 of the IT Act. The effect of s 88 is that the noting of an appeal does not suspend the taxpayer's obligation to make payment; cf. *Commissioner for Inland Revenue v NCR Corporation of South Africa (Pty) Ltd* 1988 (2) SA 765 (A) at 775E-F. The Act contains a number of provisions of which the Commissioner may make use to exact the

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[15] Compare s 71(6) and s 72 of the National Credit Act 34 of 2005 ('NCA'). The filing of a statement in terms of s 91(1)(b) of the IT Act seems to me *prima facie* to be an incident relevant to the affected person's '*financial history*' within the meaning of s 70(1)(b) of the NCA.

[16] At para [15] and para [26], above.

payment which the taxpayer is obliged to make. One such provision is s 91(1)(b). Although a statement filed by the Commissioner in terms of s 91(1)(b) has all the effects (i.e. consequences) of a judgment, it is nevertheless not in itself a judgment in the ordinary sense. It does not determine any dispute or contest between the taxpayer and the Commissioner. It has the effect of a judgment, however, in enabling the Commissioner to obtain a writ to attach and sell in execution the taxpayer's assets to exact payment of an amount that is payable. As already emphasised, the existence of any pending appeal by the taxpayer against its assessed liability has no effect on its obligation to pay the pay the tax. It thus cannot constitute any bar to the Commissioner's resort to s 91(1)(b) to exact from a taxpayer the payment that the taxpayer is obliged by the Act - notwithstanding any appeal - to make.

[38] Once it is accepted that the filing of a statement in terms of s 91(1)(b) is nothing more than an enforcement mechanism, as distinct from a means of determining liability, there is no basis for distinguishing it from any of the other recovery mechanisms, such as the appointment of an agent in terms of s 99, resort to which by the Commissioner, the judgment in *Mokoena* held to be unexceptionable in the face of a pending appeal by the taxpayer against liability.[17] It seems to me that the learned judge went awry in *Mokoena* by

[17] Whether the learned judge was correct to hold that resort by the Commissioner to s 99 of the IT Act was unexceptionable in the circumstances is open to debate. Section 99 is available to the Commissioner to obtain payment of tax that is 'due', whereas the enforcement mechanisms in terms of s 91(1) are available in respect of the recovery of tax or interest that 'has 'become due or is payable'. The mechanism in terms of s 91(1)(c) is available in respect of interest in terms of section 89(2) or 89*quat* that is 'payable', but only in respect of tax that is 'due'. Cf. *Singh v Commissioner for the South African Revenue Service* 2003 (4) SA 520

apparently regarding the filing of a statement in terms of s 91(1)(b) as having the rights-determining character of a judicially delivered judgment. It plainly does not. That much was confirmed by the Supreme Court of Appeal in a consideration of the equivalent provisions of the VAT Act in *Singh v Commissioner for the South African Revenue Service* 2003 (4) SA 520 (SCA). At para 9 of their judgment in *Singh*, after setting out the material provisions of s 40(1), (2)(a) and (5) of the VAT Act,[18] Cloete JA and Heher AJA proceeded as follows:

> The section is a recovery provision and nothing more. It does not empower the Commissioner to determine whether an amount is payable (or due). The jurisdictional element is that the tax must be payable before the Commissioner can invoke the procedure for which the section provides. When that element exists the Commissioner can rely on ss (5) and recover an amount which he certifies as (already) due or payable, despite the fact that an objection has been lodged or an appeal may be pending.

The applicant's main submissions in case no. 8274/11

[39] The applicant's counsel submitted that the taxpayer had been prejudiced by reason of the fact that the suspension granted to it in December 2010 had been given under the regime of the previous version of s 88, which entitled the Commissioner to have regard to the merits of the pending appeal, whereas the decision to withdraw the suspension had occurred under the aegis of the current provisions of s 88, which, according to the argument, did not entail any consideration of the merits of the appeal. The foundational

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(SCA) at para 11 as to the distinction, in the relevant context, between an amount that is 'payable' and one that is 'due'.

[18] As pointed out in para [4], above, s 40(2)(a) of the VAT Act mirrors s 91(1)(b) of the IT Act and s 40(5) mirrors s 92 of the IT Act.

basis for this argument has already been rejected in the course of addressing the submissions advanced on behalf of the taxpayer in case no. 26078/10. It is not necessary, or appropriate in the circumstances for this court to give any consideration to the submissions made by counsel in respect of the apparent merits of the pending appeal. Suffice it to say in that regard that the withdrawal of the suspension was not premised on any contention by the Commissioner that the appeal was frivolous or vexatious.

[40] It was further argued (i) that the grant of the suspension afforded to the taxpayer in December 2010 did not have a termination date and that it followed, having regard to the provisions of s 13(2) of Act 18 of 2009,[19] that by operation of law the suspension would expire only on 1 August 2011; and (ii) that the decision made in March 2011 purporting to revoke the suspension was accordingly *ultra vires*.

[41] In a closely related argument, the applicant's counsel also argued that the attachment of a condition to the grant of the suspension of payment obligation in December 2010 that it might '*be reviewed at any time*' was *ultra vires* the provisions of s 88 of the IT Act that were in force when the decision to grant the suspension was made. In that connection it was submitted that the previous version of s 88 vested the Commissioner with the power either to direct, or not direct, that the taxpayer's obligation to make payment be suspended; it did not invest the Commissioner with authority to attach conditions to any direction that the taxpayer's obligation be suspended. The applicant's counsel stressed the distinction between the old and the current

[19] Quoted in para [7], above.

versions of s 88, pointing out in this respect that the current version expressly vested the Commissioner with a power to revoke a suspension in specified circumstances, whereas no equivalent power was provided in the previous version.

Evaluation of the applicant's main submissions in case no. 8274/11

[42] The applicant's contentions do not go to the merits of the decision to withdraw the suspension. They are all predicated on matters of statutory construction. In my view the crucial issue for determination in the context of the applicant's arguments is the question whether or not the attachment of the 'subject to review' condition was within the Commissioner's powers under the previously subsisting s 88 of the IT Act. The answer falls to be answered affirmatively only if the provision impliedly authorised the revocation by the Commissioner of the suspension. I have already held that the substituted provisions were in large measure intended to be expositionary of the previous version of the section. In the context of that conclusion it does not assist to contrast the new provision with the old. The proper approach, I think, must be to determine whether an authority to review and revoke was a necessary implication of the provisions of s 88 in the form it existed when the decision to grant the suspension was made; cf. *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd* [2007] 1 All SA 154 (SCA) at para 27.

[43] The obligation to make payment and the right of the *fiscus* to recover assessed tax pending an appeal against an assessment was subject to the

power of the Commissioner to direct otherwise. The word '*direct*' is, and was, not specially defined in the IT Act and therefore bore its ordinary meaning within the context in which it was used. The meaning of the word in the most relevant sense is given in the Concise Oxford English Dictionary as '*to give an order or authoritative instruction to*'. It is clear in my view that the power to direct necessarily includes the power to formulate the content of the relevant order or instruction. I can think of no reason why content of the direction should not include a reservation of the right to revisit its terms; particularly having regard to the factors that would have to weigh with the Commissioner in determining upon it. Having regard to the recognised public policy considerations underpinning the 'pay now, argue later' policy, the Commissioner would, for instance, obviously need to be able to revise a decision to direct that the obligation to pay be suspended if it became evident to him in the period before the appeal was heard that the taxpayer's financial situation was deteriorating thereby jeopardising the prospect of making a recovery if the appeal were determined against the taxpayer. Similarly, the efficacious operation of the statute would be thwarted if the Commissioner were unable to revoke a decision to direct that a taxpayer's obligation to be pay be suspended by the noting an appeal if it became apparent that the taxpayer was failing conscientiously to prosecute the appeal.

[44] The very notion that the Commissioner may direct that the taxpayer's obligation be *suspended* imbues the exercise with the character of a temporary stay integral to the very essence of the concept of suspension. It seems to me to matter not whether the temporary nature of the stay is defined

by the Commissioner with reference to an expiry date or any later decision to review and or revoke, thereby leaving the expiry date open for later determination. The provisions of s 13(2) of Act 18 of 2009 confirm that the legislature had always intended that the Commissioner could fix a time limit to any grant of suspension, even though the old s 88 made no express provision therefor. There is nothing in the fixing of a time limit that would prevent the Commissioner, prior to its expiry, extending it; or, after its expiry, renewing or amending the terms of such dispensation. It would, of course, be implied by law that any such later decision would be compliant with the requirements of administrative justice. In the current case the Commissioner's direction made it plain that it was not his intention that the suspension would cease to operate only when the taxpayer's appeal was decided.

[45] The primary object of s 88 is the implementation of the 'pay now, argue later' policy. That object was evidently conceived by the legislature as a necessary incidence of efficaciousness tax recovery. The achievement of the object would be frustrated if the Commissioner's power to grant a dispensation relieving the taxpayer from the undeniably rigorous effect of the provision did not include the right to make the grant of the dispensation subject to appropriate conditions and even revocation, including in a case in which it subsequently appeared, on a reconsideration of the relevant material, that it had not been appropriate, after all, to have given the dispensation in the first place.

[46] A further consideration is that if the provision were not to be construed in the manner described, the resultant constraints on the Commissioner would in many cases redound to the prejudice of taxpayers because the Commissioner would undoubtedly be reluctant to commit himself to a decision save after the most careful and conclusive of enquiries into the relevant facts. The delay that often would be inherent in any such enquiry would frustrate the operation of the provision in a manner that would fairly address the needs of taxpayers seeking relief from the 'pay now, argue later' policy of the Act, and of the *fiscus* in exercising its powers of recovery. These considerations would serve as an incentive to the Commissioner to adopt a predisposition against the exercise of the power in favour of the taxpayer.

[47] I have therefore concluded that it was within the power of the Commissioner to impose the condition that the direction suspending the taxpayer's obligation to make payment of the assessed tax pending its appeal against the assessment was subject to revision. (The finding in favour of the incidence of the power to impose the condition makes it unnecessary to consider the arguments that were addressed in respect of the limitations on the power of the Commissioner or any officer, in terms of s 3 of the IT Act, to withdraw or amend written decisions. The operation of the condition had the effect that the subsequent revocation of the suspension did not in fact entail a withdrawal or amendment of the decision in the sense contemplated by s 3 of the Act.)

The applications by the taxpayers for interdictory relief pending the determination of applications to judicially review the decisions by SARS to refuse the request by the taxpayer in case no. 26078/10 for a suspension of its payment obligation and to withdraw the suspension afforded to the taxpayer in case no 8274/11.

[48] The effect of the findings made thus far confirm that the refusal by SARS of the taxpayer's request for a suspension of its obligation to make payment of the assessed tax before the determination of its appeal against the assessment was an effective administrative decision – effective, at the very least, in the sense that it stands unless and until set aside on judicial review; cf. *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); [2004] 3 All SA 1, at para 26-40. The findings made thus far are also adverse to the applicant's prospects of challenging the decisions on the grounds that they were made outside the Commissioner's powers under the IT Act.

[49] In consequence, on any approach, the Commissioner is entitled at this stage to avail of the enforcement measures in terms of the IT Act against the taxpayer, such as that in terms of s 91(1)(b). Because the tax is payable, it would not be open to the taxpayer in the circumstances to purport to resist the use of those measures defensively on the basis of the principle exemplified in *Boddington v British Transport Police* [1999] 2 AC 143 (HL); [1998] 2 All ER 203, approved in *Oudekraal*, at para 32. Hence, the necessity, if the applicant is to avoid the incidence of those enforcement measures, for it to obtain interdictory relief to hold off the Commissioner pending the determination of its intended review of the decision to refuse its request in terms of s 88 of the IT

Act for a suspension. If the applicants were able to establish a reasonable prospect of success on review, their apprehension of irremediable harm if an interdict were not granted would therefore have been established. (There was no evidence, however, suggesting that the Commissioner intended to make any resort to s 99 of the IT Act, or take any steps against the public officers of the applicant companies.)

[50] There was some debate between counsel as to whether the application for interdictory relief pending the determination of the contemplated review fell to be characterised as an application for interim relief or final relief. Counsel for the Commissioner argued that it fell to be treated as an application for final relief because of the fact that in the prevailing circumstances the appeal would probably be determined before any application for judicial review became ripe for hearing.

[51] In my view the nature of the relief sought is plainly interim in character. The fact that in the peculiar circumstances, by reason of external factors, it might be final in practical effect is incidental. The practical finality of its effect might affect the amenability of any grant of the relief to appeal, but it does not mean that the application must be treated as if it were one for final relief.

[52] Nevertheless, that the applicants have chosen to refrain from proceeding with any challenge by means of the threatened judicial review applications until after the determination of the current proceedings is a matter to be taken into account in weighing, all other things being equal, whether the court should exercise its discretion in favour of granting interim interdictory

relief in the circumstances. As rightly pointed out by the Commissioner's counsel, had judicial review applications been launched on shortened time limits consistent with the urgency inherent in obtaining effective relief before the noted appeals to the tax court were determined, those applications should have been ripe for hearing at more or less the same time that the current applications came before me. In the circumstances the applicants might have only themselves to blame if this court were to be inclined to grant them interim relief only if the alleged rights on which they rely for such relief were established with a higher degree of certainty than might generally have been acceptable in an application for interim interdictory relief.

[53] Apart from the questions already disposed of, the only remaining grounds of review relied upon the applicants which remain to be considered in respect of assessing the applicants prospects of success on review, which provides the existence of the relevant right for the purposes of determining their entitlement to interim interdictal relief (cf. *Ladychin Investments (Pty) Ltd v South African Roads Agency Ltd and others* 2001 (3) SA 344 (N) at 357D) are the allegations of bias and procedural unfairness. I do not intend to extend an already over-long judgment by treating with these grounds in any detail.

[54] In case no 26078/10 it was contended that there was a reasonable suspicion of bias because of the close proximity in timing between the decision to refuse the taxpayer's request for a suspension and the decision of the Commissioner in case no. 8274/11 to review and revoke the suspension

granted to the taxpayer in that matter. It was also contended that it might reasonably be inferred that the Commissioner had shown bias by deliberately delaying determining the taxpayer's request for a suspension of payment obligation until after the commencement of the current provisions of s 88 of the IT Act. In my judgment there is no merit whatsoever in these contentions, with the result that they afford no support for the taxpayer's prospects of success on review.

[55] In case no. 8274/11 similar grounds for a reasonable inference that the Commissioner's actions were affected by bias were advanced. It was also suggested that the SARS officials might have had a pecuniary interest to ensure that the obligation to make payment was not suspended. No cogent basis in fact for this insinuation was established. There was also no proper foundation for the accusation of procedural unfairness. The taxpayer was afforded sufficient opportunity to place whatever material before the Commissioner it might wish in order to persuade him against making any decision to revoke the suspension of payment obligation on review. In this case too, I am not persuaded that the applicant enjoys a reasonable prospect of successfully impugning the Commissioner's decision on review.

The postulated unconstitutionality of sections 82 and 88 of the IT Act

[56] Finally, it remains to record that no attack was launched on the constitutionality of s 82 or 88 of the IT Act in the current proceedings. In any event, an attack on the constitutionality of s 82, which imposes a so-called reverse onus on taxpayers in appeals under s 83 of the Act against

assessments, is in no manner relevant to the subject matter of the interdictory relief sought by the applicants in these proceedings. In the context of the decision in *Metcash*, the prospect of a successful attack on the constitutionality of s 88 of the IT Act, insofar as it bears on the obligation to pay now and argue later pending the determination of an appeal in terms of s 83 of the Act, is, to say the least, remote.

[57] In the circumstances of my finding that the prospect of the applicants succeeding in the postulated applications for judicial review is illusory I find it unnecessary to consider whether the applicants have satisfied the other requirements for interim interdictory relief.

Costs

[58] The Commissioner acted unfairly and misdirectedly in purporting to exact payment from the taxpayer in case no. 26078/10 before the taxpayer's request for a suspension of payment obligation had been determined. In the circumstances the first respondent in case no. 26078 will be ordered to pay the applicant's costs of suit up to and including the taking of the order by agreement before Mr Justice Griesel on 10 December 2010, including the costs of two counsel to the extent that such were engaged. Save as aforesaid the applicant shall be directed to pay the first respondent's costs of suit on the basis to be explained in the following paragraph. The costs in case no. 8274 shall follow the result, also on the basis explained in the following paragraph.

[59] The first respondent employed three counsel. It was explained by Mr *Sholto-Douglas* SC, who appeared as senior counsel for the Commissioner,

that ordinarily two counsel would have been engaged, but in the current matters a second junior had been engaged in terms of a 'fee sacrifice' arrangement agreed to by himself and the senior of the two juniors. This entails that senior counsel and the first junior each sacrifice part of the fee which they would ordinarily have charged, in order thereby to fund, in a surrogate manner, the employment by the Commissioner of the second junior. This practice is sanctioned in terms of an initiative by the Cape Bar Council to change briefing patterns and promote the exposure of juniors who might otherwise have been denied access to particular types of work. Mr *Sholto-Douglas* pointed out that the arrangement does not entail greater expense for either his client nor, in the context of an adverse costs order against the applicants, the losing party. A special order allowing the taxation of three counsel's fees charged in accordance with the fee sacrifice would, however, be required to enable the Commissioner to recoup on taxation the fees of two counsel in the amounts that would ordinarily have been charged by senior counsel and the first junior had it not been for fee sacrifice arrangement. Mr *Emslie SC*, who appeared for the applicants in both matters, quite properly, I think, raised no objection to such a special order being granted in the event that the applications failed.

Orders

[60] The following order is made in case no. 26078/10:

1. The application is dismissed.

2. The first respondent is ordered to pay the applicant's costs of suit in the proceedings up to and including the taking of the order by agreement between the parties before Mr Justice Griesel on 10 December 2010, including the costs of two counsel if such were engaged.

3. Save as provided in para 2 of this order, the applicant shall pay the first respondent's costs of suit. Such costs shall include the costs of three counsel charged on the basis of the fee-sacrifice scheme described in para [59] of the judgment, amounting in total to no more than the fees that would ordinarily have been allowed on taxation had the first respondent been represented only by the senior counsel and first junior counsel instructed on behalf of the first respondent.

[61] The following order is made in case no. 8274/11:

1. The application is dismissed.

2. The applicant is ordered to pay the first respondent's costs of suit. Such costs shall include the costs of three counsel charged on the basis set out in para 3 of the order made in case no. 26078/10.

A.G. BINNS-WARD
Judge of the High Court