REPORTABLE
CASE NO: 500/2001

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

ANIL SINGH **APPELLANT**

and

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

CORAM: OLIVIER, CONRADIE, CLOETE JJA, JONES and HEHER AJJA

DATE OF HEARING: 20 FEBRUARY 2003

DELIVERY DATE: 31 MARCH 2003

Summary: VAT Act 89 of 1991: the Commissioner must give notice to the taxpayer where he has made an assessment in terms of s 30(1) before he can recover the assessed amount in terms of s 40(2).

JUDGMENT

CLOETE JA and HEHER AJA

CLOETE JA and HEHER AJA:

[1] This is an appeal with leave of the Judge *a quo* (Galgut AJP) against his judgment which is reported at 2002 (3) SA 94 (D).

[2] The appellant sought an order setting aside a judgment obtained against him by the respondent in terms of s 40(2)(a) of the Value-Added Tax Act 89 of 1991 on 18 July 2001 in the sum of R2 366 730,63. The taking of judgment was preceded by the making of assessments in terms of s 31(1) of the Act on the previous day. The appellant was not given notice of the respondent's intention to apply for judgment. That was not his complaint (nor could it have been, in the light of what was said in *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) at para [49][1]). Instead, the essence of his case was that notice of the assessments had not been given to him before the statement contemplated by s 40(2)(a) was filed (which was common cause) and that the proceedings under the section were consequently void. The learned Judge dismissed the submission and, subject to certain alterations to the quantum of the judgment caused by the inclusion of an unfounded claim for additional tax, the application as well.

[3] Before this Court the same argument was advanced, supplemented, in the alternative, by reliance on a contention that the failure to give notice of the assessments before invoking the s 40(2)(a) procedure breached the appellant's right to fair administrative action which received statutory expression in s 3 of

1 The scheme of the Act was analysed and explained in detail by Kriegler J in paras [11] to [24].

the Promotion of Administrative Justice Act 3 of 2000 promulgated on 30 November 2000.

[4] Since counsel for the respondent relied upon the judgment of the Court *a quo* we shall begin by summarising the reasoning which led to a conclusion favourable to his client-

VAT that is calculable and payable by the taxpayer in terms of s 28(1) of the Act (as was the position in the case) becomes due and payable on or before the specified date in each tax period. The result is that when an assessment is made by the Commissioner in terms of s 31(1) the amount assessed has already fallen due and become payable. Written notice of the assessment to the taxpayer is provided for in s 31(4). That notice serves the purpose of fixing the time for objection to and appeal against the assessment. The lodging of such an objection has no effect on the taxpayer's obligation to pay VAT or the Commissioner's right to recover it. Section 40 provides the means for summary recovery of VAT, penalty, interest and additional tax which have become due or payable. In proceedings under s 40(2) the correctness of the assessment, on which the certified statement that the Commissioner files is based, may not be questioned (s 40(5)). Notification to the taxpayer of the assessment serves no purpose in the context of s 40(2)(a) and is not a prerequisite to filing of the statement.

[5] The Act contains no express requirement that notice of the assessment must be given to the taxpayer before the Commissioner files the statement

which has the effect of a civil judgment in terms of s 40(2)(a). The question is whether such notice is a necessary implication.

[6] The reasoning of Galgut AJP depends, it seems to us, on three propositions. The first is that any amount assessed by the Commissioner under s 31 has already become due and payable by reason of the provisions of s 28(1). The second is that, because an assessment merely quantifies a liability that is already due and payable, the taxpayer, whose duty it is to assess his own liability, need not be told that the Commissioner has undertaken the task and fixed an amount which the taxpayer should have reflected in his return made under s 28(1). The third is that the sole recourse of the taxpayer who disputes his liability to pay the amount of the assessment is to adopt the procedure of objection and appeal; accordingly notice to him of the assessment prior to an application for judgment in terms of s 40(2)(a) is a pointless exercise. As we shall attempt to show, none of these fundamental propositions is justified.

[7] We shall deal first with the acceptance by the Court *a quo* that any amount which the Commissioner assesses has already become due and payable, without the need of any preceding action by him. (This was also found to be the effect of the statute by Erasmus J in *Traco Marketing (Pty) Ltd and Another v Minister of Finance and Others* [1996] 2 All SA 467 (SECLD) at 471 d - i.)

[8] There are two fallacies in the first proposition: that an amount other than the amount returned by the taxpayer has fallen due under s 28 and that the amount assessed by the Commissioner is to be equated with the amount payable

by the taxpayer under that section. In *Traco Marketing*, *loc cit*, the learned Judge said,

'The Commissioner makes an assessment only when a vendor or importer fails to fulfil his obligations.'

In so far as that dictum also implies that the assessment amounts to a correction of the taxpayer's return, it requires qualification since, at least in relation to the grounds for assessment set out in s 31(1)(b) and (c), and, bearing in mind the power which he has under s 31(3) to 'estimate the amount upon which the tax is payable', the Commissioner merely forms an opinion which may subsequently be shown to have been wrong.

[9] Section 40 provides (to the extent relevant):

'(1) Any amount of any tax, additional tax, penalty or interest payable in terms of this Act shall, when it becomes due or is payable, be a debt due to the State and shall be recoverable by the Commissioner in the manner hereinafter provided.

(2)(a) If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it 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 thereof 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.

. . . .

(5) It shall not be competent for any person in proceedings in connection with any statement filed in terms of subsection (2)(a) to question the correctness of any assessment upon which

such statement is based, notwithstanding that objection and appeal may have been lodged against such assessment.'

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.

[10] In the context of the Act an amount is **due** when the correctness of the amount has been ascertained either because it is reflected as due in the taxpayer's return or because the circumstances set out in s 32(5) have become applicable (in both of which cases it is both due and payable) or, if there is a dispute, after the procedures relating to objection and appeal have been exhausted (in which case the amount so ascertained was **due and payable** with the return).

[11] An amount may be due but not yet payable, eg additional tax (see the judgment of the Court *a quo* at 100 G - 101 C). Conversely, an amount which is **payable** may not be **due**. This may be the case with an assessed amount[2] prior to the final determination of a dispute: to the extent that the assessment is finally found to be correct, that amount was due (and payable) when the return

2 In *Metcash supra* Kriegler J noted (at fn 62) that the debt arising from the obligation to pay assessed VAT becomes due by operation of the Act upon assessment. The learned Justice was not specifically directing his attention to the distinction between what is due and what is payable and the remark was obiter.

was rendered; to the extent that the assessment was not correct, that assessment was not due at any time, but it was payable in terms of s 31(1), which provides that where in the circumstances contemplated in the section, the Commissioner has made an assessment of the tax payable by the person liable for the payment of such amount of tax, 'the amount of tax so assessed shall be paid by the person concerned to the Commissioner.' An example will illustrate this. Suppose the taxpayer renders a return for 100. The Commissioner assesses his liability at 200. In the fullness of time, the amount is finally determined at 125. 125 was therefore due and payable when the return was rendered. The balance of 75 was not due; but it was nevertheless payable in terms of s 31(1) because of the assessment. We do not think that the obligation to pay which s 31(1) creates can be interpreted other than as an immediate obligation. If the Commissioner's right is to demand payment forthwith then such remedies as are provided for non-payment should logically be interpreted in a manner which allows for exaction of the amount on default. Section 40(2)(a) provides such a remedy and the word 'payable' where it appears in that section must accordingly be construed as an existing obligation rather than a future or contingent one. Section 40(5) which precludes the challenge to an assessment in such proceedings also justifies the conclusion that the right to exact the amount reflected in the assessment flows from the assessment itself and not some subsequent event. It should be noted that s 36, which requires payment of tax pending any appeal, recognises that an obligation to pay and the right to recover already exist; it does not create such obligations.

[12] The Court *a quo* assumed that the return of a taxpayer who is assessed will be incorrect and that the amount of the assessment will reflect what was always due. As the example we have given illustrates, that is not necessarily so. In the absence of a notice of assessment an amount which is not due cannot be payable. No such notice had been given in this case. It follows that it was not open to the Commissioner to utilize the procedures of s 40.

[13] The second of the propositions referred to in paragraph [6] above suffers from the same fallacious approach set out in the previous paragraph of this judgment. In addition it has shortcomings of its own.

[14] The Act predicates the bringing into existence of an assessment prior to the lodging of the statement under s 40(2)(a). That is apparent from s 40(5). The phrase used in the last-mentioned subsection is 'any assessment upon which such statement is based' not any assessment upon which it may be based. The reason is obvious. If the position were otherwise, the Commissioner could obtain a civil judgment with all the consequences that that entails, including the possibility of sequestration in terms of s 40(2)(c), without informing the taxpayer how he arrives at the amount of such assessment.

[15] Albeit that an assessment may be 'a mental act in the nature of a decision' *per* Schreiner JA in *Irvin and Johnson (SA) Ltd v Commissioner for Inland Revenue* 1946 AD 483 at 494, counsel's submission that it is sufficient for the assessment to exist purely in the Commissioner's head cannot be correct; the law is not generally concerned with thoughts but with their outward manifestations and, in the context of s 40(1), the tax cannot be regarded as

having become recoverable through judicial intervention until the taxpayer has been informed of the assessment, a subject to which we shall return.

[16] Section 31(4) requires the Commissioner to give written notice of the assessment to the taxpayer concerned. There can thus be no suggestion that, as between the two parties, any secrecy attaches to a completed assessment.

[17] The primary purpose of giving notice of the assessment is not objection and appeal but payment by the taxpayer. As we have already pointed out, section 31 provides that, in the circumstances identified in ss (1)(a)-(e), the Commissioner may make an assessment of the amount of tax payable 'and the amount of tax so assessed shall be paid by the person concerned to the Commissioner'. In *Metcash* at para [60] Kriegler J pointed out that

'Ensuring prompt payment by vendors of amounts assessed to be due by them is clearly an important public purpose . . . Requiring them to pay on assessment prior to disputing their liability is an essential part of the scheme.'

The hypothetical (or assumed) knowledge by the taxpayer of the correct amount of his liability at the date for rendering his return is, no doubt, a convenient fiction for the determination of a date of liability and payment, but the reality is that no taxpayer (*bona fide* or dishonest) who is kept in ignorance of the fact of an assessment and its content can be expected to reconsider his liability and pay what he owes.

[18] A judgment is an appropriate remedy for the refusal or neglect of a debtor to pay his creditor when he knows full well that he owes money. It is inapposite to the situation where the alleged debtor neither knows that he has a creditor nor

the amount that is said to be owing by him. A VAT vendor may fall anywhere within the spectrum of the two possibilities. It is true that section 40(2) creates a summary procedure which enables the Commissioner to file for judgment and proceed to execution. No court process initiates the claim, no service on the debtor is required and there is no scope for opposition or a hearing (*Metcash* at para [49]). All this notwithstanding, it would be extraordinary if the legislature had intended to authorise the taking of a judgment in respect of an indebtedness of which the taxpayer had only deemed knowledge, given the role of payment in the scheme, the substantial departure from the common law which such an authorisation would bring about and the seriousness of the potential consequences to the taxpayer, and then manifested that intention simply by its silence on the matter of service of the assessment before an application for judgment can be lodged.

[19] What is set out in paragraphs [14] to [18] above provides, in our view, sufficient reason to regard notification of the assessment to the taxpayer as a necessity contemplated by the legislature.

[20] As to the third proposition on which the reasoning of the Court *a quo* is founded, *Metcash* (at paras [53], [54], [56] and [71]) makes it plain that objection and appeal is not the sole recourse of the taxpayer who wishes to dispute his liability. Moreover the judgment contains clear indications that a taxpayer who is subject to a s 31 assessment is possessed of remedies which can be exercised before judgment is applied for (see para [66]: a wide field of defences is available to a debtor who wishes to pre-empt the entry of judgment).

In the absence of service of process or notice of set down of the application for judgment, the potential trigger for the exercise of those remedies can only be the assessment. All this, it seems to us, is entirely logical: if the vendor has available a range of defences, why should he only receive their benefit after judgment has been taken against him? Looked at from a different angle, what can be the prejudice to the Commissioner in allowing the taxpayer insight into the assessment before he moves for judgment?

[21] Counsel for the Commissioner submitted from the bar that there is a strong likelihood that a taxpayer against whom s 31 is invoked will be untrustworthy (see *Metcash* at para [22]) and that the giving of notice of the Commissioner's intentions may well provoke concealment of assets and even cause the taxpayer to decamp before the Commissioner can take judgment and execute on it. Assuming the validity of this apprehension, if the Commissioner has a well-founded belief that such conduct will result from service of the assessment he has his remedies at common law, or he may (if so advised) avoid the consequence by allowing only a short period of time after service of the assessment before applying for judgment, bearing in mind that fairness of administrative procedure depends on the circumstances of each case: s 3(2)(a) of the Promotion of Administrative Justice Act.

[22] We therefore agree with counsel for the appellant that, in a case such as the present, non-payment of an assessed amount is a jurisdictional fact upon which the exercise of powers under s 40(2)(a) depends. It is a necessary corollary that the taxpayer should have been given notice of the assessment

before he can regarded as one who is in default of payment for the purpose of taking judgment against him. Notice of the assessment to the taxpayer before the statement contemplated in s 40(2)(a) is filed is necessary to give effect to the objects of the Act. To exclude notice would be to deprive the taxpayer of rights at common law which are not excluded by the Act. We conclude that the learned Judge in the Court below was wrong in finding the Commissioner was entitled to implement the procedures of s 40(2)(a) before notice of the assessment had been given.

[23] Certain submissions were addressed to us on the strength of s 3 of the Promotion of Administrative Justice Act. The contention was that fair administrative procedures necessitated notice of assessment prior to judgment. Counsel for the Commissioner conceded that failure to serve constituted a breach of the appellant's fundamental rights. He sought to justify the breach by the general submissions to which we have referred in paragraph [21]. He was not able to point to any circumstance applicable to the appellant's case which provided such justification.

[24] The reliance on the breach of a constitutional right was raised by the appellant for the first time in his counsel's heads of argument on appeal. Although counsel for the respondent raised no objection, the situation is clearly unsatisfactory. As emphasised in *Prince v President, Cape Law Society and Others* 2001(2) SA 388 (CC) at para [22], in relation to a challenge to the constitutionality of a provision in a statute, it is not sufficient for a party to raise such a matter only in heads of argument without laying a proper foundation for

it in the papers or pleadings. That applies equally to a complaint of breach of a fundamental right which the other party is entitled to justify by evidence as well as argument. In the circumstances we find it unnecessary to enter further into this question as it is clear that the appellant must succeed on his main submission.

[25] It would likewise be superfluous to address the other findings of the Court *a quo* which were the subject of attack by the appellant. The right of the Commissioner to take judgment even before the expiry of the period within which objection may be made in terms of s 31(5) will, if objection is duly lodged against the assessment, certainly result in some degree of prejudice to the taxpayer. The taxpayer is confined to the, perhaps illusory, consolation of an eventual adjustment in his favour in terms of s 36(1) and repayment of or compensation for that which was wrongly taken from him. Naturally, if the Commissioner purports to take steps beyond those which the Act authorises, as he has done in this case, the remedies available to the taxpayer may be more extensive.

[26] In the result we concur in the order made by Olivier JA.

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T D CLOETE
JUDGE OF APPEAL

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J A HEHER
ACTING JUDGE OF APPEAL

CONRADIE JA)Concur
JONES AJA)