THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Commissioner for the South African Revenue Service v Candice-Jean van der Merwe (211/2021) ZASCA 106 (30 June 2022)

The Supreme Court of Appeal (SCA) today upheld an appeal with costs against the order and judgment of the majority of the full court of the Western Cape Division of the High Court, Cape Town, per Mantame J with Ndita J concurring and Cloete J dissenting (the high court), in terms of which the high court upheld an appeal against a judgment of the Tax Court, Cape Town, per Rogers J (the tax court). The costs order included the costs occasioned by the employment of two counsel.

The respondent, Ms Candice-Jean van der Merwe (the taxpayer), had approached the tax court under the auspices of rule 56(2) of the Tax Court Rules published in terms of s 103 of the Tax Administration Act 28 of 2011 (TAA) seeking default judgment against the appellant, the Commissioner for the South African Revenue Service (SARS), based on SARS's alleged failure to file a statement disclosing its grounds for dismissing her objection. In addition, the taxpayer sought an order reducing to nil the additional income tax assessment raised by SARS in February 2016 concerning the 2014 year of assessment and an order compelling SARS to repay the amount the taxpayer previously paid on the agreed assessment.

The facts of the matter were as follows. The taxpayer's tax return for the 2014 tax year reflected taxable income of R365 919. She also declared a receipt of R142 901 673 as a 'gift from her companion abroad'. In January 2015, SARS raised an original assessment in accordance with this return. The 'donation' was not subjected to tax. In February 2015, SARS started a process of interrogating the tax return and the foreign 'donation'. Settlement was also explored.

On 7 December 2015, MacRobert Attorneys (MR), which represented SARS, wrote to Werksmans Attorneys (Werksmans), which represented the taxpayer, enclosing a draft letter of audit findings, which stated that the amount of some R142.9 million was not a gratuitous donation and was subject to income tax. On 18 December 2015, Werksmans sent a settlement proposal to MR. On 18 February 2016, MR wrote to Werksmans stating that SARS had approved the settlement proposal. The amount payable was R44 175 675. On 10 March 2016, Werksmans sent MR 'proof of payment of the settlement consideration'.

On 10 September 2018, the taxpayer lodged a notice of objection to the additional assessment of 17 February 2016 together with an application for the late filing of the objection. That set in motion the events leading to the application for default judgment that served before the tax court, in terms of which the taxpayer sought to reverse what her attorneys had plainly agreed on her behalf. The taxpayer lodged her objection via her electronic filing profile. She had not obtained an extension of time prior to doing so. The taxpayer's ground for challenging the additional assessment on its merits was that tax was imposed on non-taxable income and paid on the basis of the 'pay now, argue later rule'.

The SCA found that on the conspectus of all the relevant facts, the inference was irresistible that the taxpayer paid the agreed amount within the contemplation of s 95(3) of the TAA and not on the basis of the 'pay now, argue later' principle, as alleged in the taxpayer's notice of appeal. The SCA found that the assessment against which the taxpayer objected was an agreed assessment in terms of s 95(3) of the TAA, against which the taxpayer was, in terms of that provision, 'not subject to objection or appeal'. This, the SCA found, was largely based on correspondence exchanged between SARS's attorneys and those of the taxpayer, in which it was clear that the settlement negotiations culminated in an agreed income tax assessment being raised. In short, the settlement agreement provided that s 95(3) would apply to the agreed assessment.

The SCA found further that once it was accepted that the provisions of s 95(3) were applicable, it followed that the respondent's additional assessment could not have been the subject of an objection or appeal. This, the SCA found, was because an appeal had to be preceded by a valid objection and a decision thereon. In the absence of any one of those, there could be no appeal. The SCA found that there was no doubt that SARS was correct in asserting that the taxpayer's objection was invalid. In this regard, the SCA found that it was important to bear in mind the provisions of rule 7(4), which empowered SARS to regard an objection that did not comply with the requirements of subrule (2) as invalid. This, in substance, was what SARS had conveyed to the taxpayer in terms of the notice of invalid objection. The SCA thus found that the taxpayer simply did not meet the jurisdictional requirements that warranted the consideration of an application, which presupposed compliance with all the prerequisites.

Accordingly, the SCA held that the application in the tax court was premature, because SARS was not in default as envisaged in rule 56(1) of the Tax Court Rules promulgated in terms of s 103 of the TAA. Therefore, the jurisdictional requirements for an application in terms of rule 56(2) of the Tax Court Rules were not satisfied. The SCA thus held that the tax court's finding that the taxpayer's rule 56 application was not preceded by a valid objection and valid notice of appeal was unassailable. The SCA held further that the tax court was entitled to make that finding even on an unopposed basis, as correctly stated in the dissenting judgment per Cloete J.

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