Reportable

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case no. A88/2023

Before: The Hon. Mr Justice Binns-Ward
The Hon. Mr Justice Nuku
The Hon. Ms Justice Slingers

Hearing:19 June 2024
Judgment: 28 June 2024

In the matter between:

CANDICE-JEAN POULTER Appellant

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT

in Respondent's application for leave to appeal

Delivered by email and listing on SAFLII

BINNS-WARD J (NUKU and SLINGERS JJ concurring):

[1] This judgment concerns an application by the Commissioner for the South African Revenue Service for leave to appeal to the Supreme Court of Appeal ('SCA') from the judgment of this court upholding an appeal by Ms Poulter (neé Van der Merwe) against the judgment granted against her by a tax court. Ms Poulter's appeal to this court was brought in terms of s 133 of the Tax Administration Act 28 of 2011

('the TAA'). For convenience, I shall henceforth in this judgment refer to the parties by their respective roles in that appeal.

[2] The tax court was seized of an appeal by the appellant in terms of s 107 of the TAA. It proceeded in terms of Tax Court subrule 44(7) when it made the order that was the subject of the appellant's further appeal to this court. The subrule applies when a party to an appeal to a tax court is in default of appearance at the hearing.[1] The appellant had sought audience at the hearing before the tax court through her appointed representative, who was not an admitted legal practitioner. The tax court declined to recognise the appearance by the appellant's lay representative. It invoked the line of authority confirming that, save very exceptionally, only legal practitioners may represent natural persons in proceedings before a court of law in support of its approach.

[3] In upholding the appeal from the tax court, this court held that tax courts are courts of revision, *not* courts of law. It held that the bar against lay representation in *courts of law* consequently did not apply in proceedings in a tax court. The effect of this court's judgment is that the appellant may proceed with her appeal in a tax court represented by her chosen and duly authorised lay representative on a date to be advised by the registrar of the Tax Court.[2]

[4] A preliminary, and for present purposes, potentially decisive, question that needs to be addressed is whether this court has jurisdiction to adjudicate the respondent's application for leave to appeal. The appellant contended that if the respondent sought to appeal this court's judgment in the principal proceedings, he required special leave from the SCA in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 to be able to do so.

[5] Section 16 of the Superior Courts Act resorts under the subheading '*Appeals Generally*'. Section 16(1)(b) provides:

'Subject to section 15 (1), the Constitution and any other law-

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[1] The text of the subrule is set out in para 4 of the judgment in the principal case.
[2] The judgment in the principal proceedings is reported *sub nom. Poulter v CSARS* [2024] ZAWCHC 97 (2 April 2024); [2024] 2 All SA 876 (WCC).

(b) an appeal against **any decision** of a Division **on appeal to it**, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal;'. (Emphasis supplied.)

Section 15(1) is not applicable in the circumstances of the case. The only 'other law' of relevance is the TAA, the pertinent provisions of which will be considered presently.

[6] The appellant gave notice, in terms of Uniform Rule 30, that she objected to the respondent's application to this court for leave to appeal as an irregular step. Mindful that our judgment in the principal proceedings had been given in a matter brought on appeal to this court, we would have raised the jurisdictional issue of our own accord even if the appellant had not done so.

[7] The jurisdictional issue turns on whether the judgment of this court in the principal proceedings was 'a decision … on appeal to it' within the meaning of those words in s 16(1)(b) of the Superior Courts Act. If it was, the respondent has sought leave to appeal in the wrong forum and we lack the jurisdiction to decide his application.

[8] The word 'appeal' is specially defined in s 1 of the Superior Courts Act. The only effect of the definition, however, is to exclude from the ambit of the Act appeals in criminal cases that are 'regulated in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), or in terms of any other criminal procedural law'.[3] For current purposes, the term therefore bears its ordinary meaning, determined with regard to the context in which it has been employed.

[9] It is well established that in the context of legal proceedings the word 'appeal' can have different connotations. Trollip J famously identified three of those possible meanings in *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) ([1963] 3 All SA 91) at pp. 590G-591A:

'The word "appeal" can have different connotations. In so far as is relevant to these proceedings it may mean:

[3] Cf. *August v S* [2023] ZASCA 170 (4 December 2023), para 40-42.

(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information (*Golden Arrow Bus Services v Central Road Transportation Board*, 1948 (3) SA 918 (AD) at p. 924; *S.A. Broadcasting Corporation v Transvaal Townships Board and Others*, 1953 (4) SA 169 (T) at pp. 175-6; *Goldfields Investment Ltd v Johannesburg City Council,* 1938 T.P.D. 551 at p. 554);

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong (e.g. *Commercial Staffs (Cape) v Minister of Labour and Another*, 1946 CPD 632 at pp. 638 - 641);

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly (e.g. *R v Keeves*, 1926 AD 410 at pp. 416 - 7; *Shenker v The Master*, 1936 AD 136 at pp. 146 - 7).'

[10] The application for declaratory relief in *Tikly*'s case came before the late Supreme Court because of some uncertainty concerning the character of proceedings in an appeal then pending before a revision court constituted in terms of s 19(5) of the Group Areas Development Act 69 of 1955 (as amended). Trollip J held that, as the pertinent statutory provisions required the revision court to determine afresh the property valuations that were in contestation on the basis of the evidence to be presented to that court, the appeal was one in the wide sense described in the first example in his classifications.

[11] As described with reference to pertinent authority in our judgment in the principal proceedings, an appeal to a tax court in terms of s 107 of the TAA is another example of an appeal in the wide sense. It is not an appeal of the sort that Trollip J, in the second example in his taxonomy, called 'an appeal in the ordinary strict sense'. Appeals from lower courts to courts higher up in the forensic hierarchy are, by contrast, invariably appeals in the ordinary strict sense; cf. e.g. *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190

(13 December 2019); 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA), para 51. They are, in the words of Trollip J, 'a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given,[4] and in which the only determination is whether that decision was right or wrong'. That appeals *to* a tax court fall under the first, rather than the second, of the aforementioned categories no doubt explains the repeatedly made observation that the tax courts are courts of revision rather than courts of appeal in the ordinary sense.[5]

[12] Appeals *from* a tax court in terms of s 133 of the TAA, whether to a full court of a division of the High Court, as in the appeal to this court, or directly to the SCA, are, by contrast, appeals in the ordinary strict sense of the word in the second category of appeal described in *Tikly*. They are decided on the basis of the record of the proceedings in the tax court, applying the same principles as those applied by any court of law sitting on appeal from a lower court; cf. *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 485F. In *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* [2000] ZACC 21 (24 November 2000); 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC), the Constitutional Court observed of appeals in the tax courts that '[a]lthough the procedure [in the tax courts] is referred to in the legislation as an appeal, it is a full hearing more akin to a trial'.[6] An appeal from a tax court, whether to a full court of the High Court or directly to the SCA, is dealt with in both of those fora indistinguishably from the manner in which those courts would deal with an appeal from the judgment in a trial before a single judge in the High Court. Moreover, such an appeal falls, in terms of the TAA,[7] to be dealt with procedurally in terms of the rules of those courts pertaining to appeals. The rules pertain to appeals within the meaning that word in ss 16 and 17 of the Superior Courts Act.

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[4] Subject to the power, acknowledged in s 19(b) of the Superior Courts Act, to hear further evidence: a power that is exercised only in exceptional circumstances.
[5] Cf. e.g. *Bailey v CIR* 1933 AD 204 at 220; *Rand Ropes (Pty) Ltd v CIR* 1944 AD 142 at 150, *Africa Cash & Carry (Pty) Ltd v CSARS* [2019] ZASCA 148; [2020] 1 All SA 1 (SCA); 2020 (2) SA 19 (SCA), para 52 and *CSARS v Rappa Resources (Pty) Ltd* [2023] ZASCA 28; 2023 (4) SA 488 (SCA); 85 SATC 517, para 13.
[6] In para 36. As noted in our judgment in the principal proceedings, the Constitutional Court's judgment traversed provisions in the Value-Added Tax Act 88 of 1991 concerning appeals to the special tax courts. Those provisions have since been repealed and essentially reproduced in Chapter 9 of the TAA.
[7] In terms of s 138 (3) and (4).

[13] Save in respect of cases in which three judges have sat in the appeal to the tax court (as provided for in s 118(5) of the TAA) in which event there is an automatic right of appeal directly to the SCA, an appeal in terms of s 133 lies directly to the SCA only upon leave granted by the president of the tax court concerned.[8] The president may grant leave to appeal from a judgment of a tax court directly to the SCA rather than to a full court of a division of the High Court if he or she considers the matter sufficiently important to warrant the attention of that court. The considerations to be taken into account equate with those that a single judge sitting at first instance in the High Court will take into account when deciding whether an appeal from his or her judgment should lie to a full court or directly to the SCA.

[14] An appellant from the judgment of a tax court dissatisfied with a decision of the president of the court not to allow an appeal directly to the SCA can apply to SCA to have the decision varied, and a party who considers a decision by a president to allow an appeal directly to the SCA to be inappropriate can apply to the SCA to have it set aside. In this regard, s 17 of the Superior Courts Act is made applicable, in terms of s 135(3) of the TAA, to appeals from a tax court and the provisions of the section apply *mutatis mutandis* in the same manner as they do in respect of civil appeals from a single judge of the High Court.

[15] An appeal in terms of s 133 of the TAA has to be noted to the court to which it is to be directed, whether that be the SCA or a division of the High Court.[9] The TAA provides, in s 138(4), that such an appeal has to be noted 'in accordance with the requirements in the rules of the relevant higher court'.

[16] Section 171 of the Constitution provides that '[a]ll courts [viz. those provided for in s 166 of the Constitution] function in terms of national legislation and their rules and procedure must be provided for in terms of national legislation'. The functioning of the Constitutional Court, the SCA and the High Court and the rules of those courts

[8] See s 135 of the TAA.
[9] See s 138 of the TAA.

are provided for in terms of the Superior Courts Act.[10] Those are the rules of court referred to in s 138(4) of the TAA.[11]

[17] The relevant rules – the Uniform Rules of Court and the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa – pertain to appeals in the strict or ordinary sense of the term, for they are the only type of appeal for which the rules of the respective higher courts make provision using the term. (The third type of 'appeal' described in *Tikly* is referred to in the Uniform Rules – and in the Superior Courts Act – as a 'review'.[12]). The rules in question were framed to procedurally regulate appeals from lower courts of law to higher courts of law or from decisions of a single judge of the High Court sitting at first instance to a full court. The TAA makes that order of procedural regulation applicable in respect of appeals from a tax court.

[18] It is a canon of statutory interpretation that a noun or verb used in a statute is presumed to have the same meaning wherever it appears unless the contrary is evident from the context: 'In our law, the legislature is presumed to use language consistently, and one would deviate from the presumption with great hesitation and only if driven to do so, for example, because to do otherwise would lead to manifest absurdity, or would clearly frustrate the manifest intention of the lawgiver.'[13] Thus, the word 'appeal' is presumed, wherever it appears in s 17 of the Superior Courts Act, to bear the same meaning as it has in s 16 of the Act. It follows plainly from the incorporating cross-references in Part E of Chapter 9 of the TAA to the Superior Courts Act and the rules of court made under the latter Act to procedurally regulate the appeals with which ss 16 and 17 of Superior Courts Act are concerned that an appeal in terms of s 133 of the TAA is not a horse of a different colour from any other appeal within the meaning of s 16 of the Superior Courts Act.

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[10] In Chapter 7 (ss.29-30).
[11] See s 8(1) of the Interpretation Act 33 of 1957.
[12] See rule 53 of the Uniform Rules and ss 21, 22 and 43(4) of the Superior Courts Act.
[13] *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8 (3 June 1999); 1999 (4) SA 623; 1999 (7) BCLR 771 para 47 (footnotes omitted).

[19] To sum up, the express engagement of s 17 of the Superior Courts Act[14] and the appeal rules of the SCA and the High Court in Part E of Chapter 9 of the TAA, as well as the character of an appeal to either of those courts in terms of s 133 of the TAA, provide strong contextual confirmation that the principal proceedings in this court were an 'appeal' within the meaning of that word as employed in the Superior Courts Act.

[20] The conclusion I have reached in this respect finds support in the jurisprudence. In *CSARS v Capstone 556 (Pty) Ltd* [2016] ZASCA 2 (9 February 2016); [2016] 2 All SA 21 (SCA); 2016 (4) SA 341 (SCA), the SCA undertook an analysis of the two types of appeal in terms of the TAA of essentially the same nature that I did earlier in this judgment, and concluded that '… there is indeed no reason to differentiate between an appeal from a Special Court and an appeal from a Local or Provincial Division. Unlike the position obtaining in a Special Court where a decision is given on facts which may not have been considered by the Commissioner, this Court hears an appeal from a Special Court on the record of the proceedings in that Court.'[15] The clear import of that statement is that an appeal from a tax court presided over by a single judge to the SCA is of the same type of appeal as an appeal from the judgment of a single judge of the High Court to the SCA. There is obviously no difference in the character of an appeal from a tax court to a full court and an appeal from the tax court directly to the SCA. They are both of the same sort of appeal with which ss 16 and 17 of the Superior Courts Act are concerned.

[21] That much was expressly confirmed in para 21 of *Capstone*, where Van der Merwe AJA, having observed that there was no material difference between the appeal provisions in s 86A of the Income Tax Act and Part E of Chapter 9 of the TAA which replaced them, said '… appeals from a tax court [to a full court or the SCA] in terms of the Tax Administration Act … [are] on the same footing as an appeal from a division of the High Court.'

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[14] In s 135(3). The effect of s 135(3) is that a direction by a president of a tax court that an appeal from that court should be heard by the SCA is susceptible to being set aside on application in terms of s 17(6) of the Superior Courts Act.
[15] In para 19.

[22] In *Capstone*, the appeal from the decision of the tax court first proceeded before a full court of the Western Cape Division of the High Court. The further appeal from the High Court's decision was heard by the SCA upon leave having been obtained from the latter court; see *Capstone*, para 1.

[23] All of the forementioned considerations impel the conclusion that any appeal from this court's judgment in the principal proceedings may only be prosecuted subject to s 16(1)(b) of the Superior Courts Act.

[24] The respondent, relying on his counsel's interpretation of the second judgment in *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* supra, contended, however, that s 16(1)(b) of the Superior Courts Act did not apply by reason of this court's finding that the tax courts' functions were predominantly administrative in character. The application for leave to appeal was properly directed to this court, so the argument went, because we, as the first court of law seized of the case, had heard the matter 'at first instance'. The argument was somewhat paradoxical and placed the respondent on the horns of a dilemma because it flew in the face of the principal contention that the respondent wants to pursue on further appeal, viz. that *the tax court* was the first court of law seized of the taxpayer's appeal. If the respondent were to be held true to his principal contention, he would self-evidently be in the wrong forum for his application for leave to appeal.

[25] Overlooking the intrinsic incongruity in the respondent's approach, I in any event, for the reasons that follow, consider that there was no merit in the contentions advanced by counsel on his behalf.

[26] The argument proceeded from an understanding by the respondent's counsel, said to be predicated on paragraph 52 of this court's judgment, that we had held that a tax court was an 'administrative tribunal'. Counsel have misconstrued the import of our judgment. The question before us was not whether a tax court is an administrative tribunal; it was whether a tax court is a 'court of law'. This court, relying on the eminent local and international authority that was canvased extensively in the judgment, drew heavily, but not entirely, on the predominantly administrative character of the tax courts' functions to categorise those courts as

falling outside the judicial system established in terms of s 166 of the Constitution, and, consequently, not to be 'courts of law'. We did not hold that tax courts were not courts in any sense of the word. On the contrary, having found that the tax courts established in terms of the TAA were indistinguishable in form and function from their statutory predecessors, the so-called special tax courts established in terms of Part III of Chapter 3 of the Income Tax Act 58 of 1962, we followed a hallowed line of higher court authority in holding that the tax courts are courts of revision, not ordinary courts of appeal.[16]

[27] More pertinently, I am not persuaded that the second judgment in *Lewis Stores* is in point in respect of further appeals from decisions of full courts of divisions of the High Court given on appeal to them in terms of s 133 of the TAA. Unlike any of the examples of so-called 'statutory appeals' referred to in *Lewis Stores*, the TAA gives an appeal not to the High Court simpliciter, but to a *full court* of the High Court.[17]

[28] The question that the SCA was called upon to answer in *Lewis Stores* was a narrow one. It was whether an appeal to the High Court from a decision of a full panel of the National Credit Tribunal in terms of s 148(2) of the National Credit Act 34 of 2005 was an appeal within the meaning of s 16(1)(b) of the Superior Courts Act. It was concluded that it was not.[18]

[29] The essential basis for that decision was that the appeal there in issue was a 'statutory appeal' of the sort that – like any number of other statutory appeals, some examples of which were mentioned in the judgment – comes to the High Court as a

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[16] See the judgment in the principal proceedings at para 47-53.
[17] Section 133(2)(a) of the TAA. The TAA uses the term 'full bench', which is not specially defined; see s 133(2)(a). The term is not used in the Superior Courts Act, nor was it in that Act's predecessor, the Supreme Court Act, 1959. In legal parlance it is often used interchangeably with the term 'full court', which is defined in the Superior Courts Act and the statutory predecessor thereto as a bench constituted of three judges. For examples of a three-judge bench being referred to judicially as a 'full bench', see *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of RSA and Others* [2000] ZACC 1 (25 February 2000): 2000 (2) SA 674 (CC) inter alia at para 10-12 and *Tshabalala v S, Ntuli v S* [2019] ZACC 48 (1 December 2019); 2020 (5) SA 1 (CC), para 23. Appeals from a tax court to the High Court are invariably heard by a three-judge bench.
[18] See also *National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services - Pinetown and Another* [2022] ZASCA 104 (24 June 2022) and *Barnard NO and Another v National Consumer Tribunal and Another* [2023] ZASCA 121 (18 September 2023); [2023] 4 All SA 277 (SCA); 2024 (2) SA 329 (SCA)

court of first instance. Such appeals are of the sort of proceeding that – unlike appeals to the High Court within the meaning of s 16 of the Superior Courts Act – can be heard by a single judge or by two or three judges, as decided by the judge president. In contrast to Part E of Chapter 9 of the TAA, the statutory provisions in terms of which such statutory appeals are created generally do not provide for them to be regulated by the Superior Courts Act or the rules of court pertaining to appeals made under the auspices of the Superior Courts.[19]

[30] The judgment in *Lewis Stores* acknowledged that whether a so-called statutory appeal might be an appeal within the meaning of the Superior Courts Act was dependent upon the statutory provisions in terms of which the appeal remedy in question was established. Thus, in para 47, Wallis JA referred to the regimes in respect of appeals from the Commissioner in terms of the Patents Act 57 of 1978 and from the Copyright Tribunal in terms of the Copyright Act 98 of 1978. He pointed out that those statutes provided for the statutory appeals in question to be noted and prosecuted 'in the manner prescribed by law for appeals against a civil order or decision of a single judge' and observed that the effect was that an appeal to the High Court under either of those statutory provisions therefore started 'on the footing that it is dealt with from a procedural perspective as if the Commissioner were a court'. Section 16(1)(b) of the Superior Courts Act is an integral part of the framework for the procedural regulation of such appeals.

[31] It bears mention that the appeal provisions under the Patents Act and the Copyright Act also provide that 'sections 20 and 21 of the Supreme Court Act (Act 59 of 1959) shall apply mutatis mutandis' to the statutory appeals in question.[20] Those provisions were the statutory predecessors of ss 16 and 17 of the Superior Courts Act and essentially to the same effect as the currently applicable provisions of the latter statute. By virtue of s 12(1) of the Interpretation Act 33 of 1957, the references

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[19] Compare, for example, the position in respect of appeals in terms of s 57 of the Community Schemes Ombud Service Act, 9 of 2011, in respect of which the different divisions of the High Court have adopted disparate procedures. See in this regard, *Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and Another* [2018] ZAWCHC 54 (10 May 2018); 2018 (4) SA 566 (WCC) and *Durdoc Centre Body Corporate v Singh* [2019] ZAKZPHC 29 (13 May 2019); 2019 (6) SA 45 (KZP) and contrast *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Another* [2019] ZAGPJHC 387 (24 October 2019); 2020 (1) SA 651 (GJ).

[20] In s 76(2)(a) of the Patents Act and s 36(2) of the Copyright Act.

in those statutes to the provisions of the Supreme Court Act fall to be construed, subsequent to the repeal of the Supreme Court Act, as references to the currently applicable equivalent provisions in the Superior Courts Act.

[32] The effect is that an appeal from the Commissioner or the Copyright Tribunal may, just as in the case of an appeal from a tax court, proceed either before a full court of a division of the High Court or directly before the SCA. They cannot proceed before a single judge or a two-judge bench of the High Court. The direction as to in which of the appellate fora the appeal should be heard is made by the Commissioner or the Copyright Tribunal, subject to the SCA's power, in terms of s 17(6) of the Superior Courts Act (which is the equivalent of the previously applicable s 20(2)(b) of the Supreme Court Act), to set aside the direction. As evident from the discussion above about the pertinent provisions of the TAA, exactly the same position obtains in respect of appeals in terms of s 133 of the TAA.[21]

[33] Wallis JA ventured that the reason for the difference between the statutory regime in respect of appeals under the Patents Act and the Copyright Act and those pertaining in respect of the other statutory appeals referred to in his excursus was that the Commissioner (who also personifies 'the Tribunal' under the Copyright Act) is a judge or acting judge of the High Court. Exactly same basis for legislative differentiation, would apply, of course, in respect of appeals from a tax court.

[34] Whilst the pertinent part of the TAA does not say in terms that an appeal from a tax court in terms of s 133 must be noted and prosecuted 'in the manner prescribed by law for appeals against a civil order or decision of a single judge', the statutory regime created in terms of Part E of Chapter 9 of the Act nevertheless has precisely the same import. In the circumstances, far from supporting the respondent's contention, the dicta in para 47 of *Lewis Stores* actually go against it.

[35] Enough has been said to explain our conclusion that s 16(1)(b) of the Superior Courts Act does apply in the current matter and that this court consequently does not have jurisdiction to determine an application for leave to appeal from its

[21] See the reference to s 17 of the Superior Courts Act in s 135(3) of the TAA.

judgment in the principal proceedings. The current application is a novel and unprecedented one that has confessedly been addressed to this court rather than the SCA only because of the apprehended effect of the second judgment in *Lewis Stores*.[22] For completeness, and even though it will entail some repetition, it might therefore be useful also to point out very briefly that in any event the considerations in respect of so-called 'statutory appeals' identified in paras 50-56 of that judgment as 'reasons' or 'points of principle' in support of the court's determination that an appeal from the National Credit Tribunal to the High Court should be characterised as coming before that court as a court of first instance, and not on appeal within the meaning of s 16(1)(b), do not apply in respect of appeals from a tax court.

[36] In that regard it bears reiteration that the nature of an appeal from a tax court is indistinguishable from that of an appeal from a matter heard in the High Court by a single judge. It is an appeal in the ordinary strict sense described in *Tikly*, the tax court is a court of record, and the appeal is not a review. Unlike the case in some of the statutory appeals referred to in *Lewis Stores*, characterising an appeal from a tax court as one within the meaning of the Superior Courts Act does not bring about any conflict or tension between that Act and the TAA. On the contrary, as already discussed, the TAA expressly makes relevant provisions of the Superior Courts Act and the rules of court pertaining to forensic appeals applicable. I consider that for reasons analogous to those given by Trollip JA in *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A)[23] in respect of the court of the Commissioner of Patents under the (since repealed) Patents Act 37 of 1952, proceedings before a tax court are not susceptible to review and any vitiating grounds of objection to a decision of

[22] In a post-hearing note from the respondent's counsel we were referred to a judgment in which a full court of the Gauteng Division assumed jurisdiction to hear an application for leave to appeal to the SCA from its decision, apparently in a tax appeal, on the assumption that the second judgment in *Lewis Stores* was applicable; see *Siyandisa Trading (Pty) Ltd v Commissioner for the South African Revenue Services* [2023] ZAGPPHC 126 (26 July 2023). The correctness of the assumption does not appear to have been argued, however, and the judgment refusing leave to appeal in that case, which is all of four paragraphs long, did not investigate the point. The judgment in *Siyandisa* in any event proceeded from the premise that a tax court was an 'administrative tribunal' (see para 1), which, if correct, would be adversely dispositive of the respondent's contention in the current case that it is a court of law and consequently weigh against the granting of leave to appeal. None of the issues argued before us appear to have been ventilated before the court in *Siyandisa*, with the effect that counsel's reference to that case has not been of any substantive assistance. We are not aware of, nor were we referred to, any other case in which a full court has purported to have jurisdiction to entertain an application for leave to appeal to the SCA against the full court's judgment in an appeal in terms of s 133 of the TAA.

[23] At p. 600E-602H.

the court must be advanced exclusively by way of an appeal in terms of s 133 of the TAA. The anomalous situation posited in para 54 of *Lewis Stores* therefore, unlike the position in respect of appeals in terms of s 148 of the National Credit Act, cannot arise in the context of appeals in terms of s 133 of the TAA.

[37] As the second judgment in *Lewis Stores* points out, 'special leave' to appeal 'imposes a more stringent test for the grant of leave to appeal. There must be both reasonable prospects of success and compelling circumstances justifying the grant of special leave'. The judgment also explains that the object served by the requirement of special leave is the promotion of the public interest in finality in litigation. The requirement applies when a matter has already been considered on appeal by a full court of the High Court and a party wishes to take it on further appeal to the SCA. The public interest in the finality of tax-related litigation is self-evident. It would therefore be an anomaly, bordering on absurdity, if the object of the relevant provisions of the TAA which, as highlighted earlier, have been framed in a manner to treat an appeal from a tax court to a full court for procedural purposes in the same manner as an appeal from the judgment of a single judge of the High Court were not interpreted and understood in the same way in respect of any further appeal to the SCA.

[38] For all of the foregoing reasons, *Lewis Stores* does not assist the respondent.

[39] In the circumstances, we have no reason to address the merits of the application for leave to appeal. Suffice it to say, however, that it should be evident from our judgment in the principal proceedings that the respondent's contention that the tax courts are courts of law goes against the weight of authority and we consider that it would be difficult for a further court of appeal to uphold the contention in the face of the finding by the Constitutional Court in *Metcash* that appeals to the special tax courts involve a first level of adjudication that takes place 'outside the normal forensic hierarchy'.[24] It is clear that by 'the normal forensic hierarchy' the Court meant the hierarchy of the courts identified in s 166 of the Constitution, viz. the courts of law in the judicial system. Those considerations would have weighed

[24] In para 43 and 47.

heavily with us had this court been vested with the jurisdiction to decide the application for leave to appeal. The respondent's counsel stressed that the characterisation of the tax courts was a matter of public interest sufficiently compelling to warrant the attention of a higher court. Whilst it may indeed be a matter of public interest, the prospects of success 'remain vitally important and are often decisive' when evaluating whether there is a compelling reason why an appeal should be heard; see *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17 (25 March 2020); [2020] 1 All SA 1 (SCA); 2020 (2) SA 19, para 2.

[40] The appellant is entitled to her costs in the abortive proceedings. In the post-hearing written submissions we invited after having been alerted by counsel to the effect of the recently introduced rule 67A(3) read with rule 69 of the Uniform Rules, the appellant's attorney submitted that the appellant's costs entitlement should be determined on Scale C, whereas the respondent's counsel submitted that it would be appropriate to determine them on Scale B. It seems to us, having regard to the nature of the questions involved and the seniority of counsel appropriately engaged by the respondent, that the costs should be awarded on Scale B.

[41] An order is made in the following terms:

The respondent's application for leave to appeal is struck from the roll with costs on Scale B, such costs to include the costs incurred by the appellant in raising an objection to this Court's jurisdiction to decide the application.

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

L. NUKU
Judge of the High Court

H. SLINGERS
Judge of the High Court

APPEARANCES

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