REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case Number : 500 / 2001

In the matter between

ANIL SINGH **Appellant**

and

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

Composition of the Court : **OLIVIER,CONRADIE and CLOETE JJA; JONES and HEHER AJJA**

Date of hearing : **20 FEBRUARY 2003**

Date of delivery : **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).

J U D G M E N T

OLIVIER JA

[1] In this appeal, we are unanimous as far as the order to be made is concerned. That order is the one at the end of this judgment. There are, however, differences in the reasoning leading up to that conclusion. In what follows, I set out my thoughts on the subject.

The factual background

[2] In August 2001 the appellant approached the Durban and Coast Local Division on notice of motion for an order setting aside, alternatively rescinding, a judgment granted by that court on 18 July 2001 against the appellant and in favour of the respondent for payment of the sum of R1 032 961,43

[3] The judgment resulted from the filing by the respondent of a statement in terms of s 40(2)(a) of the Value-Added Tax Act, 89 of 1991 ("the Act").

[4] It is common cause that the judgment under consideration was obtained in the course of the day of 18 July 2001. Only afterwards, at approximately 17:00, were certain VAT assessment notices (form VAT

217P), relating to periods from 1996 to September 2002, served upon the appellant.

[5] The sole complaint raised in the application by the appellant, who at all relevant times had been a registered Value Added Tax vendor, was that the respondent was required to give him notice of an assessment prior to seeking a judgment in terms of s 40 of the Act.

[6] The application, which was opposed by the respondent was heard and in the main dismissed by Galgut J, who also granted leave to the appellant to appeal against the dismissal to this Court.

[7] Neither in the court below, nor in argument in this Court, was the procedural basis of the application for rescission of the default judgment, obtained by the respondent, raised or debated. Such basis could only have been the rescission provisions of rule 42(1)(a) of the Uniform Rules of Court or the common law remedy of *restitutio in integrum*. Absent objection by the respondent to the procedural correctness of the application and argument on this point, I will say no more on this aspect.

The legal background

[8] The question then is whether the statutory 'judgment' obtained by the respondent in the High Court by virtue of the provisions of s 40(2) of the Act, can be set aside because the appellant had not, prior to such judgment having been obtained by the respondent, been given notice of the assessment envisaged by s 31 of the Act.

[9] The Act is not at all clear and the answer to the question posed above is not obvious. What is required as a first step is an overview of the procedure that must be taken by the respondent before the application for judgment in terms of s 40(2)(a). I summarise the provisions as follows.

[10] Every registered vendor must, at a certain date, furnish the respondent with a return, containing information as to the output and input tax pertaining to the preceding tax period, calculate the amount of the tax payable to the respondent or the amount of any refund due to the vendor (sec 28), and pay to the respondent the amount which, *ex facie* the said return, is payable.

[11] If the respondent is satisfied with the vendor's return, and payment, that is the end of the matter.

[12] However, in certain circumstances, the respondent may make an assessment of the amount of tax payable by the vendor and the amount of tax so assessed shall be paid by the person concerned to the respondent (sec 31(1)). The circumstances which may lead to such an assessment being made are set out in s 31(1), which reads as follows:

> '31. **Assessments**.—(1) Where—
>
> (a) any person fails to furnish any return as required by section 28, 29 or 30 or fails to furnish any declaration as required by section 13 (4) or 14; or
>
> (b) the Commissioner is not satisfied with any return or declaration which any person is required to furnish under a section referred to in paragraph (a); or
>
> (c) the Commissioner has reason to believe that any person has become liable for the payment of any amount of tax but has not paid such amount; or
>
> (d) any person, not being a vendor, supplies goods or services and represents that tax is charged on that supply; or
>
> (e) any vendor supplies goods or services and such supply is not a taxable supply or such supply is a taxable supply in respect of which tax is chargeable at a rate of zero per cent, and in either case that vendor represents that tax is charged on such supply at a rate in excess of zero per cent,
>
> the Commissioner may make an assessment of the amount of tax payable by the person liable for the payment of such amount of tax,

> and the amount of tax so assessed shall be paid by the person concerned to the Commissioner.'

Section 31(1) of the Act was the basis on which the respondent made the assessment now under discussion. The point is that the amount reflected in the assessment becomes 'payable', subject to what is said hereunder.

[13] The next step is that the respondent, in terms of sec 31(4)

> ' . . . shall give the person concerned a written notice of such assessment, stating the amount upon which tax is payable, the amount of tax payable, the amount of any additional tax payable in terms of section 60 and the tax period (if any) in relation to which the assessment is made.'

[14] The notice of assessment must include notice to the person concerned that any objection to such assessment shall be lodged or sent so as to reach the Commissioner within 30 days after the date of such notice (s 31(5)).

[15] This brings me to the steps to be taken by a vendor who is dissatisfied with an assessment. He or she may lodge an objection thereto with the respondent within 30 days after the date on which notice of the assessment was given (s 32). The respondent must consider the objection and if it is disallowed, give notice thereof to the vendor. Such decision (or

amended assessment) shall, in terms of s 32(5), and subject to the right of appeal mentioned hereunder, ' . . . be final and conclusive'.

[16] An appeal against a decision by the respondent to disallow an objection, or against an amended assessment, lies to the special court for hearing income tax appeals. Notice of such an appeal must be given to the vendor within 30 days (s 33). In the circumstances set out in s 33A the appeal shall be heard by the Board established by s 83A(2) of the Income Tax Act.

A further appeal against a decision of the special court exists in terms of s 34.

[17] Section 36 then introduces a principle that has been described as 'pay now, argue later'. The section provides that the obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under the Act, shall not, unless the respondent so directs, be suspended by any appeal or pending the decision of a court of law. If the vendor's appeal is upheld or conceded, the respondent is obliged to make a due adjustment (s 36).

[18] The principle 'pay now, argue later' also underlies the provisions of s 40. It provides that any amount of tax, additional tax, penalty or interest

payable in terms of the Act shall, '. . . when it becomes due or is payable' be a debt due to the State and shall be recoverable by the respondent (s 40(1)). Section 40(2)(a) sets out how the respondent may then proceed. It reads as follows:

> '(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.'

[19] All these steps — the taking of judgment against the vendor and proceedings for sequestration or liquidation — may thus take place while an appeal is pending. To exacerbate this draconic procedure, s 40(5) provides:

> '(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.'

[20] Must the vendor receive notice of the assessment before judgment is taken against him by virtue of s 40(2)(a) of the Act?

The Act gives no clear answer. Section 40(2)(a) requires the respondent to file with the clerk or registrar of the court concerned, in order to obtain judgment, ' . . . a statement certified by him as correct and setting forth the amount thereof so due or payable . . . '. But the Act does not explain the link between the assessment and the statement; nor does it require notification of the statement to the vendor before judgment is obtained. In the result, the requirement that a statement be filed, does not provide an answer to the question posed.

[21] Another way of approaching the problem, is to ask: what does the Act (in secs 40(1) and 40(2)(a)) mean when it requires, as a precondition for the respondent obtaining judgment, that the amount of any tax, additional tax, penalty or interest shall be recoverable by the procedure allowed in sec 40(2)(a) ' . . . <u>when it becomes due or is payable</u>'?

To circumscribe the problem more narrowly : if the VAT ' . . . becomes due or is payable' even if no notice is given to the VAT-debtor of an assessment, such assessment is not a prerequisite for the obtaining of judgment. *Ergo*, prior notification of the assessment is only

necessary, for the purposes of s 40(2)(a) if its effect is that the debt ' . . . becomes due . . ' or is rendered 'payable'.

Does notification of the assessment serve these purposes?

[22] In the court *a quo* the learned judge came to the conclusion that prior notification of the assessment was not necessary because the VAT assessed ' . . . will in all cases already have become overdue by the date on which the Commissioner makes the assessment. The same applies to the penalty and interest on unpaid VAT, because on an interpretation of sec 39(1)(a) such a penalty, in the sum of 10% of the unpaid VAT, and such interest, are automatically payable, and as such they are payable from the date upon which the VAT had become payable.' The underlying philosophy of the judgment follows what Kriegler J said in *Metcash Trading Ltd v Commissioner, South African Revenue Services and Another* 2001 (1) SA 1109 (CC) at 1122 C that ' . . . VAT is payable on each and every sale; the VAT percentage, the details for its calculation and the timetable for periodic payment are statutorily predetermined, and it is left to the vendor to ensure that the correct periodic balance is calculated, appropriated and paid over in respect of each tax period.'

[23] This philosophy was echoed by Erasmus J in *Traco Marketing (Pty) Ltd and another v Minister of Finance and others* [1996] 2 All SA 467 (SE).

In that case, the assessment was served on the vendor earlier the same day that the certified statement was filed with the registrar of the court. It was argued on behalf of the vendor that it could never have been the intention of the legislature that a judgment and subsequent execution could be taken against the taxpayer by an assessment that is neither final nor conclusive *ie* pending the final outcome of objections and appeals (see 470 f-h). The learned judge held that by virtue of the provisions of s 38(1) of the Act, which requires that the tax payable under the Act shall be paid in full within the time allowed by the specified periods in which the returns must be filed (secs 13(4), 14, 38 or 29), it is a feature of the Act. ' . . . that the tax becomes due and payable without any preceding action by the Commissioner.' (at 471 d)

The learned judge proceeded (at 471 i):

> 'It appears that the provision relates to tax payable but unpaid at the time of the assessment. The assessment therefore does not create the obligation to pay the tax. That obligation arises from the operation of s 38(1), read with the other relevant provisions of the Act. Section 40(2)(a) provides for the speedy and effective recovery of tax which has become due or is payable *before* assessment. Within the scheme of the Act, the right to object to an assessment does not affect and therefore cannot suspend the pre-existing obligation to pay the tax. Nothing in the Act provides or indicates otherwise.'

[24] If the underlying philosophy and the interpretation given to the Act in *Metcash*, *Traco* and the court *a quo* cannot be shown to be wrong, it must follow that the giving of a notice of the assessment by the respondent to the VAT debtor is irrelevant because it does not render the debt due or payable, it having become due or payable before such assessment.

The correctness of the said philosophy and interpretation thus requires close scrutiny.

[25] The ordinary meaning of 'due' is that ' . . . there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.' (per Galgut AJA in *The Master v I L Back and Co Ltd and Others* 1983 (1) SA 986 (A) at 1004 G; see also *Western Bank Ltd v S J J van Vuuren Transport (Pty) Ltd and Others* 1980 (2) SA 348 (T) at 351; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909; *Whatmore v Murray* 1908 TS 969 per Innes CJ at 970; *Banque Paribas v The Fund Comprising Proceeds of Sale of the MV Emerald Transporter* 1985 (2) SA 448 (D and C) at 463 C - E; *Commisioner for Inland Revenue v People's Stores Walvis Bay (Pty) Ltd* 1990 (2) SA 353 (A) at 366 G per Hefer JA).

[26] The word 'payable' can have at least two different meanings, viz ' . . . (a) that which is due or must be paid, or (b) that which may be paid or may have to be paid. . . . . The sense of (a) is a present liability ─ due and payable ─ . . . . (b) . . . . a future or contingent liability.' (per Trollip JA in *Marine and Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A) at 975 D - F; followed by Hefer JA in *Administrateur, Tranvsvaal v J D van Niekerk en Genote BK* 1995 (2) SA 241 (A) at 245 B - C). Depending on the context of the statute involved, the word payable may refer to ' . . . what is eventually due, or what there is a liability to pay' (per Searle J in *Stafford v Registrar of Deeds* 1913 CPD 379 at 384 *in fin*)'; '. . . . "payable at a future time", or "in respect of which there is liability to pay".' (per Searle J in *Stafford v Registrar of Deeds*, *supra*, at 385 *in fin*. (Approved of by Trollip JA in *Marine and Trade Insurance Co Ltd v Katz NO supra*, at 975D-G; and by Melunsky J in *Schenk v Schenk* 1993 (2) SA 346 (ED) at 350 A - 51C).

[27] The Act does not couple the word due and payable, in s 40, with and. They are distinguished by or. It follows that a separate meaning must be given to the two terms. From what has been stated above, 'due' must be given, in s 40 of the Act, the meaning of ' . . . a liquidated money obligation presently claimable by the creditor for which an action could presently be

brought against the debtor'. 'Payable' in order to distinguish it from 'due' must be given the meaning of a ' . . . future or contingent liability'.

[28] I must now apply these conclusions to the provisions of the Act. When does the obligation to pay VAT become 'due or payable'?

[29] Section 16(1) of the Act obliges the vendor to calculate, in the manner set out in that section, the tax 'payable' by the vendor, and s 28(1) requires the vendor to furnish the respondent with a return '. . . and pay the tax payable' to the respondent. It is clear that the word 'payable' in these two provisions cannot mean anything more than a future or contingent liability to pay an amount as later finally assessed by the respondent. Thus: the amount reflected in the return must be paid immediately because it is, in the sense described above, 'due'; however, there may be a future or contingent liability to pay more than that reflected in the return depending on the final decisions of the respondent or a court. Such contingent liability is not 'due', because it is not yet liquidated by a court or by agreement; nor is it payable because it is uncertain whether the vendor is liable for the future payment of any amount.

[30] However, the contingent liability for the correct amount payable in terms of the Act, becomes 'owing', in the sense described above, not only

when the assessment is made and notice thereof is given to the vendor, but somewhat later by virtue of the provisions of s 32(5) and read with s36.

[31] Section 32(5) deals with the situation where no objection is lodged to the respondent's assessment, or where the objection has been disallowed or withdrawn or the assessment has been altered or reduced. In these cases, the assessment becomes ' . . . final and conclusive'. This means, at least, that the amount assessed now becomes due.

[32] Two deductions from the provisions of s 32 of the Act seem to me to be incontrovertible, viz: (a) that the whole procedure of objection is predicated on the vendor having been notified of the assessment — otherwise the objection procedures cannot ever be implemented and the assessed amount cannot become due; and (b) that where the provisions of the section have been complied with and the objection properly dealt with the assessment becomes final and conclusive, and the amount thus arrived at becomes due, in the sense used above, *ie* there is now a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor; the debt is now one in respect of which the debtor is under an obligation to pay immediately (see the authorities quoted in par [25] above). It now becomes clear why the legislator in secs 40(1) and 40(2)(a) of the Act used the words

' . . . becomes due'. The liquidated amount for which the vendor is finally and conclusively liable, becomes due by virtue of the completion of the objection procedures of s 32.

[33] For present purposes, however, it must be stressed that the section 32 objection procedure is predicated upon the vendor having received notice of the assessment, as is required by s 31(4) which notice, furthermore, must give the vendor notice of his right to lodge an objection (s 31(6)).

[34] The following conclusions seem to me to be warranted:

[34.1] If the respondent is not satisfied with the return furnished by the vendor, *ie* in the circumstances set forth in s 31(1) of the Act, he may make an assessment.

[34.2] The respondent must give the debtor notice of such assessment — s 31(4) — including notice of the right of objection, which right may be exercised within a period of 30 days after such notification (s 31(5)).

[34.3] It follows that if the respondent has not made an assessment and given notice thereof to the vendor he cannot obtain judgment in terms of s 40(2)(a) of the Act, because any amount claimed by him will not be liquidated and thus not due.

[34.4] If no objection to an assessment made by the respondent in terms of s 31(1), is lodged by the vendor, the respondent, after the lapse of the 30 day period, may apply for judgment in terms of s 40(2)(a), because the amount is now due, having become liquidated, final and conclusive by virtue of the provisions of s 32(5).

[34.5] Once an objection is lodged, the respondent may only obtain judgment in terms of s 40(2) if, in accordance with s 30(5) the objection has been withdrawn or the assessment altered or reduced. It is only then, again, that the amount for which the vendor is liable, has becomes due, because it is now liquidated.

[34.6] Pending finalisation of the objection procedures the respondent may not apply for judgment in terms of s 40(2)(a). Pending such finalisation, the amount in dispute is neither due, because it is not immediately claimable : the obligation to pay is suspended pending the finalisation of the objection procedures. The amount is also not payable, because, not being finalised, it is not immediately but only contingently payable.

[35] This brings me to the case where the vendor, having objected to the s 31(1) assessment and not being satisfied with the sec 32 decision or

assessment of the respondent, appeals. He must do so within 30 days after having been notified of the outcome of the objection-procedures (see secs 33(1) and (2) which refer back to the provisions of s 32(4)). It is at this stage, and this stage only, that the 'pay now, argue later' philosophy enters into the picture. That is so because the obligation to pay the amount assessed in the course of the objection proceedings and of which notice was given to the vendor in terms of s 32(4), is not suspended by the noting of an appeal by virtue of the provisions of s 36, which expressly provide that the noting of an appeal does not suspend the obligation to pay the assessed tax etc immediately. The consequence of this provision is that payment of the amount assessed in terms of s 32 (not s 31) is no longer suspended and has to be paid immediately. It should be noted that the obligation to pay the amount assessed by the respondent in terms of s 31 is suspended by the lodging of an objection, because of the provisions of that section and s 32, whereas the obligation to pay the amount assessed in terms of s 32 is not suspended by the lodging of an appeal by virtue of s 36. This distinction is important, because it indicates, once again, that the respondent may only approach a court for judgment in terms of s 40(2)(a) of the Act after the objection provisions of the Act (s 32) have been completed – and, as shown, these provisions are predicated on notice of the s 31 assessment having been given to the vendor concerned and the

time in which he can lodge an objection with the respondent has expired or the objection has been dealt with in terms of s 32, as explained above.

Conclusion

[36] It follows that the question before us, *viz* whether a judgment in respect of VAT obtained by the respondent in terms of s 40(2)(a) of the Act, can be set aside because the appellant had not, prior to such judgment having been obtained, been given notice of the s 31 assessment on which the respondent relies, must be answered in the affirmative. The judgment obtained by the respondent against the appellant in the present case cannot be allowed to stand, nor the other proceedings taken against the respondent pursuant to such judgment. The judgment of the court *a quo* can also not be allowed to remain in force.

[37] The following orders are made:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the Court *a quo* is set aside and the following is substituted therefor:

(a) The judgment granted against the applicant on 18 July 2001 under case no 4467/2001 is set aside.

(b) The writ of attachment effected by the respondent pursuant to the aforesaid judgment, is hereby set aside.

(c) The respondent is ordered to pay the costs occasioned by this application, such costs to include those consequent upon the employment of two counsel.

P J J OLIVIER JA