



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 1222/21

In the matter between:

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

APPELLANT

and

FREE STATE DEVELOPMENT CORPORATION

RESPONDENT

Neutral citation: *The Commissioner for The South African Revenue Service v Free State Development Corporation (1222/2021) [2023] ZASCA 84 (31 May 2023)*

Coram: DAMBUZA AP, ZONDI AND WEINER JJA, MALI AND UNTERHALTER AJJA

Heard: 22 February 2023

Delivered: 31 May 2023

Summary: Application by taxpayer to withdraw statement of grounds of appeal and file amended statement – Tax Court granting order – test for appealability – Tax Court Rule 10(3) – taxpayer may not include in amended statement a ground of appeal that constitutes new ground of objection not raised under Tax Court Rule 7 – whether the amended ground of appeal foreshadowed in objection.

ORDER

On appeal from: Free State Tax Court, Bloemfontein (Musi JP sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel where so employed.

JUDGMENT

Weiner JA (Dambuza ADP, Zondi JA and Mali and Unterhalter AJJA concurring)

Introduction

[1] This appeal turns on whether the Free State Tax Court, Bloemfontein was correct in granting an order, permitting the respondent, the Free State Development Corporation (the taxpayer), to withdraw its statement of grounds of appeal (the original statement), filed in terms of Tax Court Rule (TCR) 31 (2), and to file an amended statement of grounds of appeal (the amended statement) against additional assessments levied by the appellant, the Commissioner for the South African Revenue Service (SARS).

[2] The Tax Court granted the relief sought by the taxpayer and granted it leave to file the amended statement within 20 days. It also granted leave to SARS to file a reply within 20 days of receipt of the taxpayer's amended statement. Leave to appeal to this Court was granted by the Tax Court.

[3] SARS sought to overturn the Tax Court's decision on the basis that the amended statement was premised on a new ground of objection not originally raised. Thus, it had breached TCR 10(3) which provides that a taxpayer may not appeal:

'On a ground that constitutes an amended objection against a part or amount of the disputed assessment not objected to under rule 7.'¹

[4] The Tax Court has jurisdiction over tax appeals lodged under s 107 of the Tax Administration Act (TAA)². In terms of s 117(3), it may hear interlocutory applications, or any application in a procedural matter relating to a dispute under Chapter 9 of the TAA (the chapter dealing with disputes and appeals). Its powers in relation to an assessment or a 'decision' under appeal, or in relation to an application in a procedural matter referred to in s 117(3), are set out in s 129(2) of the TAA. It reads as follows:

'In the case of an assessment or 'decision' under appeal or an application in a procedural matter referred to in section 117 (3), the tax court may –

- a. confirm the assessment or 'decision';
- b. order the assessment or 'decision' to be altered;
- c. refer the assessment back to SARS for further examination and assessment; or

¹ TCR 7 provides that a taxpayer may object to an assessment under s 104 of the Act.

² The Tax Administration Act 28 of 2011.

- d. make an appropriate order in a procedural matter.’³

Appealability

[5] The parties were requested to deliver supplementary submissions on whether the Tax Court’s order was appealable. The order deals with the granting of an amendment. Ordinarily, this would be a purely interlocutory order, which does not dispose of any issue in the main appeal. In *Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles*⁴ this Court held that:

‘It is true that the refusal of an amendment may have a final and definitive effect because a party may be precluded from leading evidence at the trial in respect of the aspects which were to be introduced by the amendment of the pleadings. However, the granting of an amendment does not, without more, have that effect. Ordinarily, an order granting leave to amend is an interlocutory order which is not final and definitive of the rights of the parties.’⁵

[6] The right to appeal a decision of the Tax Court falls under s 133(1) of the TAA, which provides that ‘[t]he taxpayer or SARS may in the manner provided for in this Act appeal against a decision of the tax court under sections 129 and 130’. It is trite that, in the ordinary course, to be considered appealable, the order or decision must be ‘final in effect; not susceptible of alteration by the court of first instance; definitive of the rights of the parties, and, the order must have the

³ Subsection 129(2)(d) was inserted pursuant to an amendment to the TAA under s 19 of Act 22 of 2018 wef 17 January 2019; Cf *Wingate-Pearse v Commissioner of the South African Revenue Service* (830/2015) [2016] ZASCA 109; 2017 (1) SA 542 (SCA) (1 September 2016), where Wallis JA dealt with the position prior to this amendment: ‘[c]onspicuously absent from s 129(2) is any provision dealing with the Tax Court’s powers when dealing with an interlocutory matter under s 117(3). ... The absence of such an express provision is, however, highly relevant to the question whether any decision on an interlocutory issue is appealable.’

⁴ *Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles* [2021] ZASCA 178 (17 December 2021); *Hassim v Commissioner, South African Revenue Services* [2002] ZASCA 140; 2003 (2) SA 246 (SCA);

⁵ *Macsteel* para 12.

effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'.⁶

[7] SARS contended that the decision was appealable because it was wrong. It relied for this submission on the dictum in *The Commissioner for the South African Revenue Services v Airports Company for South Africa (ACSA)*⁷ where this Court per Windell AJA, held that:

‘As I have shown the tax court wholly misconceived the matter. As a result, the order issued is plainly wrong and it can hardly be in the interests of justice to permit it to stand.’

[8] *Acsa* dealt with an amendment to an objection, which was granted by the Tax Court, despite there being no provision for such an amendment in the TAA. An objection is part of the pre-litigation administrative process and is not a pleading. Thus it cannot be amended. TCR 31, 32 and 33 statements constitute the pleadings which may be amended in terms of TCR35.⁸ Thus, this Court in *Acsa* arrived at the decision that the order of the Tax Court was wrong as the Tax Court had no power to grant the order which it did. In the present case, the TAA provides for the amendment of the statement of grounds of appeal, in terms of TCR 35.

[9] The taxpayer argued that because the order is not definitive of the rights of the parties, and does not dispose of any of the relief claimed in the main proceedings, it did not conform to the principles set out in *Zweni* and thus was not appealable. The important distinction in the present matter is that the appeal of the Tax Court’s order concerns the power of that court to grant an amendment

⁶ *Zweni v Minister of Law and Order* 1993 (1) SA 523(A).

⁷ *The Commissioner for the South African Revenue Services v Airports Company for South Africa (ACSA)* (785/2021) [2022] ZASCA 132; (7 October 2022) para 26.

⁸ *Acsa* *Ibid* para 18-21.

in circumstances where, in the SARS' view, it had no such power. SARS submitted that:

‘The Tax Court has permitted the operation of what may be termed a two-tiered tax system whereby a party sufficiently resourced to access the Tax Court can lay out a case in the midst of proceedings that contradicts its returns, its objections and its appeals, thus rendering that party untethered to the consequences of its own actions. This procedure is not available to any taxpayer who is bound by its declarations. The appellant's case is that the taxpayer was granted relief by the Tax Court that is not competent in statute and Rules and prejudices SARS in the process. ...’.

[10] In *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd*,⁹ this Court held that:

‘Where the challenge concerns the jurisdiction of a court, and hence the competence of a judge to hear the matter, the decision of the court is considered definitive, and appealable. This is consistent with the principles enunciated in *Zweni* because the decision as to jurisdiction is considered final. This position is entirely justified because an error as to jurisdiction, if not subject to appellate correction, would permit the court below to proceed with a matter when it had no competence to do so, rendering what it did a nullity. That is plainly an undesirable outcome.’

[11] Thus, the Tax Court's order is appealable because it concerns the Tax Court's powers to grant the order which it did. SARS contends that such powers were lacking in terms of the Legislation and the Rules of the Tax Court. Questions of competence are always treated as having a final effect as a lack of competence would vitiate the decision.¹⁰

⁹ *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Another* (273/2022) [2023] ZASCA 63; (5 May 2023) (SCA).

¹⁰ *TWK* supra; para 41; *Moch v Nedtravel (Pty) Ltd* 1996 (3) SA 1 (SCA) at para 14.

The Basis of the appeal

[12] The issue at stake is whether the ground of appeal in the amended statement constitutes a new ground of objection not previously raised, as provided for in TCR 10(3). If it does, then the Tax Court had no jurisdiction to grant the order which it did. In other words, was the ground in the amended statement foreshadowed in the original objection filed in terms of TCR 7, as found by the Tax Court? For this purpose, it is necessary to consider the nature of the transactions that were concluded between the taxpayer and the Department of Trade and Industry (DTI), as this will assist in determining whether the amendment was foreshadowed in the objection.

Transactions

[13] It is common cause that the taxpayer is a registered VAT vendor, in terms of the VAT Act. It is the official economic development agency for the Free State province. In 2014, the Special Economic Zones Act (SEZ Act)¹¹ came into force. The objects of this Act are to provide for the designation, promotion, development, operation and management of Special Economic Zones (SEZs) and the establishment of a single point of contact to deliver the required government services to businesses operating in SEZs.

[14] The SEZ Act provides that the licensee must establish an entity to manage the SEZ, and to provide the resources and the necessary means to manage and operate the SEZ. On this basis, the DTI identified the taxpayer as a public entity which would further its mandate of developing the SEZ.

¹¹ Special Economic Zones Act 16 of 2014.

[15] The Department of Economic, Small Business Development and Tourism and Environmental Affairs (DESTEA) wished to establish a SEZ within the Harrismith area of the Free State. It identified land registered in the name of the taxpayer. DESTEA requested the taxpayer to apply for a SEZ licence from the DTI on its behalf, on the understanding that the SEZ, when established, would be transferred into the name of the entity to be established under the SEZ Act. The taxpayer would not be the entity that would manage the SEZ. For that purpose, the Maluti-a-Phofung SEZ was created in terms of the SEZ Act and a permit was granted to it to operate and manage the SEZ.

[16] On or about 5 March, 2014, a Memorandum of Funding Agreement (MFA) was concluded between the DTI and the taxpayer. In terms thereof, R4 500 000 was granted to the taxpayer for the 2013/2014 financial year in order for the taxpayer to plan and prepare for the establishment of the SEZ hub in the Free State Province.

[17] On or about 15 December 2015, the taxpayer entered into a Special Economic Zone Funding agreement (SEZFA) with the DTI. Pursuant thereto, an amount of approximately R240 million was approved for the implementation by the taxpayer of the designated Maluti-a-Phofung SEZ for bulk structure development to facilitate investments in the specific SEZ.

[18] Since 2020, the taxpayer has been in the process of transferring the land to the entity created under the s 25 of the SEZ Act.

The disputed assessments

[19] In respect of the amounts paid to the taxpayer in terms of the MFA and the SEZFA (the agreements), the taxpayer submitted VAT 201 returns for the

following tax periods: 07/2012, 02/2015, 10/2015, 12/2015, 07/2016, 02/2017 and 06/2017 (the disputed periods), and declared the output tax as zero-rated supplies.¹²

[20] SARS found that the taxpayer had erroneously claimed that the supplies were zero-rated and had therefore understated output VAT for the disputed tax periods. It therefore raised additional assessments in terms of s 92 of TAA to correct the amount of VAT payable.¹³ The total assessment amount for the disputed tax periods was approximately R39 million.

[21] SARS considered the taxpayer to be a ‘designated entity’ as defined in s 1 of the VAT Act, which includes, *inter alia*, a provincial government business enterprise. It concluded that the transactions were subject to the standard VAT rate because they were supplies, in terms of s 7 of the VAT Act or ‘deemed supplies’, in terms of s 8(5) of the VAT Act.

[22] Section 7(1)(a) provides for the imposition of Value Added Tax (VAT). It provides:

‘Imposition of Value Added Tax

7.(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the State Revenue Fund a tax, to be known as the value-added tax –

(a) On the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him calculated at the rate of 15%...on the value of the supply concerned or the importation as the case may be.’

¹² In terms of s 11 of the VAT Act.

¹³ Section 92 provides that if SARS is satisfied that an assessment ‘does not reflect the correct application of a Tax Act to the prejudice of SARS or the *fiscus*, SARS must make an additional assessment to correct the prejudice’. Section 104(1) grants to the taxpayer the right to object to the assessment made.

[23] Supply is defined as including ‘performance in terms of a sale, rental agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of “supply” shall be construed accordingly’.

[24] Section 8(5) of the VAT Act provides that:

‘For the purposes of this Act a designated entity shall be deemed to supply services to any public authority or local authority to the extent of any payment made by the authority concerned to or on behalf of that designated entity in respect of the taxable supply of goods or services by that designated entity.’¹⁴

[25] On 7 January 2019, the taxpayer, in terms of s 104 of the TAA, read with TCR 7, objected to the additional assessments by means of a notice of objection.¹⁵ The taxpayer contended that, the transactions were zero-rated, in terms of s 11, which provides:

(1) ‘Where, but for this section, a supply of goods would be charged with tax at the rate referred to in section 7(1), such supply of goods shall, ... be charged with tax at the rate of zero per cent...

(2) Where, but for this section, a supply of services would be charged with tax at the rate referred to in section 7 (1), such supply of services shall, ... be charged with tax at the rate of zero per cent where -

¹⁴ “designated entity” means a vendor— (i) to the extent that its supplies of goods and services of an activity carried on by that vendor are in terms of (b)(i) of the definition of 'enterprise' treated as supplies made in the course or furtherance of an enterprise; (ii) which is a major public entity, national government business enterprise or provincial government business enterprise listed in Schedule 2 or Part B or D of Schedule 3 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), respectively; (iii) which is a party to a 'Public Private Partnership Agreement' as defined in Regulation 16 of the Treasury Regulations issued in terms of section 76 of the Public Finance Management Act, 1999 to the extent that that party supplies goods or services in terms of that Agreement to the 'institution' defined in that Regulation;

¹⁵ 7. Objection against assessment

A taxpayer who may object to an assessment under section 104 of the Act, must deliver a notice of objection within 30 days after - (a) delivery of a notice under rule 6(4) or the reasons requested under rule 6; or (b) where the taxpayer has not requested reasons, the date of assessment. (2) A taxpayer who lodges an objection to an assessment must (a) complete the prescribed form in full; (b) specify the grounds of the objection in detail including - (i) the part or specific amount of the disputed assessment objected to; (ii) which of the grounds of assessment are disputed; and (iii) the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment.’

...

(t) the services are deemed to be supplied in terms of section 8 (5A)';

[26] Section 8 (5A) read together with s 11(2)(t) deals with the zero rating of a deemed supply by a vendor (excluding a designated entity) in respect of a grant. Section 8 (5A) provides that:

‘For the purposes of section 11(2)(t), a vendor (excluding a designated entity) shall be deemed to supply services to any public authority, municipality or constitutional institution listed in Schedule 1 to the Public Finance Management Act, 1999 (Act No. 1 of 1999), to the extent of any grant paid to or on behalf of that vendor in the course or furtherance of an enterprise carried on by that vendor.’

[27] Having regard to the nature of the transactions between the taxpayer and the Department of Trade and Industry (DTI), the taxpayer submitted that it was a mere conduit for the funds and gained no financial benefit upon which VAT could be levied. The objections were disallowed by SARS in February 2019. Dispute resolution failed. In terms of TCR 10, the taxpayer delivered a notice of appeal on 7 March 2019 and the appeal proceeded in the Tax court.

The statements in terms of Rule 31(2), 32(2) and 33 of the Tax Court Rules

[28] In terms of TCR 31(2), SARS delivered its statement of ‘the grounds of assessment and opposing the appeal’. It stated that, in terms of s 7(1)(a) and the definition of ‘supply’, the taxpayer was liable for payment of VAT at the standard rate, for the actual supply of goods for consideration, as provided for in the agreements, read with the provisions of s 7.

[29] In its original statement, in terms of TCR 32(1), the taxpayer had stated that it was not in dispute that it had rendered services in accordance with the two funding agreements. It, *inter alia*, was accountable for management of the funds granted to it, and was to monitor the implementation of the project. There was,

however, no reciprocity in the form of a supply of services of a corresponding value, to the funds disbursed by the taxpayer. Such services did not attract VAT and were zero-rated.

[30] The taxpayer contended that the agreements specifically stated that such proceeds should be used exclusively for the development and advancement of the SEZ and not for the taxpayer. The taxpayer did not derive any financial benefit from the grant. It was just a conduit, which the DTI had employed to realise the objectives of developing the SEZs. The payment was not linked to an actual supply of goods or services.

[31] SARS responded to the TCR 32(2) statement of the taxpayer, in terms of TCR 33. It contended that the taxpayer was a ‘designated entity’ and therefore did not enjoy the zero-rating contemplated in s 8(5A) read with s 11 of the VAT Act.

[32] The taxpayer’s original statement was based upon advice received from its erstwhile legal advisors. In June 2022, the taxpayer received a second legal opinion. The opinion advised that the transactions were not zero-rated but were, in fact, neither a ‘supply’ nor ‘deemed supply’ in terms of the VAT Act. This led to the quest to withdraw its original statement and to file the amended statement, claiming that there was no ‘supply’ or ‘deemed supply’. The admissions that the transactions fell within the definitions of ‘supply’ and ‘deemed supply’, were legal conclusions, made erroneously. It was submitted that the amended statement was based upon the same facts and transactions, but reached a different legal conclusion. The taxpayer argued that the issue traversed in the amended grounds was covered by the substance of the objection, and it therefore did not contravene TCR 10(3).

[33] The taxpayer denied that it was ‘designated entity’. To be defined as a ‘designated entity’, it was necessary to consider whether the supply of goods and services falls within the definition of ‘enterprise’ in terms of the definition set out in paragraph (b)(i) and to establish that the deemed supply was made ‘in the furtherance of an enterprise carried on by that designated entity’.

[34] The entities referred to in paragraph (b)(i) of the definition of ‘enterprise’ exist so that the regulatory, administrative, stewardship or social functions of national and provincial government can be carried out. The taxpayer submitted that the transactions were not carried out in furtherance of the taxpayer’s enterprise. They were made pursuant to the two agreements, which did not form part of any enterprise carried on by the taxpayer. The taxpayer contended that the purpose of s 8(5) of the VAT Act is to ensure that the entities in which government has an interest, do not have an unfair advantage over other vendors participating in the market for the same or similar goods or services.

[35] The taxpayer contended that the transactions did not give it an unfair competitive advantage over other vendors participating in the market for the same or similar supplies of goods or services. The payments made to the taxpayer by the DTI were neither in the furtherance of taxpayer’s enterprise nor within the definition of paragraph (b)(i) of an enterprise. Therefore, the deeming provisions in s 8(5) of the VAT Act do not apply. Even if SARS’ contention that the taxpayer was a designated entity was correct and that the ‘deemed supplies’ were made in the course of the taxpayer’s furtherance of its enterprise, the taxpayer argued that it did not receive any payments, or such payments were not made on its behalf or for its benefit. Such payments were not ‘received’ by the taxpayer within the ambit of the VAT Act. The payments received from the DTI placed the taxpayer

in the position of a conduit. There was thus no ‘deemed supply’ as specified in s 8(5) of the VAT Act.

The amendment

[36] TCR 35 provides that:

- ‘(1) The parties may agree that a statement under Rule 31, 32 or 33 be amended.
- (2) If the other party does not agree to the amendment, the party who requires same may apply to the Tax court under Part F for an order under Rule 52.’

[37] In its application to amend under TCR 52 (7),¹⁶ the taxpayer endeavoured to show that the transactions were neither ‘supplies’ nor ‘deemed supplies’ for the reasons referred to above. SARS opposed the application on the basis that the proposed amendment sought to introduce grounds of appeal which constituted amended grounds of objection against a part of the assessments not previously objected to. It submitted that the amended ground of appeal that the amount paid does not constitute a taxable supply, was not a ground of objection relied upon. It also contradicted the taxpayer’s VAT 201 returns (in which it claimed that the supplies were zero-rated).

[38] SARS submitted that the taxpayer is bound by its own declarations that the supplies were zero-rated. In terms of s 25(2) of the TAA, a return is regarded as being true. The taxpayer had not, prior to the application to amend, indicated that this was not correct.

[39] In *HR Computek (Pty) Ltd v Commissioner for the South African Revenue Services (Computek)*,¹⁷ Ponnann JA stated that ‘not having raised an objection to

¹⁶ TCR 52 (7) provides: A party seeking an amendment of a statement under rule 35, may apply to the tax court under this Part for an appropriate order, including an order concerning a postponement of the hearing.

¹⁷ *HR Computek (Pty) Ltd v Commissioner for the South African Revenue Service* [2012] ZASCA 178 para 12.

the capital assessment in its notice of objection, the taxpayer was precluded from raising it on appeal before the tax court'. In referring to this principle, the learned judge noted that Corbett JA in *Matla Coal Ltd. v Commissioner for Inland Revenue*¹⁸ stressed the importance of adherence to this principle, for otherwise 'the Commissioner may be prejudiced by an appellant shifting the grounds of his objection to the assessment in issue'. He noted that Corbett JA, also, indicated that in the application of the principle, a court should not be 'unduly technical or rigid in its approach' and 'should look at the substance of the objection and the issue as to whether it covers the point which the appellant wishes to advance on appeal must be adjudged on the particular facts of the case'.¹⁹

[40] In the present case, the taxpayer raised the objection in its notice of objection that the payment received was not linked to a supply, but relied upon an incorrect legal conclusion in claiming that it was zero rated. It is thus distinguishable from *Computek*. In seeking to amend its grounds of appeal, the taxpayer claimed that the transactions were not subject to VAT because the transactions did not involve a supply. The basis of the objection and the claim for zero rating were similarly based on the nature of the transactions and the fact that the payments were not linked to an actual supply of goods or services. The amended grounds were thus clearly foreshadowed in the objection. The nature of the taxpayer's objection to the whole of SARS's assessment has always been (and continues to be) the legality of imposing a VAT liability on the transactions under consideration.

[41] The Tax Court found that the original statement of grounds of appeal was based upon an erroneous legal conclusion. On a proper interpretation of TCR

¹⁸ *Matla Coal Ltd. v Commissioner for Inland Revenue* (22/85) [1986] ZASCA 120.

¹⁹ *Ibid* para 25.

10(3) read together with TCR32(3), as a matter of law, the taxpayer is not precluded from raising a new ground of appeal in its amended statement, in particular when the grounds were, in substance, the same as those stated in the initial objection under Rule 7(1).²⁰ I therefore conclude that the Tax Court had the power to grant the amendment because the grounds were foreshadowed in the objection.

[42] It is then necessary to consider the Tax Court's discretion in deciding whether to grant the amendment or not. In *Magnum Simplex v The MEC Provincial Treasury*,²¹ this Court referred to *Caxton Ltd & others v Reeva Forman (Pty) Ltd & another*²² where Corbett CJ stated at 'Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles.' These principles include prejudice to the other party; that the amendment is made in good faith; and that the granting of the amendment will ensure that justice is done in deciding the real issues between the parties.

[43] This discretion must be exercised judicially. If an issue has been foreshadowed in the objection but was not expressly stated, there would be no real prejudice to the other party and the amendment should be granted. The taxpayer's explanation was that it was advised by its erstwhile attorneys that the transactions between it and the DTI, were zero-rated for VAT purposes. The taxpayer thus completed the VAT 201 assessments in that manner and on that advice. The taxpayer's objection and pleadings were also drafted in accordance

²⁰ *The Commissioner for the South Africa Revenue Services v Massmart Holding Ltd* (ITC14294[2018] ZATC 2 (11 July 2018) para 9-13.

²¹ *Magnum Simplex v The MEC Provincial Treasury* (556/17) [2018] ZASCA 78; (31 May 2018) 2018 JDR 0768 (SCA).

²² *Caxton Ltd & Others v Reeva Forman (Pty) Ltd & Another* 1990 (3) SA 547 (A).

with the advice received. This changed when the second legal opinion was received.

[44] Applications for amendments seeking to retract incorrectly admitted legal consequences are normally granted by our courts (even on appeal), for ‘the law would be prejudiced if cases were to be decided on what parties might, in ignorance, have agreed the law to be’.²³ A court is not even obliged to consider prejudice to the other side in such circumstances. In *Potters Mill* it was held that: ‘Where a plaintiff alleges in a pleading that a particular law governs the case, whereas that law may not, an admission by a defendant that the law referred to governs the case does not make it so. What the law is has always been a matter for the court to determine, and it is well established that mistakes about the law which the parties make are not binding on a court. Thus in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) the court observed at 23F – G that it would be —

‘an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part.’²⁴

[45] Even if prejudice was to be taken into account, SARS has the opportunity to file a further statement in terms of TCR 33, dealing with the amendment. It has the right to reply to any new grounds, material facts or applicable law in the appellant’s amended statement. It admits that no further evidence was provided by the taxpayer in seeking the amendment. As the taxpayer contended, this was because the amendment is based upon a legal conclusion, not a factual scenario. SARS conceded that a court will not, even where admissions are withdrawn,

²³ *Potters Mill Investments 14 (Pty) Ltd v Abe Swersky & Associates and Others* [2016] ZAWCHC 5; 2016 (5) SA 202 (WCC) (*Potters Mill*) para 33.

²⁴ *Potters Mill* para 11; *Trustees, Burmilla Trust and Another v President of The Republic of South Africa and Others* 2022 (5) SA 78 (SCA).

regard itself as being bound by a mistake of law on the part of a litigant.²⁵ The taxpayer still bears the onus of proof in terms of s 102 of the TAA to prove that the transactions were not ‘supplies’ or ‘deemed supplies’ as defined, and that they did not therefore attract VAT. These issues will be dealt with in the fullness of time.

[46] In any event, any investigations which SARS may have carried out in determining whether the ‘supplies’ were zero-rated would have encompassed whether there was, in fact, a ‘supply’ or ‘deemed supply’ in terms of s 8(5) of the VAT Act. Behind both grounds, lies the question as to whether a vatiable transaction occurred when the taxpayer performed in terms of the agreements.

[47] In appropriate circumstances, a court will carefully scrutinize the substance of a particular transaction to establish its true nature. The amendment will permit the true issue between the parties to be ventilated²⁶. This basic principle of tax law is underscored by s 143(1) of the TAA, which provides that SARS has a duty ‘to assess and collect tax according to the laws enacted by Parliament and not to forgo a tax which is properly chargeable and payable.’ This principle must also relate to the corollary - SARS’ obligation not to levy taxes, which are not payable in terms of the law. This could be the situation if the amendment was not granted.

[48] The taxpayer demonstrated that there would be no prejudice to SARS, the amendment was sought shortly after the second legal opinion was received, but

²⁵ *Alexkor Ltd and another v Richtersveld Community and others* [2003] ZACC 18 para 43 as cited in *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others* (323/2018) [2019] ZASCA 30.

²⁶ *Pienaar Brothers (Pty) (Ltd) v The Commissioner for the South Africa Revenue Services* [2017] 4 All SA 175 (GP) para 41.

more importantly, the granting of the amendment will allow the true legal issues between the parties to be ventilated.

[49] Accordingly, the appeal must fail.

Order:

The appeal is dismissed with costs including the costs of two counsel where so employed.

S E WEINER
JUDGE OF APPEAL

Appearances:

For appellant: N Snellenburg SC with DR Thompson.

Instructed by: State Attorney, Bloemfontein.

For respondent: PJJ Zietsman SC with MB Mojaki.

Instructed by: Rampai Attorneys, Bloemfontein.