REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/9651

DATE:20/10/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

JOSEPH GADIFELE MODIBANE Applicant

and

SOUTH AFRICAN REVENUE SERVICE Respondent

J U D G M E N T

TSOKA, J:

[1] This is an application for rescission of judgment obtained by the respondent, South African Revenue Service ("*SARS*"), on 5 March 2009. The application is opposed by SARS.

[2] The background facts that gave rise to the application in this matter are as follows. On 13 August 2007, the Commissioner issued an assessment for income tax, interest and additional tax against the applicant. In terms of the assessment, the applicant was liable to SARS in an amount of R 22 million. This amount was not paid. On 17 January 2008 the applicant lodged an objection to the assessment. On 30 January 2008 the Commissioner dismissed the objection. On 7 March 2008 the applicant lodged an appeal to the Tax Court against the disallowance of the objection. This appeal is still pending. After several attempts were made to discuss the applicant's tax liability, which discussions were proving fruitless, on 5 March 2009, the Commissioner, in terms of section 91 (1)(b) of Act 58 of 1962 ("*the Act*"), obtained judgment from the Registrar of this Court against the applicant. The judgment was in the amount of R 25 million inclusive of interest.

[3] On 18 November 2009, the applicant approached SARS to request that the judgment be withdrawn as he stands to lose a substantial tender should the judgment be allowed to stand. SARS refused to have the judgment withdrawn against the applicant. On 16 March 2011, the applicant launched the present application.

[4] At the hearing of the application, the applicant, who appears in person, contends that the application was rescinded on 3 May 2011 by Sutherland AJ with the result that there is no longer any *lis* between the parties.

[5] The respondent averred and argued that the order rescinding the judgment was recalled by Sutherland AJ after the applicant was duly notified and failed to attend court when the order was recalled.

[6] At the time Sutherland AJ rescinded the judgment of 5 March 2009, it appears that the applicant, instead of serving the notice of set down on SARS' attorneys of record, served the notice on the State Attorney who did not oppose the application for rescission of judgment. It is my understanding that it was on this basis that Sutherland AJ granted the order rescinding the judgment. When Sutherland AJ was apprised of the full facts, he recalled his order after the applicant was duly notified that the order was to be challenged or recalled.

[7] The order of Sutherland AJ recalling the earlier rescission of judgment stands. The recall was effective. The judgment is thus no longer rescinded and stands. The rescission is the issue (*lis*) between the parties. There being a *lis* between the parties, I requested the applicant to argue the application for rescission of judgment. In the main, the applicant argued that as there was at all material times, and still is, an appeal pending in the assessment, it was wrong of SARS to proceed to obtain judgment against him. The applicant furnished the court with a copy of a judgment in the matter between *Mr*

Prepaid (Pty) Ltd v IDC Case no 1956/2007 and 1956/2007 as confirmation that his tax assessment by SARS for the relevant period was wrong.

[8] From the founding affidavits the judgment of 5 March 2009 is attacked on three main grounds. First, it is contended by the applicant that his assessment by SARS is incorrect as the applicant did not earn any moneys from his company, Mr Prepaid (Pty) Ltd. Secondly, the judgment is attacked on procedural grounds. Thirdly, the applicant contends that it was wrong of SARS to have obtained judgment as the appeal on his assessment was still pending.

[9] In terms of the Act, the Commissioner issued an assessment setting out the amount of income tax that was due by the taxpayer. In terms of section 1, an assessment is a determination by SARS of the amount of tax payable by the taxpayer. In terms of section 89 of the Act, the amount of tax set out in the assessment is payable by the taxpayer within the period set out in the assessment. In the present matter, the applicant's assessed tax, was due for the periods 2002 – 2005 and was payable on 31 September 2007.

[10] In terms of section 81 of the Act, a taxpayer has a right to object to the assessment. If the objection is disallowed, the taxpayer is, in terms of section 83, entitled to appeal against the assessment to the Tax Court.

[11] However, in terms of section 88(1) of the Act, prior to its amendment by the Taxation Laws Amendment Act 18 of 2009, the obligation to pay any tax

and the Commissioner's right to receive and recover any tax under the Act is not suspended by such an appeal. The section then reads –

> ''*(1) The –*
>
> *(a) obligation to pay any tax chargeable under this Act shall not, and*
>
> *(b) the right to receive and recover any tax chargeable under this Act, shall not, unless the Commissioner so directs,*
>
> *be suspended by an appeal or pending the decision of a court of law under section 86A, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the tax board or the tax court or that court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest a the prescribed rate, the interest being calculated from the date proved to the satisfaction of the Commissioner to be the date on which that excess was received and amounts short-paid being recoverable with interest calculated as proved in section 89*".

[12] From the plain language of section 88(1) it is clear that a taxpayer's obligation to pay tax and the Commissioner's right to receive and recover tax is not suspended by an objection or appeal to the Tax Court, unless the Commissioner directs that such taxpayer's obligation to pay tax and its right to receive and recover tax is suspended. That such a taxpayer's appeal would not be prejudiced by the Commissioner's right to receive and recover any tax in the meantime, is clear. Should the taxpayer's appeal be upheld, such taxpayer has nothing to lose as he is to be refunded the excess amount paid together with interest thereon.

[13] SARS' right to recover tax and execute against a taxpayer's assets is provided for in section 91 of the Act which reads as follows –

> *"(1) (a) Any tax or any interest payable in terms of section 89 (2) or 89quat shall, when such tax or interest becomes due or is payable, be deemed to be a debt due to the State and shall be payable to the Commissioner in the manner and at the place prescribed.*
>
> *(b) If any person fails to pay any tax or any interest payable in terms of section 89 (2) or 89quat when such tax or interest 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 of the tax or interest 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.*
>
> *(bA) The Commissioner may by notice in writing addressed to the aforesaid clerk or registrar, withdraw the statement referred to in paragraph (b) and such statement shall thereupon cease to have any effect: Provided that, in the circumstances contemplated in the said paragraph, the Commissioner may institute proceedings afresh under that paragraph in respect of any tax or interest referred to in the withdrawn statement.*"

[14] It seems to me somewhat misleading to refer to the certified statement by the Commissioner filed with the Registrar in terms of section 91(1) of the Act, as judgment. The Registrar is not granting any judgment or making any pronouncement on the statement. The statement merely has the effect of a civil judgment as if it were indeed a civil judgment. The sole purpose of the provisions of Section 91, in my view, is to compel a taxpayer to comply with his obligations to pay tax and to facilitate the Commissioner's right to receive and recover such tax that is due and payable.

[15] In the unreported judgment of *Capstone 556 (Pty) Ltd v Commissioner, SARS and Another* [2011] ZAWCHC 297, delivered on 22 June 2011, the Court in paragraph [375] said the following –

> "*Although a statement filed by the Commissioner in terms of section 91(1)(b) has all the effects (i.e. consequences) of a judgment, it is nevertheless not in itself a judgment in the ordinary sense. It does not determine any dispute or contest between the taxpayer and the Commissioner*"

[16] I agree with the observation made in *Capstone 556* that the certified statement by the Commissioner in terms of section 91(1) of the Act is not a judgment in the ordinary sense of the word. If the statement is a judgment, I fail to see how the said judgment could, in terms of section 91(1) (bA), be unilaterally withdrawn by the Commissioner and again the Commissioner be at liberty to institute proceedings afresh based on the said withdrawn statement.

[17] It seems to me that the provisions of section 91(1) of the Act are enforcement and recovery mechanisms enabling SARS to carry its obligation in terms of the Act, that is, to receive and recover any tax owed to it by a taxpayer and, if necessary, to execute on the certified statement which has all the consequences of a civil judgment. In *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 SCA at 527A, the Court pointed out that there is no court process that initiates the claim for enforcement of the debt, no service on the debtor is required and that there is not even a scope

for opposition or hearing of sorts to resolve disputes. See also *Metcash* at 1137H.

[18] In my view, no judgment in the ordinary sense of the word was granted by the Registrar on 5 March 2009. There is consequently no judgment that is susceptible for rescission, either in terms of the rules or the common law particularly having regard to the provisions of section 92 which reads –

> "*It shall not be competent for any person in any proceedings in connection with any statement filed in terms of paragraph (b) of subsection (1) of section ninety-one to question the correctness of any assessment on which such statement is based, notwithstanding that objection and appeal may have been lodged thereto*."

[19] That, in my view, disposes of the issue. There is no judgment to be rescinded by this court. In the event that the conclusion I have reached as aforesaid is incorrect, then I deal with the matter as set out below.

[20] In the event that the Registrar granted judgment on 5 May 2009, in the ordinary sense of the word and as understood by the applicant, and which judgment is susceptible to rescission, then the applicant must show sufficient cause why the said judgment should be rescinded.

[21] In *Chetty v Law Society of Transvaal* 1985 (2) SA 756 (AD), the court pointed out that 'sufficient cause' (or 'good cause') defies precise definition. The court went further to state that the long-standing practice of our courts has established that 'sufficient cause '…comprises of two essential elements,

namely that (a) the party seeking relief must present a reasonable and acceptable explanation for his default and (b) that on the merits such party has a bona fide defence which prima facie, carries some prospect of success. These elements must be met by a party seeking to rescind a judgment granted in his absence.

Wilful Default

[22] The applicant does not complain about not receiving a notification of his tax assessment. His complaint is that after the judgment was obtained it was not properly served on him as a different address to the one reflected in the judgement was used. Furthermore, the applicant complained that the judgment was not served by registered mail.

[23] In the affidavit the applicant does not state that he did not know that the judgment was obtained. Neither does he state what prejudice was caused to him by the non-receipt of the judgment after same was granted by the Registrar. What is clear is that the applicant was aware of his tax assessment as early as September 2007. By this time the applicant engaged the services of Price Waterhouse Coopers ("*PWC*") who indicated to the Commissioner that he intends to object to the assessment. The objection was only filed by PWC on behalf of the applicant on 17 January 2008. The objection was disallowed by the Commissioner on 30 January 2008. On 12 February 2008 PWC advised the Commissioner that an appeal would be lodged. How then could the applicant have taken these steps if he had not received the

assessment? The unequivocal answer is that the applicant reacted to the assessment precisely because he received the assessment.

[24] Did the applicant receive the judgment? The applicant was without doubt aware of the judgment, otherwise PWC would not have notified the Commissioner that an appeal would be lodged against the assessment.

[25] Several attempts were made to contact the applicant on his cellphone number and through PWC but the applicant refused to engage SARS to fruitfully resolve his obligation to pay tax. On 2 March 2008, PWC informed SARS that they no longer represented the applicant and that they too had difficulty in contacting the appellant who by that time owed PWC some fees. As a result of applicant's recalcitrant attitude and his failure to co-operate in this matter, the Commissioner on 5 March 2009 filed the certified statement in terms of section 91 of the Act. Upon the judgment having been entered against the applicant same was delivered at his residence.

[26] In the result I find that the applicant was in wilful default.

Bona Fide Defence

[27] The gravamen of applicant's defence is that he lodged an appeal and as the appeal is still pending, SARS was not entitled to obtain judgment against him on 5 March 2009.

[28] The provisions of section 91(1)(b) of the Act are clear. Notwithstanding that an objection and appeal have been lodged, the Commissioner is entitled to obtain judgement against the applicant who is not without remedy should his appeal succeed. In terms of section 88 of the Act, should the applicant succeed with his objection or appeal, he would be refunded what he has paid to SARS together with interest.

[29] The applicant seems to rely on the judgment of Spilg J in *Mokoena v Commissioner, South African Revenue Service* 2011 (2) SA 556 (GSJ) wherein the court in paragraph [16] of the judgment said the following –

> *[16] It is self-evidently incompetent, having regard to the rights of objection and appeal, to obtain judgment in the interim. It is inconsistent with the framework of the Act and its provisions, eg the express right to collect tax despite an objection and appeal would be unnecessary if judgment could be obtained in the interim. See also Metcash in para 58, as well as the general principles regarding a right of hearing and access to courts (again Metcash in para 58), and the safeguards that objection and appeal provide within the context of the administrative exercise of the Commissioner's powers.*'

[30] In terms of section 88(1) of the Act, the obligation to pay tax and the right to receive and recover tax is not suspended by any appeal or any pending decision of the appeal court in terms of section 86A of the Act. A tax payer's obligation and the Commissioner's right to receive and recover tax from any taxpayer may only be suspended if directed so by the Commissioner. This has given rise to the 'pay now, argue later' principle which has become established in our law.

[31] In *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA), the Supreme Court of Appeal dealing with the provisions of section 40 of the Value Added Tax Act 89 of 1991, which provisions are identical to the provisions of section 92 of the Act, at 524H – the Court said the following –

> "*The section is a recovery provision and nothing more. It does not empower the Commissioner to determine whether an amount is payable (or due). The jurisdictional element is that the tax must be payable before the Commissioner can invoke the procedure for which the section provides. When that element exists the Commissioner can rely on ss(5) and recover an amount which he certifies as (already) due or payable,* ***despite the fact that an objection has been lodged or an appeal may be pending****."*

[32] In *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) the Constitutional Court, in approving the 'pay now and argue later' principle, in the context of VAT, the provisions of which are in substance identical to the relevant provisions of the Act, in paragraphs [60] and [61] of the judgment said –

> "*[60] In considering justification it is important to remember that the limitation under s 40(5) is limited in its scope, temporary and subject to judicial review. There are three additional features. First, the public interest in obtaining full and speedy settlement of tax debts in the overall context of the Act is significant. In their affidavits the Commissioner and the Minister mentioned a number of public policy considerations in favour of a general system whereby taxpayers are granted no leeway to defer payment of their taxes. These are in any event well-known and self-evident. Ensuring prompt payment by vendors of amounts assessed to be due by them is clearly an important public purpose. As stated earlier, the scheme of VAT instituted by the Act is a complex one which relies for its efficacy on self-regulation by registered vendors and regular periodic payments of VAT. Requiring them to pay on assessment prior to*

disputing their liability is an essential part of this scheme. It reduces the number of frivolous objections and ensures that the fiscus is not prejudiced by the delay in obtaining finality. Section 40(5) [Section 91(1) of the Act – my emphasis] *plays an important role in this scheme. In order for a 'pay now, argue later' scheme to work, it is necessary that the Commissioner is able to obtain execution against a taxpayer without having first to air the subject-matter of the objection which will be adjudicated upon by the Special Court in due course. There is therefore a close connection between the overall purpose of the 'pay now, argue later' rule and the effect of s 40(5).* [Section 91(1) of the Act – my emphasis]

[61] Secondly, the principle 'pay now, argue later' is one which is adopted in many open and democratic societies. In many of these jurisdictions, as well, some scheme for immediate execution against a taxpayer is provided to ensure that the rule is efficacious. Given its prevalence in many other jurisdictions, it suggests that the principle is one which is accepted as reasonable in open and democratic societies based on freedom, dignity and equality as required by s 36."

[33] In *Commissioner, South African Revenue Service v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA) in paragraph [17] of its judgment, the Court said –

[17] The argument that the 'pay now, argue later' rule, the constitutionality of which was established by Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another, applies only where the Commissioner takes a statutory 'judgment', and not to an application for liquidation, is unsustainable. Once the Commissioner is a creditor, he is entitled to whatever remedy a creditor may have for the enforcement or collection of the debt."

[34] In *Capstone 556* in paragraph [36] the court said the following –

'*[36] However, as evident from the passage from para 16 of the judgment referred to earlier, in the course of giving judgment Spilg J held it to be incompetent for the Commissioner to file a statement in terms of s 91(1)(b) of the IT Act when there was an undetermined appeal by the taxpayer in terms of s*

> *83 of the Act still pending before the tax court. If the judgment is sound in this respect the applicant would undoubtedly be entitled, in the face of the threats by the Commissioner to make use of s91(1)(b) against it, to a prohibitory interdict pending the determination of its appeal. However, with respect to the learned judge. I find myself unable to agree with the statements at para 16 of Mokoena. In my judgment Spilg J s view that the Commissioner cannot have resort to s 91(1)(b) when an appeal is pending is not supported by a proper construction of the pertinent provisions of the statute, or by relevant precedential authority.*'

[35] Like the court in *Capstone 556*, I am unable to agree with my learned brother Spilg J in *Mokoena*. Section 91(1)(b) of the Act entitles the Commissioner to exact payment from a taxpayer pending an appeal. The previous judgments referred to above all allude to and confirm the competency of the Commissioner to exact payment of tax pending an appeal.

[36] In my view, Spilg J in *Mokoena* is not supported by the provisions of the Act and the *dicta* of both the Supreme and Constitutional Courts. The judgment, in my view, is clearly wrong. The applicant's contention that the Commissioner is incompetent to obtain judgment is without merit. It is rejected.

[37] In the circumstances the application deserves to be dismissed.

[38] The respondent argues for costs of two counsel. The applicant did not argue otherwise. There is no reason why such an order for costs should not be made.

[39] In the result the application is dismissed with costs which costs include costs consequent upon the engagement of two counsel.

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M TSOKA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

APPLICANT APPEARED IN PERSON

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INSTRUCTED BY	:	EDELSTEIN-BOSMAN INC