IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

Case Nos. A5022/2011

(Appeal case number)

34417/201009

(Motion Court case number)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
..... DATE	..... SIGNATURE

In the matter of the appeal of:

PIETRO ROSSI First Appellant

ANTONIO PERA Second Appellant

P & R CONSTRUCTION CIVIL ENGINEERING CONTRACTORS Third Appellant

and

THE COMMISSIONER OF THE
SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT

WILLIS J:

[1] In the court below (*per* Satchwell J), the appellants' application was dismissed with costs. The appellants had sought an order declaring that a letter from the respondent to the third respondent did not constitute an assessment in terms of the Income Tax Act, No. 58 of 1962, as amended ('the Act'); that the amount determined by the respondent to payable in terms of that letter was not payable, as a matter of law and that the appellants were entitled to a refund of the amounts collected by the respondent, consequent upon the aforesaid letter. The appellants also sought an order that the respondent pay interest and costs. The court below granted leave to appeal to this court. The judgment of the court below was delivered on 15 March, 2011.

[2] In the applicants' founding affidavit they allege that during October 1999 officers of the South African Revenue Service ('SARS') inspected the third applicant's business premises for the purposes of conducting an audit. SARS held the third applicant to be liable for several hundred thousand rand in each of the respective tax years from 1

March 1998 to 28 February 1999 and from 1 March 1999 to 28 February 2000. This liability appears in a letter dated 19 October 1999 addressed by the respondent to the third applicant. The third applicant is a partnership in which the first and second applicants are the partners.

[3] In paragraph 29 of the founding affidavit the applicants alleged that the letter of 19 October 1999 did not constitute an assessment because, *inter alia*, there was not a 'notice' in terms of section 77(5) of the Act and the applicants were not informed of their rights to object to the respondent's claim.

[4] In the founding affidavit the applicants go on to allege that:

> The third applicant, through one of its employees, a certain Mrs U Lang, in the meantime entered into negotiations with the respondent (under the incorrect assumption that the letter dated 19 October 1999 constituted an assessment), explaining that the respondent had erred and requested that the respondent's Employees Tax claim be waived, but in the process failed to file a formal written objection, as is required under section 81 of the Act.

[5] The applicants claim that they were lulled into a false sense of security, thinking that the matter had been resolved. They received no further communication from the respondent for almost seven years.

[6] In response to an email received by the third applicant from SARS on 7 March 2007, Meintjies, Vermooten & Partners, the attorneys acting for the applicants at that time, sent a letter, dated 16 May 2007, to the respondent in which they said the following:

> We hereby request, if we can be allowed, at this late stage that the assessment on 03/98, can be revised or that the Receiver and the client can

come to an understanding on the amount excluding penalties and interest to be paid.

[7] In the answering affidavit, the respondent pertinently alleges that the third applicant was assessed by him on 20 October 1999, and relies on a document, separate and distinct from the letter of 19 October 1999, as the revised 'assessment'. The respondent annexed this document as 'PO1' to the answering affidavit. The respondent alleges that the third applicant neither objected to this revised assessment nor lodged an appeal. The respondent contends that the applicants' claim had prescribed by the time the application was brought in 2010.

[8] In the replying affidavit, the applicants responded to these allegations by the respondent as follows:

> The notices attached as 'PO1' to the answering affidavit do not constitute proper 'assessments' , for the simple reason that they have never been issued and served on the applicants, and therefore do not constitute assessments in terms of the Act as explained in paragraph 29 of the founding affidavit.

[9] Quite apart from the submissions made, as a matter of law, as to whether or not the letter of 19 October 1999 constitutes an 'assessment' in terms of the Act, there is a dispute of fact as to whether annexure 'PO1', alleged by the respondent to have been issued on 20 October 1999, was indeed served on any of the applicants and whether it can be considered, *ex facie* the document itself, to be an 'assessment'. It is common cause that, during the hearing in the court below, no application was made to refer the dispute or fact for the hearing of oral evidence or to trial.

[10] As to whether or not annexure 'PO1' constitutes an 'assessment', Mr *Mtshaulana* who, together with Mr *Molokomme*, appeared for the respondent, relied on the following provisions of section 94 of the Act:

> The production of any document under the hand of the commissioner purporting to be a copy or an extract from any notice of assessment shall be conclusive evidence of the making of such an assessment, and except in the case of proceedings on appeal against the assessment, shall be conclusive evidence that the amount and all particulars of such assessment appearing in such document are correct.

It is unnecessary to consider the arguments that were presented to the court in regard to the provisions of this section in the Act. It is time-honoured principles applied in our courts relating to disputes of fact in motion proceedings which are dispositive of the appeal.

[11] In general terms, these principles applicable to resolving disputes of fact in motion proceedings are well known: the facts as stated in the respondents' affidavits together with the admitted or undisputed facts in the applicants' affidavits form the basis for application and where the application cannot properly be decided on affidavit, then it should, in terms of Rule 6 (5) (g) of the Uniform Rules of Court, be referred either to oral evidence or to trial, whichever is more appropriate.[1] Where, however, there is no real, genuine or *bona fide* dispute of fact, different considerations apply.[2] Where the allegations or denials of the

[1] See, for example, *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C), *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I and *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).
[2] See, for example, *Petersen v Cuthbert & Co. Ltd*1945 AD 420 at 428, *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5, *Da Mata v Otto NO*1972 (3) SA 858 (A) at 882D-H, *Plascon-Evans Paints Ltd v Van Riebeeck Paints*

respondents are far-fetched or untenable, the court may reject them merely on the papers.[3] It cannot be said, merely from the papers in this case, that the factual dispute is neither genuine nor tenable.

[12] In *Joh-Air (Pty) Ltd v Rudman*[4] Myburgh J, with De Villiers and Nestadt JJ concurring, held that although there may be circumstances in which a judge could, *mero motu*, decide that a motion proceeding should be decided through the hearing of *viva voce* evidence, it would generally be bold and indeed unwise for a court to do so. In the appeal hearing, no criticism could be levelled at the court below for failing to decide that the dispute should be resolved through the hearing of *viva voce* evidence.

[13] In the court below the application was decided on the basis that the High Court did not have jurisdiction to decide the matter. Learned arguments were presented to this court, as they were in the court below, by counsel for both sides on whether the Tax Court, in terms of the Act, had exclusive jurisdiction to decide this case. We were referred, *inter alia*, to *Metcash Trading Limited v Commissioner, SARS*,[5] *Whitfield v Phillips and Another*,[6] *Friedman and Others NNO v CIR*[7] and *The Oceanic Trust Co. Ltd N. O. V Commissioner, SARS*.[8]

(Pty) Ltd (*supra*) at 635A-C.

[3] See, for example, *Associated South African Bakeries (Pty) Ltd v Oryx and Verenigde Bäckereien (pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G-924D, *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (*supra*) at 635A-C.

[4] 1980 (2) SA 420 (T) at 428-9

[5] 2001 (1) SA 1109 (CC)

[6] 1957 (3) SA 318 (A)

[7] 1991 (2) SA 340 (W)

[8] Western Cape High Court case no. 22556/09, decided by Louw J.

[14] Again, the *Plascon-Evans* principles[9] make it unnecessary to traverse the potentially complex issue of jurisdiction.

[15] Although may be understandable why the respondent briefed two counsel in this matter, Mr *Mtshaulana* fairly and correctly did not press for the costs of two counsel to be awarded against the appellants.

[16] The order of this court is as follows:
The appeal is dismissed with costs.

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N.P.WILLIS

JUDGE OF THE HIGH COURT

I agree.

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C. G. LAMONT

JUDGE OF THE HIGH COURT

[9] So-called after the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I. See also paragraph [11] above.

I agree.

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R.MONAMA

JUDGE OF THE HIGH COURT

Counsel for the Appellants: *J. Truter*
Counsel for the Respondent: *P.M. Mtshaulana* S.C. (with him, *T. Molokomme*)

Attorneys for the Appellants: Shepstone and Wylie
Attorneys for the Respondent: The State Attorney

Date of hearing: 15 February, 2012
Date of judgment: 21 February, 2012