

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO.: 35006/2016

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO
(3)	REVISED.
<u>21/10/2016</u>	

21/10/2016

In the matter between:

BMW SOUTH AFRICA (PTY) LTD

Applicant

and

THE COMMISSIONER OF THE SOUTH AFRICAN  
REVENUE SERVICE

Respondent

---

JUDGMENT

---

VAN DER WESTHUIZEN, A J

1. This matter comes before me on the unopposed motion court roll. It is a somewhat unfortunate matter. The respondent had made a finding that the applicant had not paid the value-added tax payable for the period October 2011 to February 2012 and had consequently levied penalties and interest due. The applicant had in fact made the payment, but due to reasons best known to the respondent the payment had not been properly allocated.
2. Despite proof of the payment by the applicant to the respondent, the latter insisted on levying penalties and interest and compelled payment thereof. The applicant's request for suspension of the

payment of penalties and interest was not favourably received by the respondent and further discussion in that regard was denied.

3. The applicant was obliged to lodge this application. The respondent did not file an intention to oppose the application. Counsel for the applicant filed heads of argument prior to the matter being heard in which he traversed the issues and made submissions. In particular counsel made convincing submissions relating to the payback of the penalties and interest that the applicant was compelled to make prior to the issue of alleged non-payment had been adjudicated. These heads of argument were served upon the respondent.
4. The respondent eventually conceded the application. It consented to an order setting aside the Commissioner's finding of non-payment and it to be substituted with an order that the value-added tax was paid and that no penalties and interest are due by the applicant to the respondent. The respondent further consented to an order that the penalties and interest paid by the applicant to be paid back by the respondent and the respondent further consents to payment of costs on the scale as between attorney and client and further on the basis that the employment of senior counsel was justified.
5. Initially the applicant sought the order for setting aside of the Commissioner's finding of non-payment and the order to be substituted as well as costs. As forewarned in the heads of argument, the applicant applied for an amendment to the original notice of motion to include repayment of the penalties and interest it was compelled to pay under protest.
6. When the matter was called, the respondent was represented by counsel who was instructed to oppose only a limited issue. That issue related to the payment of interest on the amount of penalties and interest paid by the applicant.

7. The amendment to the original notice of motion was granted by agreement between the parties.
8. Mr Joubert SC who appeared on behalf to the applicant submitted with reference to the judgment in *Shuttleworth v South African Reserve Bank et al*<sup>1</sup> 2015(1) SA 586 (SCA) and the Tax Administration Act of 2012<sup>2</sup>, that the applicant is entitled to interest on the amount of penalties and interest paid by it under protest.
9. Mr Ellis SC who appeared on behalf of the respondent, submitted with reference to the judgment in *Commissioner for Inland Revenue v First National Industrial Bank Ltd*<sup>3</sup> that no *mora* interest was payable on the amount relating to the penalties and interest.
10. There is no merit in that submission of counsel. The judgment in *Shuttleworth, supra*, and the provisions of the Tax Administration Act clearly provide for the contrary.
11. It follows that the applicant is entitled to interest on the amount paid on 4 March 2016 in respect of the penalties and interest levied by the respondent.
12. I grant the following order.
  - (a) The finding by the Commissioner that value-added tax payable by the applicant for the period of October 2011 to February 2012 was not paid by applicant is set aside and is substituted with an order that the value-added tax was paid by Applicant and that no penalties and interest are due by the applicant to the respondent;

---

<sup>1</sup> 2015(1) SA 586 (SCA) at [33] and [34]

<sup>2</sup> In terms of sections, 181, 188 and 190 of the Act.

<sup>3</sup> 1990(3) SA 641 (AD)

- (b) Respondent is ordered to pay back the provisional payment of R15 660 300.70 made to it by the applicant on 4 March 2016, with interest *a tempore morae* thereon from 4 March 2016 to date of payment;
- (c) Respondent is ordered to pay applicant's costs, such costs to be taxed on the scale as between attorney and client and on the basis that employment of senior counsel was justified.

  
C J VAN DER WESTHUIZEN  
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:  
Instructed by:

A P Joubert SC  
Edward Nathan Sonnenbergs

On behalf of Respondent:  
Instructed by:

P Ellis SC  
The State Attorney