THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 830/2015

In the matter between:

MARTIN FRASER WINGATE-PEARSE **APPELLANT**

and

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

Neutral citation: *Wingate-Pearse v CSARS* (830/2015) [2016] ZASCA 109 (1 September 2016)

Coram: LEWIS, CACHALIA, TSHIQI, THERON and WALLIS JJA.

Heard: 26 August 2016

Delivered: 1 September 2016

Summary: Appeal from Tax Court – s 133(1) of Tax Administration Act 28 of 2011 – only decisions under ss 129 and 130 appealable – interlocutory ruling on onus and duty to begin not a decision in terms of s 129(1) and (2) – ruling not appealable.

ORDER

On appeal from: Tax Court, Johannesburg (Khumalo J sitting at first instance):

(a) The appeal is struck off the roll.

(b) The appellant is ordered to pay the respondent's costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Lewis, Cachalia, Tshiqi and Theron JJA concurring)

[1] At the outset of this appeal we heard argument from the parties on the question whether the decision of the Tax Court was appealable. Thereafter the appeal was struck from the roll and the appellant ordered to pay the costs of the respondent Commissioner, South African Revenue Services (SARS) including the costs of two counsel. The court intimated that reasons for that decision would be handed down later. These are those reasons.

Background

[2] The appellant taxpayer, Mr Martin Wingate-Pearce, submitted returns of income for the tax years ending on the last day of February from 1998 to 2005. In April 2006, SARS issued revised assessments for each of those years. Once interest and penalties were taken into account, these amounted cumulatively to some R41 million. Mr Wingate-Pearce objected to the revised assessments and further revised assessments were

issued reducing his tax liability to slightly less than R23 million. Dissatisfied with these, he lodged an appeal with the Tax Court in terms of s 83 of the Income Tax Act 58 of 1962 (the Tax Act). That was on 1 August 2007. This prompted further consideration of his objections to the assessments and some downward adjustment in the form of further revised assessments, but the accrual of interest substantially increased his overall liability.

[3] For reasons that are unexplained it took until 9 February 2015 for the appeal to be set down in the Tax Court before Khumalo J. In the meantime a number of sections of the Tax Act having a bearing on the issues in this appeal were repealed and replaced by provisions in the Tax Administration Act 28 of 2011 (the Administration Act). In terms of s 270(2)*(d)* of the Administration Act the appeal had to be continued and determined under that Act. Prior to the hearing the parties held a pre-trial conference at which they agreed that, while there was some dispute over where the onus lay, the taxpayer would commence by leading his evidence. However, at the commencement of the hearing Mr Wingate-Pearse's counsel sought leave to argue a point *in limine* concerning the onus of proof and the duty to commence leading evidence. The purpose underlying this argument was to secure a situation where SARS would have to commence the appeal by leading its evidence.

[4] Notwithstanding opposition by SARS, the Tax Court permitted argument to proceed on the point *in limine*, reserved judgment and in April 2015 handed down the following ruling:

'1. The initial burden of proof lies with the Appellant to discharge the onus that [lies] upon him in terms of s 102(1) to show that the decision of the Respondent against which he is appealing is wrong, consequently the onus to establish that the

return or information he submitted to the Respondent was correct and/or adequate remained with Appellant;

2. Appellant therefore has the onus to begin to adduce evidence cast upon him as a result of the onus as in 1; he will therefore commence the proceedings;

3. The burden of proof on the reasonableness of the estimate under s 95 or facts upon which the imposition of the understatement penalty is imposed is cast upon the Respondent. Further Respondent has the onus to prove the requirements of s 76(1) and s 67 and carries the evidentiary burden in terms thereof that will follow.

4. The Plaintiff also carries the onus and evidential burden to prove that he did not have the intent to evade tax and therefore the onus to prove that the 200% additional tax should, either in part or as a whole be remitted.'

Thereafter, on 26 August 2015, the Tax Court granted leave to appeal to this court in terms of ss 134 and 135 of the Administration Act.

Appealability

[5] SARS submitted in its heads of argument that the decision of the Tax Court was not appealable. Initially Mr Wingate-Pearse's heads of argument did not deal with the issue. He was invited by the court to make submissions and SARS was afforded the opportunity to supplement its existing submissions in the light of those furnished on his behalf.

[6] The Tax Court is constituted in terms of the Administration Act. As such the scope of its jurisdiction, its powers and the ambit of any right of appeal from its decisions are defined in the Administration Act. It is therefore to its provisions that we must look to determine whether the Tax Court's ruling on the onus and the duty to begin to lead evidence was appealable and not to the statutory provisions that ordinarily govern appeals to this court. That is clear from the provisions of s 2(3) of the Superior Courts Act 10 of 1913.

[7] In terms of s 107(1) of the Administration Act a taxpayer objecting to an assessment or a 'decision'[1] is entitled to appeal to the Tax Court. The expression 'decision' is defined in s 101 as meaning a decision referred to in s 104(2) of the Administration Act. Three decisions are referred to in that section, namely a decision not to extend the period for lodging an objection; a decision not to extend the period for lodging an appeal; and any other decision that may be objected to or appealed against under any tax statute. None of these applied to Mr Wingate-Pearce's appeal, which was an appeal against the revised assessments issued to him.

[8] The Tax Court's jurisdiction is set out in s 117 of the Administration Act. It has jurisdiction over tax appeals lodged under s 107 and, in terms of s 117(3), may hear any interlocutory application, or any application in a procedural matter relating to a dispute under Chapter 9 of the Administration Act, which is the chapter dealing with disputes and appeals. Its powers in regard to an assessment or '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), which reads as follows:

'(2) 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; or

(c) refer the assessment back to SARS for further examination and assessment.'

Conspicuously 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). No doubt this is because these involve a range of largely procedural

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[1] In the Administration Act the word 'decision' is enclosed in inverted commas when it is referring to the type of decision that is defined in s 104(2) and I will follow that usage in this judgment.

issues that it is commonplace for courts to dispose of in the course of litigation to secure the expeditious disposal of the cases before them. There is no need to make special provision for a court's powers in disposing of such procedural issues. The absence of such an express provision is, however, highly relevant to the question whether any decision on an interlocutory issue is appealable.

[9] The right to appeal from a decision of the Tax Court is dealt with in s 133(1) of the Administration Act, which provides that:

'The 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.'

Section 130 deals with orders for costs and has no bearing on this case. The issue of appealability in this case was therefore whether the decision by the Tax Court on the point *in limine* was a decision in terms of s 129 of the Administration Act. If it was, then it was appealable in terms of s 130. If not, then it was not appealable at all. An inability to appeal at this stage of proceedings would not have prejudiced the taxpayer. Any interlocutory decision adverse to the taxpayer, will be remediable on appeal once the Tax Court had delivered judgment and made one or other of the orders contemplated in s 129(2) of the Administration Act.

[10] The argument on behalf of Mr Wingate-Pearse was that because s 117(3) of the Administration Act provides that the Tax Court has the jurisdiction to deal with an interlocutory application, and s 129(2) contemplates a decision by the Tax Court in terms of s 117(3), the decision by the tax Court on the question of onus and the duty to begin was appealable.

[11] The difficulty with that argument was that it started at the wrong point and asked the wrong question. The correct question was whether the decision by the Tax Court on the question of onus and the duty to begin was a decision in terms of s 129 of the Administration Act. In order to answer that question the provisions of s 129 must be examined. In terms of s 129(1) the Tax Court must decide any appeal after hearing the appellant's appeal against an assessment or 'decision'. In both instances, s 129(1) is concerned with a decision by the Tax Court that finally resolves the point in issue, that is, the correctness of the assessment or the 'decision' as the case may be. It is not concerned with decisions on interlocutory matters. That is a clear indication that the right of appeal may only arise once the appeal on the merits has been finalised.

[12] The point is put beyond debate by a consideration of s 129(2), which is quoted in paragraph 8 of this judgment. The section refers to decisions by the Tax Court in three circumstances only. These are decisions on, firstly, an appeal in respect of an assessment; secondly, an appeal against a 'decision' of the type referred to in paragraph 7 above; and, thirdly, an application in a procedural matter referred to in s 117(3). A decision on questions of onus and the duty to begin is none of these. That it is not a decision under s 129 is further reinforced by considering the nature of the decisions that may be made by the Tax Court under s 129. These are spelled out in s 129(2) as being a decision confirming an assessment or 'decision'; a decision ordering that an assessment or 'decision' be altered; or a decision referring an assessment or a 'decision'

back to SARS for further examination and assessment.[2] Once again a decision on questions of onus and the duty to begin is none of these.

[13] Counsel for the taxpayer sought to overcome these difficulties by treating a decision by the Tax Court on an interlocutory matter on the same footing as a decision on an application in a procedural matter referred to in s 117(3). But s 129(2) expressly includes the latter and excludes the former. That this is deliberate is apparent from viewing the history of these two sections. When the Administration Act was first enacted it provided in s 117(3) that:

'The court may hear an interlocutory application relating to an objection or appeal and may decide on a procedural matter as provided for in the "rules".'

The reference to the 'rules' was a reference to the rules for dispute resolution made in terms of s 103 of the Administration Act. So there were two decisions that could be made under s 117(3), namely a decision in an interlocutory application and a decision on a procedural matter as provided in the 'rules'. Section 129(2) made no reference to s 117(3). Therefore no appeal lay against either kind of decision under s 117(3).

[14] The Tax Administration Laws Amendment Act 39 of 2013 amended both s 117(3) and s 129(2). While the reference to interlocutory applications in s 117(3) was unaltered, the reference to deciding procedural matters in terms of the dispute resolution rules was replaced by the following:

'… an application in a procedural matter relating to a dispute under this Chapter as provided in the "rules"'.

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[2] There may be a *lacuna* in this provision in that it fails to make provision for an order where the appeal concerns an application in a procedural matter referred to in s 117(3), but that does not affect the present case. Inferentially the Tax Court must be able to make an appropriate decision in such matters.

At the same time the same wording was inserted in s 129(2), thereby rendering a decision on such an application appealable. The probable reason was to clarify that decisions made by the Tax Court in resolving disputes arising under the dispute resolution rules would be subject to appeal. However, it left untouched the position in respect of interlocutory applications, which was that decisions in such cases were not appealable. The endeavour by counsel to elide interlocutory applications and procedural applications under the dispute resolution rules cannot therefore succeed.

[15] We were referred in the supplementary written argument on behalf of SARS to the judgment of this court in *Sprigg Investment*[3] in support of the proposition that in appropriate circumstance a decision by the Tax Court in both an interlocutory application and an application relating to a dispute under chapter 9 of the Administration Act may be appealable. In my view that is incorrect and, when the point was raised with him, counsel for SARS accepted that this was so. That case involved a decision as to the appealability under s 86A of the Tax Act of an order made in an application for the furnishing by SARS of proper reasons for issuing certain assessments. There the question of appealability depended on whether that order was a 'decision' by the Tax Court and the question was resolved by the application of the well-established distinction between orders that are final and definitive of the rights of the parties and purely interlocutory orders.[4] While that reasoning remains relevant to understanding the meaning of a 'decision' in terms of s 133(1) of the

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[3] *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* [2010] ZASCA 172; 2011 (4) SA 551 (SCA).
[4] *Hassim v Commissioner, South African Revenue Service* [2002] ZASCA 40; 2003 (2) SA 246 (SCA) paras 10 and 11.

Administration Act, the need to resort thereto may be limited in view of the description in s 129(2) of the decisions that a Tax Court may make in considering an appeal. It may only be of relevance to the question whether a particular order by the Tax Court in an application in a procedural matter referred to in s 117(3) is appealable. But it is unnecessary to be definitive in that regard as the order in this case was one in an interlocutory matter in an appeal and did not fall within the ambit of a decision under s 129.

[16] The decision by the Tax Court was accordingly not appealable in terms of the Administration Act. In any event it would not have been appealable if the conventional criteria for identifying decisions that are subject to an appeal were applied.[5] The reason is that such decisions must be final decisions incapable of being altered during the course of the proceedings. If the judge may alter a decision it lacks the necessary requirement of finality and cannot dispose of any issue in the case. That the decision in this case on the onus of proof and the duty to begin was alterable is apparent from the fact that it was made in terms of Uniform Rule 39(11), which reads:

'Either party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence, and the court after hearing argument may give a ruling as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent injustice.'

The judge quoted this rule in her judgment, but crucially omitted the proviso. That makes it clear that her order was susceptible of alteration. Accordingly it was not an appealable order on conventional principles.

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[5] Reference need only be made to the criteria stated in *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 535G-J and *Grancy Property Ltd and Another v Seena Marena Investment (Pty) Ltd and Others* [2014] ZASCA 50; [2014] 3 All SA 123 (SCA) paras 12-16. See also s 17(1) of the Superior Courts Act 10 of 2013.

[17] For those reasons therefore, after hearing argument on the point of appealability the court ordered that:

(a) The appeal is struck from the roll;

(b) The appellant is ordered to pay the respondent's costs, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	A Katz SC (with him D West)
Instructed by:	KWP Attorneys, Randburg,
	Symington & De Kok, Bloemfontein
For respondent:	J J Gauntlett SC (with him H G A Snyman SC)
Instructed by:	Mahlangu Attorneys, Pretoria,
	Lovius Block, Bloemfontein.