

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Reportable

CASE NO: 05/20445

DATE: 31/08/2010

In the matter between:

MOKOENA ALBERT SEPATAKA

Applicant

and

**COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE**

Respondent

REASONS FOR DECISION

SPILG, J:

[1] On 17 March 2010 the Commissioner for the South African Revenue Service (the Commissioner) filed with the Registrar of the South Gauteng High Court a notice in terms of section 91(1)(b) of the Income Tax Act 58 of

1962 that was dated 16 March 2010. In terms of the notice the commission withdrew the statement filed under section 91(1)(b) whereby judgment had previously been granted, on 1 December 2005 against the applicant.

[2] The applicant now applies for rescission of judgment on the grounds that he had not previously been aware of the judgment. He became aware of it only after he approached Nedbank for a bond and a credit check revealed this outstanding monetary judgment against the applicant. Rescission is competent in these circumstances. See *Kruger v CIR* 1966 (1) SA 457 (A) at 462A and *Metcash Trading Limited v Commissioner for South African Revenue Service and Another* 2001 (1) SA 1109 (CC) at paras [65] and [66].

[3] Both in respect of obtaining judgment and in withdrawing it the Commissioner purported to act under the powers conferred on him by section 91 of the IT Act.

[4] I set out the relevant provisions of the IT Act which deal with the Commissioner's powers to obtain judgment by filing a written statement with the Registrar, without the issue of summons and without notice to the taxpayer, as well his powers to withdraw the "*statement*". They are to be found in sections 91, 91A and 92 of the IT Act. I refer only to those provisions relevant to the present enquiry:

"91. Recovery of tax.— (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 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.

92. Correctness of assessment cannot be questioned.— *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."*

[5] Under section 78(1) if any person makes default in furnishing a return, or if the Commissioner is dissatisfied with the return or information furnished by a taxpayer, he may estimate either in whole or in part the taxable income in relation to which the return or information is required.

[6] In terms of section 78(2) such an estimate is subject to objection under section 81 and appeal under section 83 or 83A and 86A.

[7] Should tax not be paid on due date under section 89(2) then interest commences running under section 89*quat* and the Commissioner is entitled to apply for judgment under section 91 in the manner set out earlier.

[8] In the present case the Commissioner believed that there was what was termed “*unexplained income*” based on an income tax audit. As a consequence, and on 22 April 2004, he raised an additional assessment of R702 215 for the 2001 year of assessment and R597 175 for the 2002 year of assessment.

[9] The applicant’s chartered accountant explains in his supporting affidavit what is meant by the term “*unexplained income*” in the Commissioner’s estimate of additional tax payable. “*Unexplained income*” is income determined by firstly deducting the applicant’s liabilities incurred from the increased value of his assets during the tax year in question and adding the applicant’s living expenses as estimated by the Commissioner for that year. Any shortfall between that and the applicant’s disclosed annual income is then regarded as “*unexplained*” and is then brought into account as taxable income.

[10] The powers conferred on the Commissioner under section 78 as read with sections 79, 81(1), 89*quat* and 91 entitle him to obtain judgment based on an estimate. These powers ensure that a taxpayer whose lifestyle is in marked contrast to his disclosed income will not escape liability for tax simply because he has under-declared his income. The provision however is

draconian and should therefore be exercised with care by properly experienced and suitably qualified personnel since it may otherwise be reduced to an arbitrary guesstimate with grave consequences to the taxpayer. This is so because the Commissioner is entitled, even if there is an objection or an appeal, to seize and realise assets including money standing to the credit of the taxpayer's bank account notwithstanding that these actions may jeopardise the taxpayer's cash flow and business. See section 88(1) read with sections 99 and 100 and *Metcash* at paras [60] to [62].

[11] In the present case the applicant objected to the additional assessment on 27 June 2005.

[12] Despite this the Commissioner utilised the provisions of section 91 to apply, without notice, for judgment by filing a notice on 7 November 2005 with the Registrar of this Court who as indicated earlier granted judgment on 1 December 2005.

[13] The facts reveal that subsequently, on 29 August 2007, the objection was allowed by the Commissioner in respect of both years of assessment. The Commissioner accepted the income as declared by the applicant. His own incorrect estimate was based on a duplication of certain amounts which suggests that suitably qualified or experienced persons were not engaged to perform the forensic analysis or accounting calculations. In the result their estimates were fundamentally flawed.

[14] I am satisfied that the supplementary affidavits I allowed to be filed, which includes an affidavit by the applicant's chartered accountant with supporting documents, discloses not only a *bona fide* defence to the notice relied upon by the Commissioner to obtain judgment but that the judgment could not be competently sought in the face of a pending objection.

[15] While it is clearly competent in terms of the provisions I have already mentioned for the Commissioner to demand and collect even through an appointed agent payment of the assessed capital sum (the issue of collecting interest and penalties pending an objection or appeal may be on a different footing), it is not done under a judgment but by reason of the acceptance of the pay now argue later principle adopted in section 88(1) read with sections 99 and 100 of the IT Act.

[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, e.g. 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* at para [58] as well as the general principles regarding a right of hearing and access to courts (again *Metcash* at para [58]) and the safeguards that objection and appeal provide within the context of the administrative exercise of the Commissioner's powers.

[17] Since the judgment could not be lawfully obtained having regard to the objection that was noted and not finalised, it is a nullity and falls to be set aside.

[18] The applicant has requested costs. In the application served on the Commissioner, the applicant did not ask for costs if there was no opposition, and the Commissioner did not oppose. For this reason it is necessary to give notice to the Commissioner in the form of a rule calling upon him to show cause why an order for costs should not be awarded against him.

[19] This case reveals the dangers inherent in the combination of the exercise of powers by the Commissioner to estimate taxes based on an effective lifestyle audit under section 78(1) and the implementation of an assessment pursuant to that, if care is not taken to ensure that before a statement is filed under section 91(1)(b) of the Act that a responsible person in the Commissioner's office has satisfied himself or herself that there is not a pending objection or appeal. *Metcash* confirmed the constitutional regularity of the mechanism of assessment, the pay now argue later provisions and the entitlement to file a statement to obtain judgment without notice to the taxpayer.

[20] The facts of this case do however suggest that certain checks and balances may be necessary to safeguard the rights of taxpayers in the *implementation of Section 91(1)(b)* In this case despite the taxpayer filing a proper objection a court judgment was sought and obtained having prejudicial

consequences to the applicant. This case does not necessitate any enquiry into the appropriate means of safeguarding taxpayers' rights.

[21] This case is concerned with whether or not the judgment obtained should be rescinded or otherwise set aside. Nonetheless it appears desirable that in order to provide adequate safeguards to the way in which section 91(1)(b) is implemented and possibly to continue satisfying the requirement of constitutional proportionality, the statement should indicate clearly;

(a) whether the assessment relied upon is an estimated assessment under the exercise of the powers conferred under section 78(1),

(b) if so, the suitability of the qualifications and experience of the person to conduct the estimated assessment;

(c) finally that the responsible person has satisfied himself or herself from the records maintained by SARS that no objection or appeal is pending or if lodged has been finally disposed of so that there is no impediment to filing the statement.

[22] The current statement filed by the Commissioner for judgment under section 91(1)(b) of the IT Act falls short of providing adequate safeguards against similar errors occurring in future in that the person who certifies the correctness of the statement does not necessarily have to be involved in the determination of the assessment and only identifies his or her position (e.g. acting senior manager) and certifies that the figures contained in the statement in respect of the relevant tax (e.g. assessed tax, employee's tax, provisional tax, interest and penalties).

[23] In the result on 31 August 2010 I ordered:

1. The judgment granted against the applicant on 7 November 2005 is set aside and declared null and void.
2. A rule *nisi* is hereby issued calling upon the Commissioner; South African Revenue Service in his official capacity to show cause on Tuesday 21 September 2010 why he should not be liable for the costs of the application.

B SPILG
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

HEARINGS: 20 August 2010 and 26 August 2010

DATE OF JUDGMENT: 31 August 2010

FOR APPLICANT Adv Matanda

Bahlekazi Attorneys