

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A145/2014

In the matter between:-

SOUTH AFRICAN REVENUE SERVICE

Appellant

and

R D VAN WYK

Respondent

CORAM:

DAFFUE, J *et* WILLIAMS, AJ

JUDGMENT BY:

DAFFUE, J

HEARD ON:

1 JUNE 2015

DELIVERED ON:

5 JUNE 2015

I INTRODUCTION

- [1] This is an appeal against the whole judgment of the magistrate in Kroonstad granting rescission of judgment and setting aside a warrant of execution.

II THE PARTIES

[2] Appellant is the South African Revenue Service (SARS), herein represented by Adv D R Thompson, instructed by the State Attorney.

[3] Respondent is Mr R D van Wyk, a Kroonstad farmer and registered tax payer. He is represented by Adv S J Reinders.

III MATERIAL FACTS

[4] Mr Van Wyk (the taxpayer) is registered with SARS for income tax and value added tax purposes.

[5] According to SARS the taxpayer was liable for payment of income tax in the amount R264 422,90 for which amount it issued a certified statement, filed with the clerk of court of the Kroonstad magistrates' court, to which I shall refer again hereunder. This amount is disputed by the taxpayer who filed an application for rescission of judgment in the above magistrates' court. On his version he owed R8 765,89 only and offered to pay that amount simultaneously with the filing of his replying affidavit in that application.

[6] On 5 December 2012 SARS issued a final notification of outstanding debt to the taxpayer, claiming R263 219,62. This letter of demand was sent to the taxpayer, care of P O Box 1628, Kroonstad, 9500. It is the taxpayer's case that the

letter was never received. He avers that his postal address is P O Box 7049, Kroonpark, 9502. I shall refer to this aspect later herein. I merely wish to record at this stage that all income tax assessments on which the taxpayer relies and which he attached to his founding affidavit, indicate that these were sent to the very same address used by SARS. Some were original assessments and others reduced or additional assessments and they were issued in the period from 23 August 2011 to 23 May 2013.

- [7] Following upon the final letter of demand and the taxpayer's failure to respond, SARS filed the certified statement mentioned above with the clerk of the Kroonstad magistrates' court in terms of s 172 of the Tax Administration Act, 28 of 2011 ("the Tax Admin Act"). Judgment was entered into by the clerk of the court on 11 March 2013 in the amount of R264 422,90.
- [8] A warrant of execution was issued several months later in a reduced amount, allowing for payments since judgment, a revised assessment and interest adjusted. Upon being confronted with possible execution the taxpayer took steps, first trying to engage the State Attorney and eventually applying for rescission of judgment and setting aside of the warrant of execution.
- [9] The application was opposed, but on 26 May 2014 the court *a quo* delivered judgment in favour of the taxpayer.

IV THE JUDGMENT OF THE COURT A QUO

[10] The court *a quo* found that SARS should have applied for judgment against the taxpayer in another court that has jurisdiction to accommodate the monetary claim, that the judgment obtained was *void ab origine* or obtained by mistake common to the parties. The court *a quo* did not appreciate SARS' argument that the taxpayer could not approach that court for rescission of judgment, but should have exhausted the remedies provided for in the Tax Admin Act. It also found that disputes of fact existed which could only be adjudicated by a competent trial court. Therefore the judgment entered into against the taxpayer was rescinded and the warrant of execution issued pursuant thereto set aside and SARS was ordered to pay the costs of the application.

V LEGISLATION AND LEGAL PRINCIPLES

[11] It is necessary to consider the appealability of the order of the court *a quo* in view of Mr Reinders' submissions which I shall consider later in this judgment. It is trite that, generally speaking, an order in terms whereof a default judgment is rescinded and set aside is not appealable. The reason for this is that such order is not final in effect; it is not definitive of the rights of the parties. See **Absa Bank v Mkhize and two similar cases** 2014 (5) SA 16 (SCA) at para [17]. The SCA found that the above requirements are "*neither cast in stone nor exhaustive*". In that matter the SCA had to deal with

judgments of the High Court relating to sections 129 and 130 of the National Credit Act,³⁴ of 2005. The court found at para [19] that the court *a quo* made "... a final determination of an issue underlying the applications for default judgment: that default judgment cannot be given against the consumer where, although a s 129(1) notice has been sent by registered post, and received at the post office for the consumer's domicilium, if there is evidence to show that the notice was not collected by the consumer, the notice has not in effect been given. But for that conclusion, the applications for default judgments would not have been postponed. The remainder of the order was based on irrevocable findings on Absa's obligations under the NCA. Unless those findings are overturned on appeal, Absa is bound to take the steps required by the order before exercising its right to obtain default judgments."

The SCA found at para [21] that the court *a quo* "... reached firm findings - not provisional conclusions - on what was required for enforcement of the credit agreements before him and made an order accordingly." At para [22] the SCA found that the order of the court *a quo* had a definite bearing on the relief sought by Absa, that it was not merely the postponement of a hearing and therefore the order was considered to be appealable.

- [12] In **Jacobs v Baumann NO** 2009 (5) SA 432 (SCA) the SCA found in para [9] of the judgment that in determining whether or not an order is final one must have regard not only to its form but "*predominantly, its effect*". In **NDPP v King** 2010 (2) SACR 146 (SCA) reaffirmed at para [42] that the test was whether the order made was in substance and not in form, final in effect.

- [13] Chapter 9 of the Tax Admin Act deals with dispute resolution. Section 104 provides for an objection procedure to be followed by a taxpayer aggrieved by an assessment made. Section 105 clearly stipulates that the taxpayer may not dispute an assessment or decision described in s 104 in any court or other proceedings, except in proceedings under Chapter 9 of the Tax Admin Act or by application to the High Court on review. Section 107 provides for an appeal procedure in the event of the taxpayer being dissatisfied by a decision of SARS in terms of s 106 relating to his objection. Further appeal processes are fully described in chapter 9 and I need not elaborate thereon.
- [14] The obligation to pay tax and the right of SARS to receive and recover tax is not suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal, unless a senior SARS official otherwise directs. See ss 164(1) read with ss 164(3). See also s 31 of the Value Added Tax Act, 89 of 1991 and sections 88 to 91 of the Income Tax Act, 58 of 1962 prior to their repeal.
- [15] SARS does not have to institute action like a normal creditor to enforce payment of a taxpayer's tax liability. The judgment procedure to be adopted by SARS is fully dealt with in Part B of chapter 11 of the Tax Admin Act. Section 172 of the Tax Admin Act reads as follows:

“172. Application for civil judgment for recovery of tax.—(1) If a person has an outstanding tax debt, SARS may, after giving the

person at least 10 business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct.

(2) SARS may file the statement irrespective of whether or not the amount of tax is subject to an objection or appeal under Chapter 9, unless the period referred to in s 164(6) has not expired or the obligation to pay the tax debt has been suspended under s 164.

(3) ...”

- [16] Section 173 of the Tax Admin Act stipulates that, despite anything to the contrary in the Magistrates' Court Act, 32 of 1944, the certified statement referred to in s 172 may be filed with the clerk of the magistrates' court that has jurisdiction over the taxpayer named in the statement. The effect hereof is clear. It is irrelevant whether or not the amount certified is in excess of the jurisdiction of the magistrates' court as long as the specific magistrates' court has jurisdiction over the person of the taxpayer involved. In the event of an individual taxpayer, he must reside, carry on business or be employed within the district of that court. Section 174 reads as follows:

“174. Effect of statement filed with clerk or registrar.—A certified statement filed under s 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.”
(emphasis added)

- [17] It is apparent from the terminology used by the legislature that once the certified statement is filed with the clerk of the

court (or registrar) it should be deemed to be a civil judgment although it is not a civil judgment in the ordinary sense.

[18] In **Singh v Commissioner, SARS** 2003 (4) SA 520 (SCA) judgment was obtained by the commissioner pursuant to s 40(2)(a) of the Value-Added Tax Act, Nr 89 of 1991 (“the VAT Act”). The taking of judgment was preceded by making assessments in terms of s 31(1) of the VAT Act on the previous day, but notice of assessment was not given to the taxpayer before the statement contemplated by s 40(2)(a) was filed. The Supreme Court of Appeal set aside the judgment and found in para [14] that the VAT Act “... predicates the bringing into existence of an assessment prior to lodging of the statement under s 40(2)(a).” It found in para [15] that the tax could not be regarded as recoverable through judicial intervention until the taxpayer had been informed of the assessment.

[19] Section 40(2) of the Vat Act provides for a similar procedure as s 172 of the Tax Admin Act. In **Singh** *loc cit* the SCA found at para [9] as follows:

“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.”

- [20] Section 40(2) of the VAT Act, as is the case with s 172 of the Tax Admin Act, creates a summary procedure which enables SARS to file for judgment and proceed to execution. A short-cut is created as no court process initiating a claim for judicial enforcement of a debt and no service of process summoning the debtor to court to answer the claim is required. There is also no scope for opposition or a hearing to resolve disputes. See **Metcash Trading Ltd v Commissioner, SARS and Another** 2001 (1) SA 1109 (CC) at para [49]. Binns-Ward J aptly put it as follows in **Capstone 556 v Commissioner, SARS** 2011 (6) SA 65 (WCC) at para [2] with reference to the **Metcash** judgment: *“The concept of “pay now, argue later” understandably does not rest easily with taxpayers who find themselves in dispute with the revenue authorities in respect of the amount of tax which the authorities are determined is exactable from them. It is, however, a concept applied in taxation dispensations of many countries in the world. The legality of the concept survived scrutiny by the Constitutional Court in the context of this country’s Value Added Tax Act, 89 of 1991, when a taxpayer sought to impugn the legislation in terms of which it is applied, contending it to be incompatible with section 34 of the Bill of Rights.”*
- [21] The primary purpose of giving notice to the taxpayer is not objection and appeal, but payment by the taxpayer. Prompt payment by taxpayers is an important public purpose. Taxpayers are required to pay an assessment prior to disputing their liability. This is regarded as an essential part of the collection of taxes scheme. See **Singh** *loc cit* para [17], relying on **Metcash** *loc cit*.

[22] In **Capstone** *loc cit* the court had to adjudicate interdict proceedings by two taxpayers with assessed tax liabilities under the Income Tax Act, 58 of 1962. They sought prohibitory interdicts in terms whereof SARS would be interdicted from filing certificates and thereby obtaining judgment in order to attach their bank accounts. Their applications were dismissed. The court dealt with the collection procedure contained in s 88 to s 91 of the Income Tax Act which had the same effect and consequences as s 172 to s 174 of the Tax Admin Act and confirmed in para [37] that the noting of an appeal did not suspend the taxpayer's obligations to make payment. It also found as follows in para [37]:

“Although a statement filed by the Commissioner in terms of s 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. It has the effect of a judgment, however, in enabling the Commissioner to obtain a writ to attach and sell in execution the taxpayer's assets to exact payment of an amount that is payable.”

The court proceeded at para [38] as follows:

“Once it is accepted that the filing of a statement in terms of s 91(1)(b) is nothing more than an enforcement mechanism, as distinct from a means of determining liability, there is no basis for distinguishing it from any other recovery mechanisms, such as the appointment of an agent in terms of section 99. ...”

It proceeded in the same paragraph to criticise the approach of Spilg J in Mokoena v Commissioner, South African Revenue Service 2011 (2) SA 556 (GSJ), relying on the *dictum* of the SCA in Singh *loc cit* at para [9] which I quoted above and made it clear that the filing of a certified statement in terms of s 91(1)(b) does not have “*the rights determining character of a judicially delivered judgment.*”

VI EVALUATION OF THE EVIDENCE AND LEGAL SUBMISSIONS

- [23] Mr Reinders’ submission that the judgment of the court *a quo* is not appealable must be considered first. The court *a quo* undeniably found that the Kroonstad magistrates’ court did not have jurisdiction to entertain SARS’ monetary claim in that the amount exceeded the court’s jurisdiction. It was wrong in coming to that conclusion which has a final effect on the parties’ rights and obligations. It also found that the judgment obtained by SARS “... *was a judgment as defined in the law...*” and “... *that it will be undesirable for this court to turn away an applicant who wants to be heard on a judgment which was given by this court*”. It apparently relied on the fact that the judgment was void *ab origine* or was obtained by common mistake. SARS denied having committed any error and the taxpayer was not involved in the granting of the judgment. There was no room for a finding of common mistake. The only basis for the court *a quo*’s finding could be that the judgment was void *ab origine*. The court *a quo* is *functus officio*, both in respect

of this issue as well as its finding of lack of jurisdiction and cannot revisit these issues again.

[24] The court *a quo* also mentioned the following and I quote it *verbatim*:

“I cannot see the argument that applicant should have exhausted certain ‘internal remedies’ having all the legs to withstand the slightest wind. As matters stand, a warrant of execution against applicant’s property is out. I see no logic in the respondent assertion that applicant is not entitled to approach this court.”

This conclusion has a very definite bearing on SARS’ rights and the taxpayer’s obligations in accordance with the provisions of the Tax Admin Act. In fact the court *a quo* went further and found that the disputes pertaining to whether or not the taxpayer received notice in accordance with s 172 and whether or not the tax assessments were correctly issued, were disputes of facts which could only be adjudicated by a competent trial court “*after having exhaustively interrogated all the evidence*”.

[25] As stated in **Absa Bank v Mkhize** *loc cit*, also relying on other judgments of that court, if an order irreparably anticipates or precludes some of the relief which would or might be given at the hearing, it will be appealable. The test is whether the order made was in substance and not in form, final in effect. I am satisfied that the judgment of the court *a quo* is indeed appealable in so far as it is final in effect and

not susceptible to alteration. If it is allowed to stand, SARS would be forced to issue summons in either the regional or the high court, to proceed with the normal civil procedures and once the pleadings are closed, to apply for a trial date whereupon evidence will have to be led for the court to finally adjudicate the dispute. This would put SARS in an untenable situation and obviously allowing the taxpayer to achieve directly the opposite of what the legislature intended. The judgment of the court *a quo* is indeed appealable. The appeal should be entertained on the merits.

- [26] Having made a finding that the judgment of the court *a quo* is appealable, the only issue that may cause some concern is whether the jurisdictional requirements for obtaining judgment in accordance with s 172 to s 174 of the Tax Admin Act have been met. The taxpayer denied having received notice as required in s 172. However the annexures to his founding affidavit, i.e. the assessments on which he relies, contradict his version in reply. It is clear that the taxpayer misconstrued or did not have any regard to the judgment procedure contained in the Tax Admin Act. He did not deal with that procedure at all, but referred to a default judgment granted against him as if a normal judicial process in terms of the magistrates' court rules had been followed. It is only when SARS attached to the answering affidavit a copy of the final demand sent to him on 5 December 2012 in accordance with the provisions of s 172, that he indicated in the replying affidavit that he did not receive the final demand. He declared in paragraph 3.3 of the founding affidavit that he

was involved in a serious dispute with SARS over several years in respect of his assessments. He undeniably, even on his own version, received assessments which he was not prepared to accept. He went so far to state in paragraph 3.4 of his founding affidavit that his accountant objected on his behalf, but no affidavit of the accountant is attached and the court *a quo* was also not informed as to what the outcome was of these objections, although it would in any event be irrelevant, bearing in mind the “pay now, argue later” principle.

[27] In my view the taxpayer was evasive and vague with reference to the address, to wit P O Box 1628, Kroonstad, 9500. The assessments attached to his founding affidavit were sent to this address. The taxpayer did not explain how these assessments came to his attention, if these were indeed sent to a wrong address. In the reply the taxpayer merely mentioned that the aforesaid postal address was not his and that his postal address was P O Box 7049, Kroonpark, 9502. It is not explained whether the P O Box 1628, Kroonstad address was a previous postal address, whether he had changed his address and whether and when he informed SARS of his new address. As mentioned, the dates on the assessments indicate that some were sent to him before judgment and others thereafter. I am satisfied that SARS complied with the jurisdictional requirement pertaining to notice. There is also no doubt that the taxpayer received assessments.

[28] Even if I am wrong in my finding that the jurisdictional requirements have been met, the parties are not before us on review, the procedure which the taxpayer should have followed in terms of s 105 of the Tax Admin Act, if he believed that an irregularity had occurred. In such a case SARS' approach to the litigation would in all probabilities be different and it would be detrimental to it if we adjudicate the matter as a review court at this stage of the proceedings. Mr Reinders submitted that this court could deal with this aspect on appeal in light of **Singh** loc cit where a judgment was set aside on appeal by the SCA due to lack of notice. The situation was totally different in that instance in that the SCA dealt with an appeal against a decision of the high court, dismissing a review application by the taxpayer. See: **Singh v Commissioner, SARS** 2002 (SA) 94 (D & CLD).

[29] The court *a quo* could not entertain the application for rescission as it was not a civil judgment in the ordinary sense. The certified statement filed on behalf of SARS could not be regarded as having the character of a judicially delivered judgment. The judgment procedure contained in Part B of Chapter 11 of the Tax Admin Act - in particular s 172 to s 174 thereof - is a recovery or collection provision and nothing more, as stated by the SCA in **Singh** loc cit.

[30] I quoted s 105 of the Tax Admin Act above. I re-iterate that a taxpayer may not dispute an assessment or decision as described in s 104 in any court or other proceedings except in proceedings under Chapter 9 of the Tax Admin Act or by

application to the high court on review. The taxpayer could not attack the assessments or the certified statement issued by SARS in respect thereof in the court *a quo*. He should have utilised the dispute resolution process referred to above or applied to this court for review. He failed to elect either of these two options, but in any event, the principle, “pay now, argue later” would still apply, unless payment was suspended.

[31] Mr Reinders argued that even if the appeal is allowed, the order setting aside the warrant of execution should still remain operative. I disagree. The appeal was directed against the whole judgment of the court *a quo*. In any event, it would be untenable to find that the judgment was incorrectly set aside, but that the order setting aside the warrant should remain operative. Appellant would in any event be entitled to immediately issue a new warrant. However, this appears to be unnecessary. Once it is pronounced that the application for rescission of judgment should have been dismissed, it follows as necessary consequences that a valid judgment was obtained and the setting aside of the warrant of execution is of no force or effect.

[32] Consequently the appeal should succeed with costs.

VII ORDERS

[33] The following orders are made:

1. The appeal succeeds with costs;
2. The order of the court *a quo* is set aside and replaced with the following:

“Applicant’s application is dismissed with costs.”

J. P. DAFFUE, J

I concur.

A. WILLIAMS, AJ

On behalf of the appellant: Adv. D. R. Thompson
Instructed by:
State Attorney
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On behalf of the respondent: Adv. S. J. Reinders
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