

21/9/2009

/EVDM

REPORTABLE

IN THE HIGH COURT OF SUID AFRICA
(NORTH GAUTENG HIGH COURT)

DELETE WHICHEVER IS NOT APPLICABLE

1 REPORTABLE: YES/~~NO~~.

2 OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

3 REVISED.

DATE ~~22~~ 21/9/2009 SIGNATURE

Case Number: 9849/2008



In the matter between:

SAIRA ESSA PRODUCTIONS CC

1ST APPLICANT

SAIRA ESSA

2ND APPLICANT

MARK CORLETT

3RD APPLICANT

VS

THE SOUTH AFRICA REVENUE SERVICE

1ST RESPONDENT

JUDGMENT

Delivered on: 21 September 2009

POTTERILL AJ,

1. The applicants, after oral argument, are seeking only the following relief:

1.1 "Declaring that the Applicants have duly and properly complied with their obligations under the Small Business Tax Amnesty and Amendment of Taxation Laws, Act, 2006 ("the Act") in respect of the

charges levied against them and detailed in the summonses served upon them and attached hereto marked "SE!" "SE2" SE3;

- 1.2 *Declaring that the Applicants are accordingly entitled to rely upon the protection afforded by Section 8(c) of the Act read with Section 5 of the Second Small Business Tax Amnesty and Amendment of Taxation Laws, Act, 2006 and are thus protected and/or relieved from prosecution in respect of the charges.*
- 1.3 *Ordering only those Respondents (or other persons) that oppose this application to pay the costs hereof jointly and severally the one paying the other to be absolved such costs to include the costs of two Counsel, where two Counsel are employed."*

2 The following facts are common cause:

- 2.1 A criminal investigation was instituted against the applicants during July 2003. According to a letter dated 11 August 2004 the investigation pertained to the non-filing and under declaration of VAT, PAYE and Income Tax. The first Applicant was notified about the investigation in said letter.
- 2.2 The First applicant represented by the second and third applicants was then charged with non-payment of the VAT to SARS for the period 10/2002-02/2004 (Schedule A to the charge sheet) and PAYE not paid over to SARS for the period 06/2003-9/2004 Schedule B to the charge-sheet. They made their first court appearance on 12 August 2005.
- 2.3 The applicant's accountant compiled the financial statements and the VAT returns for the tax periods October 2002-February 2004.

- 2.4 Consequently VAT became payable by the Applicants and was in fact paid between August 2004 and September 2005.
- 2.5 The VAT was paid before the submission of the application for amnesty. The application for amnesty was on made on 27 October 2006.
- 2.6 The First, Second and Third Applications for indemnity were approved on 11 May 2007, 26 March 2007 and 16 April 2007 respectively.
- 2.7 The Commissioner did not deliver a notification as intended in Section 5(4) of the said Act.
- 3 The Small Business Tax Amnesty and Amendment of Taxation Laws, Act No 9 of 2006 (the Amnesty Act) was assented to on 20 July 2006 and came into operation on 25 July 2006. The purpose of the Act is to provide tax relief to small businesses which are either not registered for tax, or those registered for tax but for the years preceding the 2006 year of assessment have not declared tax, understated tax or whose tax returns were outstanding. The qualifying periods in respect of tax is tax years up to 28 February 2006. In terms of the Act "2006 year of assessment" means "the year of assessing ending during the 12 month period commencing 1 April 2005 and ending 31 March 2006." The total gross income of the business must not have not exceed R10 million to qualify.
- 4 The relevant sections relied on by the parties are Sections 5(1), 5(2), 5(4), 8(c), 10(a) (b) and (c) of Act 9 of 2006.

- 5 The applicant contends the crisp question for determination is whether someone who has applied for amnesty and was granted amnesty can still be prosecuted for the non-payment of VAT to which the amnesty pertains. It was further argued that it could never be the intention of the Act to benefit businesses that paid nothing versus businesses that paid.
- 6 The respondent categorically denies that the applicants were granted amnesty in respect of the VAT forming the subject matter of the criminal prosecution. They contend that the applicants were granted amnesty in respect of other periods not covered by the previous assessments [paragraph 24 of the answering affidavit]. Besides this factual dispute they also contend that it was not legally possible to have obtained amnesty for the periods they are prosecuted for.
- 7 The applicants aver that they have been granted amnesty for the VAT periods as charged for in schedule A of the charge sheet and consequently are entitled to immunity from criminal prosecution in terms of section 5(1) of Act 10. It is in dispute whether the qualifying periods for which amnesty was granted is the subject matter of the prosecution. According to the charge sheet, schedule A they are charged for VAT for the periods 10/2002-02/2004. The respondent states that the Amnesty Act is to provide relief for the years preceding the 2006 year of assessment. In terms of the definition of the 2006 year of assessment that is the period before 1 April 2005. In the amnesty application form attached to the documents no provision is made for stating for

what periods amnesty is required. Section 4 (1) of Act 9 requires the applicant to in the application disclose taxable income in respect of all amounts accrued, received or deemed to have been received or accrued *"to applicant from the carrying on of business during the 2006 year of assessment."* The respondent does not state that this was not done in the applicants' application. In this application the applicants ticked the boxes relating to inter alia VAT and PAYE. In terms of section 4(2) the applicant *"must also furnish an income tax return for the 2006 year of assessment and a statement of all assets.. and liabilities as at the end of that year together with the application for tax amnesty."* The respondent does not aver that this was not done. The amnesty application would thus cover the period from start of business to 1 April 2005 and the tax income return the period of 1 April 2005-31 March 2006. That would correspond with the qualifying period as defined in the Act and specifically (d) *"any other tax, levy or contribution means any tax period or month which ends on or before 28 February 2006."* Under these circumstances the bold averment by the respondent that: **"However they were granted amnesty in respect of other periods not covered by the previous assessments"** [paragraph 24 of the answering affidavit] constitutes a bare denial. "Other periods" is never defined and is vague and insubstantial. This does not generate a genuine or real dispute of fact and the formulation as set out in **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd** 1984(3) SA 623(A) is accordingly not applicable. The respondent did not answer or argue that the applicants' were not granted amnesty pertaining to the charges set out in schedule B.

8 The respondent's legal basis for averring that amnesty could not have been granted is that information was furnished to the Commissioner, was assessed, became payable and was in fact paid. This argument is founded on section 10 of the Act. This reads as follows:

Section 10(a) (b) and (c):

"The tax amnesty relief does not apply in respect of any tax... to the extent that it-

(a) had already been paid before the submission of the application;

(b) is payable or becomes payable by the Applicant in consequence of any information which was furnished to the Commissioner by the Applicant or a representative of the Applicant in any return or declaration or otherwise before the submission of the application: or is payable by the applicant in terms of an assessment issued by the Commissioner before the submission of the application.."

From the common cause facts supra the Applicants had furnished information to the Commissioner, assessments were issued and assessments paid. Thereafter application for amnesty is made and amnesty is granted. Prima facie it would seem that section 10 would bar amnesty from being granted in these circumstances. Prima facie the applicants' could not rely on section 5 of Act 10 of 2006 which reads as follows:

*"(1) An applicant whose application has been approved in terms of Section 5 of the Tax Amnesty Act [Act 9 of 2006] is deemed not to have committed any offence in terms of any Act to which Chapter 1 of the Tax Amnesty Act relates **to the extent that relief has been***

granted in terms of Section 8 of the Tax Amnesty Act.[my emphasis]

(2) Subsection (1) also applies to a person insofar as that person acted in a representative capacity on behalf of the applicant during the qualifying period.”

Section 8 of the Act reads as follows:

Section 8(c)

“Subject to Section 10, an applicant whose application has been approved in terms of Section 5 is not liable for this payment of_

(c) any value-added tax in terms of the Value added Tax Act, in respect of any supply or importation of goods or services, during the qualifying period...”[my emphasis]

Section 10 is thus the overriding section setting out to what circumstances tax amnesty relief does not apply. In terms thereof the VAT forming the subject-matter of the charge-sheet was not circumstances to which amnesty relief applies. The reality is however that de facto the Commissioner did grant the applicants' amnesty in terms of the applicants' application. This application included amnesty for VAT. The respondent's failure to enlighten the Court" for what periods not covered by previous assessments" they were granted amnesty can only lead to one inference, i.e. the VAT as set out in the charge sheet was included in the amnesty approval. This is also so for the reasoning as set out in paragraph 7 supra. The respondent's argument that the Commissioner did not have the power to approve the Applicant's application for amnesty in respect of the VAT forming the subject-matter of the

investigation is prima facie correct. The Commissioner did however grant amnesty.

9 The respondent also relied on:

Section 5(2):

"The Commissioner may not, subject to subsection (4), approve an application in terms of subsection (1) if the Commissioner, at any time before the submission of the application for tax amnesty, delivered a notice to that applicant or that applicant's representative informing that applicant of any audit, investigation or other enforcement action relating to any failure by that applicant to comply with any Act in respect of which application for tax amnesty is made."

Section 5(4):

"Subsection (2) does not apply if the Commissioner has, before the submission of the application for tax amnesty, delivered a notification that-

- (a) the notice contemplated in that subsection has been withdrawn;*
- or*
- (b) the audit or investigation contemplated in that subsection has been concluded."*

From the common cause facts set out above there was a notice of investigation delivered before the submission of the application for tax amnesty. This notice and the submittal of the returns by the applicants were before the Act came into operation on 20 July 2006. No notice in terms of 5(4) was delivered.

The applicants apply for amnesty when the Act comes into operation. If the Commissioner had the intention to retrospectively invoke section 5(2) of the Act, he did not do so. The applicants were in fact granted amnesty.

10 The Commissioner thus when granting amnesty either failed to take into account material information because it was not before him or he failed to act upon the information. The amnesty in fact exists and this court can not ignore it. The respondent's argument that the Commissioner had no power to do so is nothing else but an argument that he acted *ultra vires*. I have not been asked to declare the amnesty void or voidable and am not going to do same. As long as the amnesty exists in fact, it provides the foundation for reliance on section 5 of Act 10. In terms of section 5(2) of Act 9 the Commissioner, not the applicants, ought to have known what applications he may approve and what applications he may not approve.

1 I accordingly make the following order:

- 11.1 Declaring that the Applicants have duly and properly complied with their obligations under the Small Business Tax Amnesty and Amendment of Taxation Laws, Act, 2006 ("the Act") in respect of the charges levied against them and detailed in the summonses served upon them and attached hereto marked "SE1" "SE2" SE3;
- 11.2 Declaring that the Applicants are accordingly entitled to rely upon the protection afforded by Section 8(c) of the Act read with Section 5 of the Second Small Business Tax Amnesty and Amendment of Taxation

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Laws, Act, 2006 and are thus protected and/or relieved from prosecution in respect of the charges.

- 11.3 Ordering the respondent to pay the costs, such costs to include the costs of two Counsel where two counsel are employed.



S Potterill Acting Judge of the High Court

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