

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION) KLERK VAN DIE HOF

CAPE TOWN: Friday 19th MAY 2000

BEFORE THE HONOURABLE MR JUSTICE SELIKOWITZ 2000-07-10

BEFORE THE HONOURABLE MR JUSTICE GRIESEL

STRAND

CLERK OF THE COURT

In the matter between:

JOHANNES BARNARD

APPELLANT

and

KOMMISSARIS VAN BINNELANDSE INKOMSTE

RESPONDENT

Having heard Counsel for the Appellant and Counsel for the Respondent on an Appeal from the judgment of the Magistrate for the District **STRAND** delivered on the day of 25 October 1996 and having read the record of the proceedings in the said Court (Case No. 2921/95).

THE COURT ORDERS:

1. *That the appeal in as much as it relates to the question of the jurisdiction of the Court a quo succeeds with costs.*
2. *The matter is remitted to the Court a quo for further determination of the matter in the light of the findings in this judgment.*
3. *Proceedings in the Court a quo are to be stayed pending the outcome of the Constitutional Court reference made in Metcash Trading Ltd and The Commissioner for the SARS 2000 (2) SA 232 at 246.*

BY ORDER OF THE COURT


COURT REGISTRAR

286 Etienne Barnard Attorneys
SOMERSET WEST /avz

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A127/97

DATE: 19-5-2000

In the matter between:

JOHANNES BARNARD Appellant

and

THE COMMISSIONER FOR INLAND Respondent

REVENUE

10

J U D G M E N T

SELIKOWITZ, J: The Value Added Tax Act No. 89 of 1991 provides the means by which the respondent can recover the taxes due to him in terms of that Act. Section 40(2)(a) provides:

"If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act when it 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 thereof 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."

20

I wish to add immediately that in the recent case of Metcash Trading Ltd v Commissioner for the South African Revenue Service, 2000(2) SA 232 the learned Judge there presiding found this section to be contrary to the Constitution and referred the section in terms of section 167(5) of our

30

Constitution for confirmation or otherwise by the Constitutional Court. I shall return to that issue in due course.

On 13 June 1995 the respondent filed with the Clerk of the Court at the Strand, a statement in terms of the section just quoted. Some time thereafter the appellant sought to have the judgment which resulted upon the filing of that statement set aside, using the Rule relating to the setting aside of default judgments in the Magistrates' Court. The magistrate was also on that occasion required to consider an application for condonation filed by the appellant by reason of the delay in bringing the application for the rescission of the judgment. After hearing argument the magistrate came to the conclusion that he did not have the necessary jurisdiction to consider and rule upon the application for rescission of the judgment. It is that finding and that judgment which is appealed before us today. 10

Before I get to the question of the appeal, it is necessary to note that when this matter came before this Court on 6 April of this year, there was a no appearance for either party. A day or two before the hearing appellant's attorney sent a telefax to the Registrar requesting that the matter be removed from the roll. In the light of the history of the matter before this Court, a rule nisi was issued on 6 April calling upon the appellant to show cause today why the appeal should not be dismissed with costs on the grounds of failure to prosecute it properly. The response to that order has been the filing of affidavits on behalf of the appellant setting out the circumstances and difficulties which he has faced in trying to resolve his issue on the merits in this matter. The application 20 30

to avoid the appeal being dismissed has been opposed by the respondent on the grounds that the appellant has not properly pursued the appeal and has only himself to blame for the fact that we have reached this stage without the appeal having been heard.

I have given careful consideration to the facts as set out by the appellant. It is clear that in the light of the state of the law he had to embark upon a two-pronged appeal process in order to advance his objection to the assessment of some R39 000 of Value Added Tax in issue in this matter. The system is cumbersome and the one arm of the procedure, namely the appeal to the Special Income Tax Court, is indeed controlled by and regulated by the respondent himself who is required to ensure that the matter is heard before the Special Court. It is clear on the facts that despite a number of requests and for whatever reason, the matter has not yet, despite the passing of some five years, been enrolled for hearing by the Special Court. At the same time appellant has been seeking to pursue his remedy to have the judgment which resulted from the filing of the statement on section 40(2)(a) of the Value Added Tax Act set aside. There, he has been thwarted by the decision of the magistrate, which we have to consider today. The appeal will not be dealt with as envisaged in the rule nisi but is reinstated.

Having regard to the wording of section 40(2)(a) it is, in my view, clear that the effect of the filing of the statement is that the statement thereupon has the effect of a judgment lawfully given by the Court in question. The section, however, also says:

"...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."

It seems to me that the ordinary meaning of those words, and in particular the phrase "any proceedings may be taken thereon" clearly envisages that the provisions of the Court in question in relation to rescission of a judgment on a liquid debt are open to the appellant. The nature of the judgment is that of a default judgment and it would appear to me that the provisions of section 36 of the Magistrates' Court are applicable here. 10

I find support for this view, not only in the wording of the sub-section in question, but indeed in a similar conclusion that was reached by Melunskv, J in Traco Marketing (Pty) Ltd & Another v The Minister of Finance & Another 1998(4) SA 74 where the learned Judge, who was dealing in that case with an application for rescission of a judgment brought before the High Court and not before the Magistrates' Court, reached the conclusion that the provisions of section 40(2)(a) entitled the applicant for rescission to make use of rescission procedure of the relevant court and, indeed, in the case of Traco, also of the common law which the High Court is empowered to apply. 20

The judgment in Traco finds support also in the fact that a provision similarly worded to section 40(2)(a) of the Value Added Tax Act can be found as section 91(1)(b) of the Income Tax Act No. 58 of 1962. That section was interpreted by a Full Bench in this Court in the matter of Kruger v Commissioner for Inland Revenue 1966(1) SA 457 (C) where the Court found that the judgment debtor in a judgment obtained by the respondent, pursuant to the provisions of 3

section 91 of the Income Tax Act, could be set aside or rescinded by the use of the Rules relating to the setting aside of default judgments. I may mention that that finding was confirmed albeit in an obiter dictum by the Appellate Division in the case on appeal reported in 1973 (1) SA 394 (A) at 412D-F. In the light of what I have just said there can, in my view, be no doubt that the magistrate had jurisdiction to entertain the application brought for the rescission of the judgment obtained pursuant to the terms of section 40(2)(a) of the Value Added Tax Act. 10

For those reasons it is also, in my view, correct that the appellant should succeed in the appeal to the extent that the question of jurisdiction was appealed against and that the costs should follow the result.

As already mentioned, the Witwatersrand Local Division of this Court has found in the Metcash case that the provisions, inter alia, of section 40(2)(a) of the Value Added Tax Act are contrary to the Constitution and that finding awaits ratification or otherwise by the Constitutional Court. It therefore appears that in the present case no final decision on the merits of the setting aside and the rescinding of the judgment can be made until such time as the Constitutional Court has ruled upon the pending enquiry into the constitutionality or otherwise of section 40(2)(a) and, indeed, also section 45 of the Value Added Tax Act. 20

This matter does not involve a large sum of money and in order to assist the parties to reach finality in this matter in as cost-effective and efficient manner as possible, it seems to me that in upholding the appeal on the ground of jurisdiction, this Court should refer the matter 3

back to the magistrate or to some other magistrate to consider the merits of the application for condonation and the application for rescission of the judgment. That, of course, can only properly be done after the Constitutional Court has ruled on the constitutionality of the sections in question. If section 40(2)(a) of the Value Added Tax Act is struck down, cadit quaestio, the matter will there end and the judgment will be null and void, although it may still need to be formally set aside. If, on the other hand, the Constitutional Court does not strike down the section, but either upholds it in its present form or in some altered form, then the Magistrates' Court will be able to consider the merits of this application in the light of that decision.

10

That being the case the order that I would propose is as follows:

1. The appeal inasmuch as it relates to the question of the jurisdiction of the Court a quo succeeds with costs.
2. The matter is remitted to the Court a quo for further determination in the light of the findings in this judgment.
3. The proceedings in the court a quo are to be stayed pending the outcome of the Constitutional Court reference made in Metcash Trading Ltd v Commissioner for the South African Revenue Service 2000(2) SA 232 at 246B.

20


GRIESEL, J: I agree.

30

GRIESEL, J

SELIKOWITZ, J: /...

SELIKOWITZ, J: It is ordered accordingly.


SELIKOWITZ, J