

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO. 581/12

Reportable	Yes / No
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Delivered on: 11/03/2014

In the matter between:

SOUTH AFRICAN NATIONAL TUBERCULOSIS

Applicant

and

PROVINCIAL GOVERNMENT OF THE EASTERN

CAPE

Respondent

JUDGMENT

MALUSI AJ

- 1] This is an application for payment of value added tax (VAT) and interest thereof on the purchase price of certain immovable properties (the hospitals).

2] On 30 October 2009 the applicant entered into a sale agreement with the respondent in terms of which the former sold to the latter the hospitals for a purchase price of R27 000 000,00. The parties could not agree whether the transaction was liable to VAT. The respondent contended that the transaction was exempt from the payment of VAT. The applicant held a contrary view.

3] The sale agreement was drawn to accommodate the difference on this issue. It is necessary for the purposes of this judgment to quote the exact wording of clause 4 of the sale agreement:

4.1 The purchase price is R27 000 000,00 (TWENTY SEVEN MILLION RAND) plus VAT, if applicable.

4.2 It is recorded that the Purchaser has paid a deposit of R25 000 000,00 (Twenty Five Million Rand) into the trust account of the Attorney. The Attorney is hereby authorized to invest this amount and any further amounts received in respect of the purchase price in an interest-bearing account for the benefit of the purchaser.

4.3 The balance of the purchase price plus VAT, if applicable, which amounts to a total of R2 000 000,00 (Two Million Rand) plus VAT on the full purchase

price, if applicable, shall be payable against registration of the PROPERTY in the PURCHASER's name, to be secured by a bank guarantee to the satisfaction of the SELLER and the ATTORNEY within 7 (seven) days after date of signature of this agreement by both parties.

4.4 The Seller confirms that it is a vendor for Value Added Tax, with VAT registration number 4590128957 (own emphasis).

- 4] The conveyancer attending to the transfer applied and obtained a transfer duty exemption certificate from the South African Revenue Services (SARS) despite the fact that it was not legally required for the transaction. On the 27th November 2009 the hospitals were transferred to the respondent.
- 5] On 5 July 2011 SARS demanded VAT, penalties and interest payment from the applicant. After lengthy negotiations, the applicant settled the debt due to SARS by payment of the sum of R4 168 927,73 as a portion of the penalties and interest was waived. The applicant in turn demanded payment of this amount with interest from the respondent.

- 6] The respondent admitted liability for the VAT and made a part-payment thereof in the sum of R1 793 424,86. The payment of the outstanding VAT was settled by the parties in a consent order of this Court on 14 February 2013. The respondent denied liability for interest payment for the period before it was informed by applicant of SARS demand i.e. before 1 March 2012.
- 7] The issue for determination is the liability of the respondent for the payment of the interest from the 27th November 2009 to the 1st March 2012. The applicant contends that the interest accrued from the 27 November 2009 whilst the respondent contends it only accrues from 1 March 2012.
- 8] *Mr Schuring*, for the applicant, submitted that the sale agreement fixed the time for the payment of the interest. There is no need for demand to have been made by the applicant as *mora ex re* is applicable.
- 9] *Mr Nyangiwe*, for the respondent, submitted that the respondent was only liable for interest from 1 March 2012 which is the date it was informed of the demand for VAT payment by the applicant. He argued that both the applicant and SARS have caused the respondent not to be in *mora*.

- 10] *Mora* has been described as delay or fault. It arises when a party to a contract fails to perform his/her obligations on time. When the contract fixes the time for performance, faults arises from the contract itself (*mora ex re*) and no demand (*intepelatio*) is necessary to place the debtor in *mora*. The contrasting position is when the contract does not provide time of performance. In those circumstances the debtor will not be in *mora* until there is a demand by a person. This is the reason it is called *mora ex persona* as an act by a person is required to place the defaulting party in *mora*¹.
- 11] It is apparent from paragraph 3 above that clause 4.3 of the sale agreement fixed the time for the payment of VAT as the registration of the property in the respondent's name, which occurred on the 27 November 2009. As the respondent failed to pay the VAT on that date, interest accrued from thereon.
- 12] The respondent has argued "the exemption" from SARS precluded it from being in *mora ex re*. The argument was developed to say because of the exemption certificate the applicant was required to inform the respondent of the demand from SARS before the respondent could be in

¹*Scoin Trading (Pty) Ltd v Bernstein NO [2011] 2 All SA 608 (SCA) at paragraphs 11 & 12; C & T Products (Pty) Ltd v M H Goldschmidt (Pty) Ltd 1981 (3) SA 619(C) at page 631G-H*

mora. I do not agree. The transfer duty certificate did not exempt the parties from the payment of VAT but only transfer duty. The entry in the certificate that VAT was not applicable was made by the conveyancer and not SARS. It was neither SARS nor the applicant that caused the alleged uncertainty but the respondent's own insistence that VAT was not payable.

- 13] The respondent's argument further overlooks the crucial aspect that the due date for the payment of VAT had already been fixed in the contract itself. All that had to be determined was whether VAT is payable or not. Once it was determined that VAT was payable, then the consequences of not having paid it on due date followed.
- 14] The respondent submitted that it ought to pay interest at a lower rate than the prescribed rate. It requested me to consider the exemption certificate as the special circumstance envisaged in Section 1 (1) of the Prescribed Rate of Interest Act 55 of 1975. I am not satisfied that the circumstances allow me to exercise the discretion in favour of the respondent. The respondent is the cause of its own misery. Furthermore, as indicated on paragraph 12 above, it is the conveyancer who indicated that VAT is not applicable and not SARS.

15] In the circumstances, the following order is made:

- (a) The respondent to pay interest at the rate of 15,5% per annum on the sum of R4 168 927,73 from the 27 November 2009 to 30 January 2013.**
- (b) The respondent to pay interest at the rate of 15.5% per annum on the sum of R2 375 506,87 from 31 January 2013 to date of payment.**
- (c) The respondent to pay the costs of the application.**

T. MALUSI

ACTING JUDGE OF THE HIGH COURT

Counsel for the applicant : Adv C. Schuring

Instructed by : Hutton & Cook

KING WILLIAM'S TOWN

Counsel for the respondent : Adv X. Nyangiwe

Instructed by : The State Attorney

c/o Shared Legal Services

KING WILLIAM'S TOWN