REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A72/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

20/6/2025
DATE

MOKOSE SNI

In the matter between:

LUTZKIE: AUGUST WILHELM FREDERICK Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

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JUDGMENT

MOKOSE J

[1] The appellant appeals to this court against a judgment delivered on 27 October 2020 in terms of Rule 49(17) of the Tax Administration Act 28 of 2011, in which the Tax Court dismissed an appeal by the appellant in respect of tax assessments for the tax years 2005 to 2007.

[2] The brief facts of the case are that prior to issuing an assessment for those years, a letter of audit findings was delivered to the appellant. The purpose of this letter of audit findings was to allow the appellant an opportunity to show cause and to demonstrate why the findings were wrong and why the assessment must not be issued. The appellant responded to the letter of audit findings which submissions were considered by the respondent.

[3] The appellant provided reasons and evidence in support of his objection to demonstrate that the respondent's assessment was incorrect. The respondent considered the submissions but subsequently disallowed the objection on 3 May 2011. The appellant then lodged an appeal against the partial disallowance of his objection on 14 June 2011. After all other issues in dispute were resolved between the parties the only issue which remained for adjudication by the Tax court was the tax levied in respect of the sum of R1 670 099,85 which had been paid to appellant by a company known as Volaw Trust. Its name has since been changed to the VG Group.

[4] The respondent had also imposed an additional charge of 90% of the tax payable in respect of this payment. This was done on the basis that SARS is empowered to impose additional tax to the maximum of 200% of the tax payable by a taxpayer who has evaded tax or has omitted from his return the amount which ought to have been included therein. The respondent averred that the appellant omitted, in his return, to include the amount received from Volaw which was discovered by SARS through the audit process. The respondent determined that

there was no intention on the part of the appellant to evade or omit to reflect the income from his return and could therefore not impose the maximum 200% additional tax. Accordingly, in its own discretion, the respondent imposed 90% additional tax.

[4] The facts are that on 15 June 2006 the appellant received an amount of R1 670 099,85 from Volaw which amount the respondent included in the appellant's 2007 income tax assessment. This amount was indicated as having been included in the letter of audit findings. In response thereto, the appellant indicated that it was a loan repayment between it and Volaw. Despite being asked for proof of such loan agreement, the appellant failed to provide same to the respondent. A document titled "Acknowledgment of Debt" dated 14 June 2006 was however furnished to the respondent as proof of the loan agreement.

[5] The "Acknowledgment of Debt" was signed by the appellant and two witnesses only. It was not signed by a representative of Volaw Trust. It read as follows:

> *"I FWA LUTZKIE (ID 6203155091089) ("the Debtor") do hereby admit that I am liable and hold myself bound to Volaw Trust or nominee ("the Creditor") for the due and proper payment of the amount of R1 670 099,85 by reason of the payment of LEGAL FEES ("the Principal Debt") and furthermore I declare that I am bound by the conditions set out in the annexure which document I have initialled for purposes of identification.*
>
> *THUS DONE ……"*

[6] An annexure is attached to the Acknowledgment of Debt wherein the amount of the debt is stated therein including, *inter alia,* the interest charged.

[7] The appellant did not testify personally in the proceedings. He was represented by Mr Van Dyk, an auditor who was alleged to have been instructed to investigate the Volaw Trust matter. It is noted that this investigation was taking place 12 years after the fact. Based on the findings by Mr Van Dyk the appellant sought to amend his grounds of appeal and advance 'new reasons' that the Volaw Trust receipt was a 'repayment of a shareholder loan.' Email communications were produced as evidence to show that the Volaw Trust income was a repayment of the appellant's shareholder loan and was therefore not taxable. The amendment was granted having been found by the court not to be prejudicial to the respondent.

[8] The appellant's amended statement of the grounds of appeal was that the deposit of the sum of R1 670 099,85 was a repayment of the appellant's shareholder loan and as such was not taxable in his hands.

[9] The issues to be determined by this court on appeal are the following:

(i) whether the Tax Court was correct in finding that the income of R1 670 099,85 received by the appellant from Volaw Trust was taxable income;

(ii) whether the Tax Court was correct in finding that the respondent had correctly levied additional tax against the appellant; and

(iii) whether the Tax Court was correct in awarding the costs in favour of the respondent.

[10] In terms of Section 82 of the Income Tax Act 58 of 1962 and Section 102 of the Tax Administration Act 28 of 2011, the burden of proving that an assessment issued by South African Revenue Services ("SARS") is incorrect rests on the taxpayer. The onus is discharged through the presentation of evidence by the taxpayer. The court then evaluates such evidence and decides whether the onus has been discharged or not.

[11] At all relevant times, Mr Wagner, who was in the employ of the appellant, had represented the appellant in his dealings with the respondent. He was employed as the appellant's legal adviser. Mr Van Dyk subsequently represented the appellant in his dealings with the respondent. At the time of the appeal, he had been employed as the appellant's current auditor. It was noted from the record that the appellant did not give evidence in his personal capacity and utilised the services of Mr Van Dyk who testified on his investigations into the Volaw matter and his findings.

[12] In his evidence, Mr Van Dyk relied on emails exchanged with Ms Gray, an employee of Volaw and a Mr Fagan, a director of VG Group. Mr Van Dyk wrote an email to Ms Gray requesting her to write an affidavit as an expert witness to confirm, *inter alia,* that the transactions were loans made by the appellant to the MCM Development Limited. Furthermore, that the shareholder's loan, due his status as a non-resident was refunded to the appellant and that although there were discussions on a loan and therefore an acknowledgment of debt, the loan and the acknowledgment of debt did not happen and was therefore cancelled. This attempt to obtain an affidavit from Ms Gray did not materialise.

[13] In response to the enquiries, Ms Gray responded as follows in an email dated 16 July 2019 that:

"I can only confirm that there was a shareholder loan which was either repaid in full or in part (we have no records to clarify the amounts)."

[14] It is clear from this communication that Ms Gray did not state how much money was paid and to whom and furthermore confirms that she has no records to support her submission that it was a shareholder loan. In a previous email dated 22 October 2018 Ms Gray states:

"I am sorry but as advised in my email of 10 October we have no further information as the files have been destroyed."

[15] Mr Van Dyk's response from Mr Fagan was that the appellant must have been connected in some was to an entity and that without knowing the entity it was difficult for him to assist.

[16] The respondent took issue with the appellant's failure to testify. The respondent is of the view that the appellant was best placed to provide the necessary facts than any other person pertaining to the relevant transaction. In so doing he would discharge his onus to show why the assessment against him should not stand. This he did not do. The explanation for his absence was that he was in self-isolation due to the Covid-19 pandemic. No proof of his illness was submitted in support of his absence at the proceedings. Be that as it may, the court proceedings were held on line in a Teams meeting and not physically. The respondents are of the view that his failure to attend the proceedings even on line while in isolation in the comfort of his home must be viewed in a dim light by this court and as an indication of his lack of interest in pursuing his own appeal. In any case, the particularity of the transaction remains in the knowledge of the appellant himself. Accordingly, the evidence of Mr Van Dyk was hearsay in its nature.

[17] The appellant, on the other hand, was of the view that although the evidence of Mr Van Dyk together with the emails exchanged with officials of the VG Group may be hearsay and may not be admitted as such, it could be admitted into evidence in certain circumstances. Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 provides that (subject to the provisions of any other law) hearsay evidence shall not be admitted as evidence in civil proceedings unless each party against whom the evidence is to be adduced agrees to the admission thereof, or the person on whose credibility the probative value of the evidence depends, himself testifies at such proceedings, or the court (having regard to the various factors listed in Section 3(1)(c)) is of the opinion that such evidence should be admitted in the interests of justice. This approach was followed in the case of *Giesecke and Devrient SA (Pty) Limited v Minister of Safety and Security*[1] where the court dealt with the admissibility of hearsay evidence in terms of Section 3(1)(c) and the exercise of the court's discretion.

[18] From the record, it is evident that the Tax Court did admit certain of the evidence of Mr Van Dyk although it did not specifically refer to Section 3(1) of the Law of Evidence Amendment Act. However, the Court observed speculations in his evidence which was not supported by any documentation sought to be obtained from Ms Gray or Mr Fagan to prove a shareholder's loan.

[19] Furthermore and during proceedings, Mr Van Dyk attempted to proffer some evidence pertaining to documentation emanating from the South African Reserve Bank being codes used by the bank in distinguishing the nature of monies received in the Republic of South Africa from a foreign source. This application by Mr Van Dyk to obtain such evidence was rejected by the Tax Court for the reason that it would not take the matter any further to prove the nature of the transaction. This would also have necessitated a postponement of the matter once

[1] 2012 (2) SA 137 (SCA) at para [25] to [34]

again to allow the appellant to gather more evidence in support of his case. This would have caused an unwarranted delay in finalising the matter.

[20] In view of the fact that the evidence of Mr Van Dyk was not corroborated by any other evidence in support of the fact that the funds received by the appellant was the repayment of a shareholder's loan, I am of the view that the onus of proof has not been discharged by the appellant. Accordingly, the Tax Court was correct in its finding that the income of R1 670 099,85 received by the appellant from Volaw was taxable income.

[21] Another ground of appeal was for this court to determine whether the Tax Court had correctly levied additional tax against the appellant. It is the respondent's pleaded case that:

(i) the respondent is empowered to impose an additional tax to the maximum of 200% of the tax payable by a taxpayer who has evaded tax or has omitted from his return the amount that ought to have been included therein; and

(ii) the appellant had omitted to include in his return the amount received from the Volaw Trust which ought to have been included in his return, which amount was discovered by the respondent through the process of an audit.

[22] The appellant was of the view that the penalty imposed in the form of an additional tax was not justified and that a penalty of no more than 10% should have been imposed by the respondent. The appellant referred the court to Section 223 of the Tax Administration Act of 2011 in which understated penalty percentages applicable under different circumstances are set out. In the case of a "standard case" or a case not involving obstructive conduct or a repeat offence by a taxpayer involving a substantial understatement, the penalty is 10%. The appellant further submits that this was a "standard case" in which there had not

been an obstructive conduct on the part of the appellant. He had co-operated with the respondent.

[23] The appellant accepted that the imposition of an understatement penalty was the prerogative of the Tax Court, so too was the amount of the penalty. However, the appellant was of the view that the Tax Court had misdirected itself in material respects in exercising its discretion.

[24] Section 76 (1) of the Tax Administration Act 2011 provides that a taxpayer shall be required to pay in addition to the tax chargeable in respect of his income tax, an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted, if he or she omits from his return any amount which ought to have been included therein.

[25] The appellant tendered evidence of the auditor who raised the assessment, Ms Moitse who explained that after raising the assessment, she presented the matter to the penalty committee with her recommendation that an additional tax of 50% be levied. She explained further that the category within which her recommendation fell ranged between 30% and 90%. The penalty committee accepted her recommendation that an additional tax be levied but increased the recommendation to 90% on the basis that 'there was a deliberate intent to omit income'.

[26] From a reading of Section 76(1) it is evident that a taxpayer can be charged 200% additional tax in the event that he omits income which should have been included in his return. The jurisdictional requirement is that there must have been an omission. There is no need to show an intention to evade the payment of tax on the part of the taxpayer. In *ITC 1430 (50 SATC 51)* the court held that in an

appeal against the decision of the Commissioner where he exercised his discretion, the Special Court on appeal is called upon to exercise its own original discretion and in so doing, is not restricted to the evidence the Commissioner had before him. That being the case, the Tax Court is in a position and must take into account all evidence before it in arriving at a decision whether or not the additional tax imposed should be remitted or not.

[27] The appellant did not present any form of evidence to the court in opposition to the additional tax levied of 90%. The evidence tendered by the respondent was that presented by Ms Moitse that she had recommended 50% but that the penalty committee had decided to impose additional tax of 90%.

[28] The appellant challenged the competency of the Commissioner to delegate her power to impose penalties to a committee. However, the respondent was of the view that this court must take a similar approach to that followed in the case of *CIR v Da Costa*[2] where it was held as follows:

> *"And since the appeal is directed against the penalty determined by the Court a quo, it is immaterial whether the Commissioner was entitled to delegate his function to the aforesaid committee."*

[29] The respondent was of the view that this court must not consider whether the penalty committed exercised its decision correctly but must determine whether the evidence before it the imposition of penalties by it was justified.

[30] From the record, I note Ms Moitse's evidence that she considered the fact that the appellant's auditor was co-operative during the audit but that there were numerous extensions granted to the appellant to deliver documents in proof of his objection which extensions expired without the information being furnished,

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[2] 1985 (3) SA 768 (A) at p775A

causing delays which prejudiced the respondent. I also note that an intention to evade tax is not a requirement for the imposition of the additional tax in terms of Section 76(1). Accordingly, the fact that the appellant omitted the Volaw Trust income from his return was sufficient for the imposition of the additional tax of 200%. I am satisfied that extenuating factors were considered in determining that the additional tax to be imposed is 90%. No submissions were furnished by the appellant in opposition to the imposition of 90%. The Tax Court was accordingly entitled to decide in light of the evidence before it as to what additional tax should be imposed. There is no evidence before the court that the court *a quo* failed to do so.

[31] The final issue to be determined by this court is that of costs – whether the Tax Court was correct in awarding costs in favour of the respondent. The appellant submits that the respondent be ordered to pay the costs in the appeal to the Tax Court. The respondent was of the view that the appellant's objection and appeal against the taxation of the income from Volaw was frivolous and without any basis. Furthermore, the appellant's case relied on allegations without no supporting proof.

[32] The Tax Court held that the appellant's case 'fell hopelessly short of discharging his onus and that the impression created was one of contrivance and intentional obfuscation rather than an attempt to offer a proper account of the payment'. Furthermore, the court held that the tactic adopted by the appellant was clearly also one of delay and frustration of the proceedings.

[33] I agree that the appellant did not take his appeal seriously. As stated above, there was no explanation on the part of the appellant for not only his failure to testify but also his absence from the proceedings. Proffering an excuse that he was isolating due to the Covid 19 pandemic with the medical proof was not

sufficient not to have participated in the proceedings which were held on line on Teams. I agree that it is an indication of a lack of interest to pursue his appeal. Accordingly, there is no reason why the order of the Tax Court should be overturned in respect of the costs order.

[34] Consequently, I am of the view that no evidence was presented by the appellant that the amount of R1 670 099,85 received from the Volaw Trust was not taxable. Furthermore, I am satisfied that the additional tax was correctly imposed, no evidence to the contrary having been furnished by the appellant. As a result, the assessment raised by the respondent against the appellant was correctly confirmed by the Tax Court.

[35] Accordingly, the following order is granted:

The appeal is dismissed with costs.

S N MOKOSE
Judge of the High Court of South Africa, Gauteng Division, Pretoria

I agree and is so ordered

BALOYI-MBEMBELE AJ
Acting Judge of the High Court of South Africa, Gauteng Division, Pretoria

DISSENTING JUDGMENT

DAVIS J

Introduction

[1] The appeal in this matter was heard by a full court on 12 October 2022. Judgment was reserved. A draft judgment by the self-proclaimed scribe, Baloyi-Mbembele AJ was revised by my sister Mokose J. I received her proposed judgment just over a week ago, some eight months after the hearing of the appeal. This court unreservedly apologises to the parties for the delay in the finalisation of the appeal.

[2] I have read the judgment of my sister Mokose J and I am appreciative of her succinct summary of the matter. Regrettably, I find myself in disagreement with her evaluation and conclusion. I shall, equally succinctly, set out the reasons for the disagreement hereunder.

The nature of the receipt of R 1 670 099.85

[3] It has correctly been pointed out that the appellant as taxpayer, has the onus to prove the nature of the income. He averred that this was a repayment of a shareholder's loan and therefore attracted no income tax as assessed by SARS.

[4] In support of his contention, the taxpayer did not testify himself before the Tax Court, but had his current auditor, Van Dyk, who had conducted an investigation into the taxpayer's affairs, testify.

[5] Van Dyk's evidence was hearsay, but once the Tax Court has admitted the hearsay evidence, it was incumbent upon it to consider the weight and value thereof in deciding whether or not the taxpayer had discharged the onus on him on a balance of probabilities.

[6] In the hearing before the Tax Court, counsel for SARS, had failed to challenge the truth or correctness of Van Dyk's evidence in any material respect, save to argue that it was mere "speculation".

[7] In argument before us on appeal, counsel for the taxpayer had, in my view correctly so, relied on the Constitutional Court's determination of both the requirements and obligations attached to cross-examination as set out in *SARFU v President of the Republic of South Africa*[3] as follows: "*The institution of cross-examination not only constitutes a rights, it also imposes certain obligations. As a general rule, it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, whilst still in the witness box, of giving any explanation open to the witness defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct ...*"[4].

[8] A mere assertion that Van Dyk's evidence amounts to speculation is not a proper contestation thereof. The absence of a proper contestation is understandable as SARS, despite its audits, had no alternative version to that of the repayment of a loan.

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[3] 2000 (1) SA 1 (CC).
[4] At para 61.

[9] It is common cause that the taxpayer was the beneficial shareholder of MCM Development (Ltd), registered in the British Virgin Islands. The funds emanated from this company, (which the Tax Court has labelled "MCM") upon its dissolution in 2006. It is not uncommon, upon final dissolution of a company, that the loans of shareholders as the members of such a company, are repaid.

[10] The Tax Court referred to a Settlement Agreement between Anker Holding BV, Anker Coal and Mineral Holdings South Africa (Pty) Ltd and the taxpayer. In terms of this agreement Anker Holdings BV would have paid the taxpayer R1 million. Neither the taxpayer nor Middleburg Consolidated Mines (Pty) Ltd had signed this settlement agreement and the Tax Court was wrong to have found that the taxpayer had done so. The Tax Court had further been wrong to have referred to Middleburg Consolidated Mines (Pty) Ltd as MCM and to have assumed that it was the same entity as the separate company registered in the British Virgin Islands. The Tax Court's consequential finding that the payment by Anker Holding BV of the R1 million was a "suggested" source of the payment received from the taxpayer from the dissolution of the "real" MCM, was therefore also not sustainable.

[11] On the contrary, when Van Dyk was cross-examined by counsel on behalf of CSARS in relation to emails received by him from Ms Gray, the following contents her of e-mail of 10 October 2018 were ignored: "*I think it is likely the funds were transferred as a repayment of a shareholder loan rather than a dividend*".

[12] In view hereof, Ms Gray's later email of 16 July 2019 makes perfect sense wherein she stated: "*I can only confirm that there was a shareholder's loan which was either repaid in full or in part ...*". The fact that Ms Gray had no particulars of the exact amount is neither here nor there, as she had identified the nature of the payment, which was what the taxpayer had set out to prove.

[13] In assessing the probabilities, the Tax Court had to weigh up the evidence of Van Dyk and the e-mails of Ms Gray to determine whether the taxpayer's onus had been discharged. In view of the fact that there was no countervailing evidence, the probabilities must swing towards the taxpayer. To put it in more simple terms, if there is some evidence, hearsay or otherwise, on one side of the scale and nothing which had been placed by SARS on the other side (once one has removed the Tax Court's erroneous findings and assumptions), then the scale tilts in favour of the taxpayer.

[14] Once the scales have been tilted, it matters not that the taxpayer himself had not testified and, in my view, the criticism that he had chosen to isolate during Covid 19 circumstances "in the comfort of his home" is not justified.

[15] Once it has been determined that the payment received by the taxpayer was not taxable, it follows that no penalty could have been imposed. I therefore need not deal with Ms Moitse's hearsay evidence about the basis upon which the committee which had dealt therewith (and not her) had decided on the 90% penalty. I also need not then deal with the absence of evidence of intentional evasion of tax as juxtaposed to paragraphs 10.4 and 16.6 of SARS's own grounds of opposing the appeal.

[16] Accordingly, I would have upheld the appeal, with costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria
14 June 2023

Date of hearing: 12 October 2022

Date of Judgment: 21.. June 2023

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