THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No: 438/2001

In the matter between:

Dr I M Hassim Appellant

and

The Commissioner South African Revenue Services
Respondent

Coram: Howie, Streicher, Farlam, Cameron, JJA, and Lewis, AJA

Heard: 12 November 2002

Delivered: 26 November 2002

Income Tax Special Court - appeal – s 86A of the Income Tax Act 58 of 1962 – meaning of 'any decision'.

J U D G M E N T

STREICHER JA:

[1] The appellant appealed to the Natal Income Tax Special Court against the disallowance of his objections to assessments to tax by the respondent in terms of the Income Tax Act 58 of 1962 ('the IT Act') and the Value-added Tax Act 89 of 1991 ('the VAT Act'). At the commencement of the hearing of the appeals the appellant applied for an order compelling the respondent to make discovery. The court *a quo* held that such an order could not be made as the appellant had failed to state the grounds of his objection to the assessments made by the respondent in clear and definite terms. This finding of the court *a quo* led to its granting to the appellant, of its own accord, leave to amend his notices of objection and appeal. With the leave of the court *a quo* the appellant now appeals against the judgment in terms of which the court *a quo* granted such leave.

[2] Regulation B3 of the regulations promulgated in terms of s 107 of the IT Act requires the respondent to prepare, for submission to the Income Tax Special Court, a dossier containing a short statement of the case and copies of the relevant assessment, the notices of objection and appeal and the correspondence relating thereto. The respondent prepared such a dossier in respect of both the income tax appeal and the value-added tax appeal.

[3] According to the dossier in respect of the value-added tax appeal the appellant is a medical practitioner registered as a vendor in terms of the VAT Act. An investigation by the respondent in terms of the VAT Act revealed that the appellant operated two undisclosed bank accounts in which money received from various medical aid schemes, during the period June 1995 to February 1997, was deposited. These receipts had not been disclosed in the value-added tax returns furnished by the appellant. As a result the respondent issued an assessment, based on those receipts, of the value-added tax and the additional tax payable by the appellant.

[4] According to the dossier prepared by the respondent in respect of the income tax appeal an investigation into the appellant's income tax affairs revealed that the appellant failed to disclose income received by him during the 1996 and 1997 tax years. In due course the appellant was assessed to tax on the undisclosed income. Again the assessment was based on the deposits made into the undisclosed bank accounts during the period June 1995 to February 1997.

[5] The dossiers included copies of the relevant bank statements and deposit slips.

[6] The appellant objected to the value-added as well as the income tax assessments. The court *a quo* summarized the objections as follows:

(a) The respondent failed to apply his mind properly.

(b) The respondent's 'claim' had 'prescribed'.

(c) The respondent took account of irrelevant matters.

(d) The respondent acted *ultra vires*.

(e) The respondent failed to consider the appellant's representations.

(f) The respondent's view that there was additional or undisclosed income was 'without any factual basis' and the documents relied on by the respondent were capable of 'various alternative interpretations' and were 'not evidence of

income derived'.

(g) The respondent failed to comply with the provisions of ss 32 and 33 of the Constitution.

[7] The respondent disallowed the objections whereupon the appellant appealed to the court *a quo*. The matters were then consolidated, and after postponements, set down for hearing on 17 April 2001. Shortly before the date upon which the matters were set down for hearing the appellant notified the respondent that he required proper discovery. The respondent's response was that discovery proceedings as provided for under the Magistrate's Court Act rules did not apply but proposed that a pre-trial conference be held at which discovery and other relevant matters could be discussed. The proposal was not acceptable to the appellant who required that a full discovery be made.

[8] At the hearing of the appeal the appellant sought an order compelling the respondent to make discovery of all documents which related to the appellant. In its judgment dealing with the application for discovery the judge *a quo* referred to regulation B4 promulgated in terms of s 107 of the IT Act which provides as follows:

> 'Save as in these regulations is otherwise provided, the general practice and procedure of the Court shall be that of a magistrate's court in so far as such practice and procedure are applicable.'

He stated that discovery was a procedure which was available in the magistrate's court and that, in view of regulation B4, there seemed to him no reason why discovery should be excluded as a procedure applicable in

the Income Tax Special Court. He also stated that there were provisions in the Constitution 'which, although not by means of formal discovery, warrant the right of access to documents' but considered it unnecessary to go into those provisions because he was prepared to assume that formal discovery was a procedure available to a taxpayer and to the respondent in the Income Tax Special Court. On that basis the court *a quo* was of the view that an order for discovery could only be made in respect of such documents as were relevant to the issues between the parties because –

> 'rule 23(1) of the Magistrates' Courts Rules, which would be the source of the Income Tax Court's power to make the order, provides that the only documents that must be discovered are those in a party's possession or under his control "which relate to the action and which he intends to use in the action or which tend to prove or disprove either party's case".'

[9] In the court *a quo*'s view the appellant failed to state his objections to the assessments in clear and definite terms with the result that it could not be determined what the issues were and consequently what documents needed to be discovered. As a result it granted the appellant leave to amend his notices of objection. The appellant appealed against the whole of the court *a quo*'s judgment while the respondent submitted that the matter was not appealable.

[10] Section 86A(1) of the IT Act reads:

> ‘The appellant in a special court or the Commissioner may in the manner hereinafter provided appeal under this section against any decision of that court.’

The words ‘any decision’ are also used in s 21 of the Supreme Court Act 59 of 1959. In the case of s 21 it was held that the ‘decision’ referred to must be a decision of the same nature as a ‘judgment’ or ‘order’ in the sense in which those terms are used in s 20 of the Supreme Court Act (see *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A) at 546E). A ‘judgment’ or ‘order’ referred to in s 20 does in general not include ‘a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings’ (see *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536B).

[11] I do not think that the phrase ‘any decision’ in s 86A should be interpreted differently and neither of the parties contended otherwise. To interpret the phrase literally would be at odds with the generally accepted view that it is in general undesirable to have a piecemeal appellate disposal of the issues in litigation and that it is advisable to limit appeals in certain respects (see *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 866 to 871; *Guardian National Insurance Co Ltd v Searle NO* 1999 (3) SA 296 (SCA) at 301B-D). In *Pretoria Garrison Institutes* Schreiner JA said (at 867-868):

> ‘A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. For, apart from the increased power which it would probably give the wealthier

> litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics.'

In *Guardian National Insurance Co Ltd* Howie JA said (at 301C) that it is generally desirable for obvious reasons that the issues in litigation be resolved by the same Court and at one and the same time and added:

> 'Where this approach has been relaxed it has been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes. First, they were final in effect and not susceptible of alteration by the court of first instance. Secondly, they were definitive of the rights of the parties, for example, because they granted definite and distinct relief. Thirdly, they had the effect of disposing of at least a substantial portion of the relief claimed.'

[12] The appellant submitted that the appeal should succeed on two grounds. He submitted firstly that, in terms of s 32 of the Constitution read with item 23(2)(a) of Schedule 6 thereto (the access to information provision), he was entitled to all documents in the possession of the respondent in order to properly formulate his objection and that the effect of the court *a quo*'s judgment was to refuse him such entitlement. He submitted secondly that the court *a quo* in effect prematurely dismissed some of the grounds of his objections. According to him such refusal and dismissal constituted final decisions which were appealable. I shall deal

with the two grounds in turn.

[13] In my view there is no merit in the appellant's contention that the court *a quo* refused to order a disclosure of documents required by the appellant to formulate his objection. The court *a quo* never even addressed the question whether the appellant was entitled to disclosure of all the documents in the respondent's possession before properly formulating his objection. All the indications are that the question referred to was not addressed by the court *a quo* because it was not an issue before it.

[14] After the matter had been set down for hearing in the court *a quo* the respondent wrote to the appellant:

> '[Y]our client has baldly suggested that the bank statements and deposit slips . . . do not reflect turnover or income, and are "capable of different interpretations as to value". Despite request, your client advances no facts (in particular, no records) in support of these suggestions.'

In reply the appellant did not state that he required documents in order to properly formulate his objection but stated that his grounds of appeal were in the notice of appeal. Shortly before the date on which the matter was to be heard by the court *a quo* the appellant requested the respondent 'to make proper discovery' and stated, not that such discovery would enable him to properly formulate his objection but that it was 'essential to enable argument on the points of law and the merits'. In two subsequent letters the appellant reiterated that 'discovery' was required in order to prepare for the hearing of the matter. From the correspondence it is therefore clear that the issue between the parties was not whether the appellant was entitled to disclosure of all documents in respondent's possession so as to enable the

appellant to properly formulate his objection. The issue between the parties was whether the appellant was entitled to discovery of documents in order to prepare for the hearing of the matter. That was the issue addressed by the court *a quo*. In effect the court *a quo* decided that a discovery order could not be made until such time as the necessary detail had been provided in respect of the appellant's grounds of objection. In my view that decision is not a 'decision' within the meaning of that word as used in s 86.

[15] The main dispute between the parties concerns the validity of the assessments made by the respondent. The decision by the court *a quo* regarding discovery is incidental to the main dispute between the parties. It regulates the procedure to be followed in order to determine that dispute. It is not a decision that disposes of any issue or any portion of the issue in the main proceedings between the parties or, put differently, it does not preclude any of the relief, which may be given at the hearing of the main dispute. It is, therefore, a purely interlocutory decision which may be corrected, altered or set aside by the court *a quo* at any time before final judgment (see *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549F – 551A; *Globe and Phoenix Gold Mining Co Ltd v Rhodesian Corporation Ltd* 1932 AD 146 at 163). It follows that the decision by the court *a quo* in regard to discovery is not appealable.

[16] I shall now deal with the submission that the court *a quo* in effect dismissed some of the grounds of the appellant's objections. The court *a quo* said in its judgment:

> '[T]he only ground that is relevant was the one contained in (f) above. All of the others (save for the reference in (g) to section 32 of the Constitution which relates to the taxpayer's claim to access to documents and which as such cannot in any event be a proper ground) depend for their validity upon the success of the ground in (f); in other words they depend entirely on the fate of the ground in (f). For practical purposes the ground in (f) is therefore the only one

that requires consideration.'

The validity of the grounds of objection was not an issue to be decided by the court *a quo* and no order was made in this regard. The statement simply formed part of the reasoning of the court *a quo* in respect of a non-appealable order and does not preclude the court *a quo* from changing its view in this regard. It does not constitute a 'decision' let alone a final 'decision' by the court *a quo* in respect of the validity of the grounds of objection. The statement is, therefore, not appealable. See *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 715D where Nicholas AJA said:

> 'There can be an appeal only against the substantive order made by a Court, not against the reasons for judgment.'

[17] For these reasons the appeal is struck from the roll with costs.

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P E Streicher
Judge of Appeal

Howie JA)
Farlam JA)
Cameron JA)
Lewis AJA)concur