



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no. 838/2021

In the matter between:

JAMES MATODZI NESONGOZWI

Appellant

and

**COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

Respondent

Neutral citation: *Nesongozwi v Commissioner for SARS* (838/2021) [2022]
ZASCA 138 (24 October 2022)

Coram: Ponnann, Makgoka and Plasket JJA and Weiner and Windell AJJA

Heard: 24 August 2022

Delivered: 24 October 2022

Summary: Tax Administration Act 28 of 2011 – valuation of shares for purposes of donations tax and capital gains tax – assessment and objection – appeal to tax court – only issues objected to subject to appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Dippenaar and Senyatsi JJ and Wanless AJ sitting as court of appeal).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Plasket JA (Ponnan and Makgoka JJA and Weiner and Windell AJJA concurring)

[1] This is an appeal against an order of a full court of the Gauteng Division of the High Court, Johannesburg (the full court) dismissing an appeal against an order of the tax court made by Francis J, assisted by assessors. It concerns an additional assessment of the appellant, Mr James Matodzi Nesongozwi (the taxpayer), to tax for the 2010 year of assessment. More particularly, it concerns the quantum of his liability for capital gains tax and donations tax imposed by the respondent, the Commissioner for the South African Revenue Service (the Commissioner), arising from the transfer of his shares in the Nesongozwi Mining Corporation (Pty) Ltd (NMC) to the Nesongozwi Family Trust (the trust). The appeal is before us with the special leave of this court.

Background

[2] The taxpayer is a mining engineer. He was initially the sole director of Umthombo Resources (Pty) Ltd (Umthombo), a company that held coal prospecting and mining rights. Umthombo's sole shareholder was NMC. The taxpayer was, until August 2008, also the sole shareholder of NMC.

[3] In May 2006, Umthombo entered into a consultancy agreement with Sumo Coal (Pty) Ltd (Sumo) in terms of which it was to prospect for coal in defined areas in Mpumalanga, KwaZulu-Natal, Gauteng and the Free State. Sumo undertook to pay Umthombo for this work. The parties also agreed that, in the event of viable deposits of coal being found, they could, if Sumo wished to, conclude joint venture agreements to exploit those deposits. Sumo would have a 60 percent participation interest in any such joint venture, while Umthombo would hold a 40 percent interest.

[4] In August 2008, the taxpayer sold 50 percent of NMC's shares in Umthombo to Kalyana Resources (Pty) Ltd. The purchase price of the shares was R150 million. A shareholders agreement was concluded that regulated the disposal by the shareholders of their shares in Umthombo.

[5] In October 2009, the taxpayer concluded a verbal agreement with the trust for the sale of his shares in NMC for a price of R547 275. The purchase price was determined on the basis that NMC was not a trading entity but a holding entity and that its only anticipated income would be dividends paid by Umthombo. No dividends had, by that time, been declared by Umthombo, and neither had it engaged in any mining operations.

[6] In October 2014, the Commissioner issued an additional assessment in respect, inter alia, of the 2010 year of assessment, which took into account the taxpayer's disposal of his NMC shares. The Commissioner determined that the taxpayer had disposed of the NMC shares at a price below their market value and imposed a donations tax and capital gains tax liability on him of R48 635 677.49. The taxpayer objected to the assessment. The Commissioner disallowed the objection and the taxpayer then appealed to the tax court. It is only in respect of the share transaction that this appeal is concerned.

[7] After hearing evidence that was largely of an expert nature, the tax court, dismissed the taxpayer's appeal but made certain amendments to the assessment. In relevant part the order reads:

'130.4 The additional assessment for 2010 dated 10 October 2014 is altered as follows in terms of section 129(2)(b) of the TAA:

130.4.1 To reflect a capital gain in respect of the disposal by the taxpayer of the shares he held in NMC to the Nesongozwi Family Trust, in the amount of R115 700 000 (R231 400 000X50%);

130.4.2 To reflect a donation in respect of the disposal by the taxpayer of the shares he held in NMC to the Nesongozwi Family Trust, on the amount of R115 125 725 (R115 700 000—R547 725);

130.5 The imposition of a 10% understatement penalty in terms of section 222 and 223 of the TAA is confirmed.

130.6 The imposition of interest in terms of section 89*quat* of the Income Tax Act 58 of 1961 is confirmed.

130.7 The taxpayer is ordered to pay 50% of the costs of this appeal including 50 % of the qualifying fees of the following expert witnesses:

- (a) Mr A Clay;
- (b) Mr D Thayser;
- (c) Mr A McDonald.'

[8] In his appeal to the full court, the taxpayer raised two grounds of appeal. They were that the tax court had erred in not discounting the value of Umthombo's shares as a result of the potential joint venture agreements envisaged by the consultancy agreement with Sumo; and that the tax court had erred in ordering the taxpayer to pay 50 percent of the costs and the qualifying fees of the Commissioner's expert witnesses.

[9] A day before the appeal was argued, the taxpayer gave notice of his intention to apply for an amendment of the notice of appeal to introduce two further grounds, namely that the valuation method applied by the Commissioner's experts was an incorrect one and that Umthombo's mineral resources were incorrectly categorized. The full court disallowed the amendment in respect of the first issue but allowed it in respect of the second issue. It concluded, however, that there was no merit in any of the grounds of appeal before it and dismissed the appeal.

[10] From the taxpayer's heads of argument, it appears that he wishes to revisit (a) whether the method used to determine the market value of the shares was the

appropriate method; (b) whether the impact of the consultancy agreement between Sumo and Umthombo was taken into account correctly; and (c) whether Umthombo's mineral resources were correctly characterized. This raises an important point of principle anterior to the merits, namely whether these points are properly before this court as grounds of appeal. I say this because the tax court is a creature of statute with the result that, as was held in *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service*,¹ 'the scope of its jurisdiction, its powers and the ambit of any right of appeal from its decisions' are defined in the Tax Administration Act 28 of 2011 (the TAA).

[11] The same principle was applied, in relation to an appeal to the tax court in terms of the Value Added Tax Act 89 of 1991, in *H R Computek (Pty) Ltd v Commissioner for the South African Revenue Services*² when Ponnar JA held that it had followed that 'not having raised an objection to the capital assessment in its notice of objection, the taxpayer was precluded from raising it on appeal before the tax court'. The purpose underpinning this principle (which is of general application in civil and criminal appeals too) was set out thus by Corbett JA in *Matla Coal Ltd v Commissioner for Inland Revenue*,³ a matter concerning the Income Tax Act 58 of 1962:

'Section 81(3) of the Act provides that every objection shall be in writing and shall specify in detail the grounds upon which it is made. And in terms of s 83(7)(b) the appellant in an appeal against the disallowance of his objection is limited to the grounds stated in his notice of objection. This limitation is for the benefit of the Commissioner and may be waived by him.'

He stressed the importance of adherence to this principle, 'for otherwise the Commissioner may be prejudiced by an appellant shifting the grounds of his objection to the assessment in issue'. At the same time, however, he held that in the application of the principle, a court should not be 'unduly technical or rigid in its approach' and 'should look at the substance of the objection and the issue as to

¹ *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service* [2018] ZASCA 36 para 6. See too *Wingate-Pearse v Commissioner, South African Revenue Service* [2016] ZASCA 109; 2017 (1) SA 542 (SCA) para 6.

² *H R Computek (Pty) Ltd v Commissioner for the South African Revenue Service* [2012] ZASCA 178 para 12.

³ *Matla Coal Ltd v Commissioner for Inland Revenue* [1986] ZASCA 120; 1987 (1) SA 108 (A) at 125C-D.

whether it covers the point which the appellant wishes to advance on appeal must be adjudged on the particular facts of the case'.⁴

The system

[12] The term 'assessment' is defined in s 1 of the TAA to mean 'the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS'. In terms of s 92 of the TAA, if SARS is satisfied that an assessment 'does not reflect the correct application of a tax Act to the prejudice of SARS or the *fiscus*, SARS must make an additional assessment to correct the prejudice'. If it does so, s 104(1) grants a right to the taxpayer to object to the assessment so made.

[13] When the taxpayer objects, they must, in terms of s 104(3), lodge their objection 'in the manner, under the terms, and within the period prescribed in the "rules"'. Those rules are made in terms of s 103 by the Minister of Finance after consultation with the Minister of Justice and Constitutional Development. They govern 'the procedures to lodge an objection and appeal against an assessment or "decision", and the conduct and hearing of an appeal before a tax board or tax court'.

[14] Rule 7 sets out how a taxpayer objects to an assessment. They are required to deliver their objection to SARS within 30 days of obtaining the reasons for the assessment or, if no reasons were sought, of the date of assessment.⁵ The objection must be made on the prescribed form, completed in full,⁶ and it must 'specify the grounds of the objection in detail', including the part or amount objected to and the grounds of assessment that are disputed.⁷

[15] Section 106, which deals with the determination of objections by SARS, provides in relevant part:

'(1) SARS must consider a valid objection in the manner and within the period prescribed under this Act and the "rules".

(2) SARS may disallow the objection or allow it either in whole or in part.

⁴ At 125I-J.

⁵ Rule 7(1).

⁶ Rule 7(2)(a).

⁷ Rule 7(2)(b).

(3) If the objection is allowed either in whole or in part, the assessment or “decision” must be altered accordingly.

(4) SARS must, by notice, inform the taxpayer objecting or the taxpayer's representative of the decision referred to in subsection (2), unless the objection is stayed under subsection (6) in which case notice of this must be given in accordance with the “rules”.

(5) The notice must state the basis for the decision and a summary of the procedures for appeal.’

In terms of rule 9, SARS must ‘notify the taxpayer of the allowance or disallowance of the objection and the basis thereof’ within 60 days of receipt of the objection.

[16] Section 107 makes provision for an appeal against an assessment. The relevant sub-sections provide:

‘(1) After delivery of the notice of the decision referred to in section 106(4), a taxpayer objecting to an assessment or “decision” may appeal against the assessment or “decision” to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the “rules”.

(2) . . .

(3) A notice of appeal that does not satisfy the requirements of subsection (1) is not valid.

(4) If an assessment or “decision” has been altered under section 106(3), the assessment or “decision” as altered is the assessment or “decision” against which the appeal is noted.’

[17] Rule 10 provides that when a taxpayer wishes to appeal against an assessment, they must deliver a notice of appeal in the prescribed manner, within 30 days of receipt of SARS’s notice of disallowance of the objection.⁸ In terms of rule 10(2)(a), a notice of appeal must be ‘made in the prescribed form’ and, in terms of rule 10(2)(c), it must:

‘specify in detail –

- (i) in respect of which grounds of the objection referred to in rule 7 the taxpayer is appealing;
- (ii) the grounds for disputing the basis of the decision to disallow the objection referred to in section 106(5); and
- (iii) any new ground on which the taxpayer is appealing.’

⁸ Rule 10(1)(a).

[18] In terms of rule 10(3), a taxpayer may not appeal 'on a ground that constitutes a new objection against a part or amount of the disputed assessment not objected to under rule 7'. If they do so, however, SARS may, in terms of rule 10(4), require them 'within 15 days after delivery of the notice of appeal to produce the substantiating documents necessary to decide on the further progress of the appeal'.

[19] Section 116 empowers the President to establish by proclamation 'a tax court or additional tax courts'. A tax court has, in terms of s 117(1), 'jurisdiction over tax appeals lodged under section 107' as well as, in terms of s 117(3), in respect of interlocutory applications or procedural matters 'relating to a dispute under this Chapter as provided for in the "rules"'.

[20] Section 129 deals with the decisions that a tax court may make. It provides, in the first two sub-sections:

'(1) The tax court, after hearing the "appellant's" appeal lodged under section 107 against an assessment or "decision", must decide the matter on the basis that the burden of proof as described in section 102 is upon the taxpayer.

(2) In the case of an assessment or "decision" under appeal or an application in a procedural matter referred to in section 117(3), the tax court may-

- (a) confirm the assessment or "decision";
- (b) order the assessment or "decision" to be altered;
- (c) refer the assessment back to SARS for further examination and assessment;
or
- (d) make an appropriate order in a procedural matter.'

[21] Part E of the rules deals with the procedure before a tax court. Rule 31(1) requires SARS to deliver 'a statement of the grounds of assessment and opposing the appeal', which it must do within 45 days of delivery to it of the taxpayer's notice of appeal. In terms of rule 30(2), that statement 'must set out a clear and concise statement of' the following:

- (a) the consolidated grounds of the disputed assessment;
- (b) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and
- (c) the material facts and legal grounds upon which SARS relies in opposing the appeal.'

[22] In terms of rule 32(1), the taxpayer is then required to deliver to SARS, within 45 days of receipt of the rule 31 statement, a statement of the grounds of their appeal. The taxpayer must, in terms of rule 32(2), set out 'clearly and concisely' the following:

- '(a) the grounds upon which the appellant appeals;
- (b) which of the facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and
- (c) the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31.'

In terms of rule 32(3), the taxpayer 'may not include in the statement a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7'.

[23] SARS has a right, in terms of rule 33, to reply to the taxpayer's statement of grounds of appeal. Its reply must be a 'clear and concise' response to any new grounds, facts or law raised by the taxpayer. Finally, s 34 defines the scope of the issues before the tax court on appeal. It provides:

'The issues in an appeal to the tax court will be those contained in the statement of the grounds of assessment and opposing the appeal read with the statement of the grounds of appeal and, if any, the reply to the grounds of appeal.'

[24] Section 133 makes provision for an appeal from a decision of a tax court. It states:

'(1) The taxpayer or SARS may in the manner provided for in this Act appeal against a decision of the tax court under sections 129 and 130.

(2) An appeal against a decision of the tax court lies-

- (a) to the full bench of the Provincial Division of the High Court which has jurisdiction in the area in which the tax court sitting is held; or
- (b) to the Supreme Court of Appeal, without an intermediate appeal to the Provincial Division, if-
 - (i) the president of the tax court has granted leave under section 135; or
 - (ii) the appeal was heard by the tax court constituted under section

118(5).'

[25] Section 134 prescribes the procedure for noting an intention to appeal against a decision of a tax court. Sections 134(1) and (2) state:

'(1) A party who intends to lodge an appeal against a decision of the tax court (hereinafter in this Part referred to as the appellant) must, within 21 business days after the date of the notice by the 'registrar' notifying the parties of the tax court's decision under section 131, or within a further period as the president of the tax court may on good cause shown allow, lodge with the 'registrar' and serve upon the opposite party or the opposite party's legal practitioner or agent, a notice of intention to appeal against the decision.

(2) A notice of intention to appeal must state-

- (a) in which division of the High Court the appellant wishes the appeal to be heard;
- (b) whether the whole or only part of the judgment is to be appealed against (if in part only, which part), and the grounds of the intended appeal, indicating the findings of fact or rulings of law to be appealed against; and
- (c) whether the appellant requires a transcript of the evidence given at the tax court's hearing of the case in order to prepare the record on appeal (or if only a part of the evidence is required, which part).'

[26] Having considered the statutory regime that regulates appeals against assessments to the tax court and to the high court, I shall now consider which issues were before the tax court and, by extension, the full court.

The taxpayer's objection and appeals

[27] After receiving the first additional assessment made by SARS, the taxpayer objected on the basis that 'SARS USED INCORRECT VALUATIONS FOR ITS ASSESSMENTS'. The taxpayer argued that the valuation was excessive and that it should have valued Umthombo's assets at R63 million. It was suggested that if SARS did not agree with this valuation, the process should 'be suspended until an independent valuator is appointed that is acceptable to both SARS and our client'.

[28] Venmyn Rand (Pty) Ltd (Venmyn) was then commissioned by SARS to value the NMC shares. A second valuation was obtained from Mr Dave Thayser. On the strength of these valuations, SARS delivered another additional assessment, to which the taxpayer objected. That is the assessment of relevance in this matter.

[29] The taxpayer's grounds of objection, in terms of rule 7, focused on one issue. It was that Venmyn's valuation of the NMC shares, confirmed in a slightly lower amount by Thayser, was 'grossly overstated' and that, in accordance with a valuation made by Fin5, the shares should have been valued at –R136 million.

[30] The Commissioner disallowed the objection and furnished the following reasons for his decision. He stated that the share transfer to the trust in effect 'constituted a transferal of 50% of the total Umthombo shares'. Venmyn considered that 'the most appropriate and fair value of mineral assets of the company should be based on the values derived from the Venmyn commodity valuation curve' and concluded, on this basis, that Umthombo's fair value – and hence that of the NMC shares, was R562 million. In the second opinion, Thayser had been of the view that the most appropriate valuation method, namely the net asset value method, had been used by Venmyn, but he valued Umthombo, and hence the NMC shares, at R548.1 million. The Commissioner accepted Thayser's lower figure, and so used a figure of half of R548.1 million, namely R274 050 000, for the purposes of determining the taxpayer's donations tax and capital gains tax liabilities.

[31] The Commissioner, after stating that the NMC shares had been sold to the trust for R547 275, concluded that they had been disposed of for an inadequate consideration, and were deemed to have been disposed of as a donation, in terms of s 58 of the Income Tax Act. As the shares had a market value of R274 050 000, donations tax and capital gains tax had been levied on the basis of this value. The Commissioner summarized the taxpayer's grounds of objection as being that, in relation to the value of the NMC shares, the taxpayer asserted that the Fin5 valuation of –R136 million was the correct valuation and the Venmyn and Thayser valuations were grossly inflated.

[32] In his rule 10 notice of appeal, the taxpayer confirmed that his grounds of appeal were precisely the same as his grounds of objection. In the Commissioner's statement of the grounds of assessment and opposition to the appeal, in terms of rule 31, it was simply stated that the negative value attributed to the shares by Fin5 was 'unfounded'.

[33] The taxpayer, in his rule 32 statement, devoted attention to the source of the difference in opinion as to the value of the NMC shares. That was the consultancy agreement that had been concluded between Umthombo and Sumo, and a dispute that had developed in respect of the formation of a joint venture, in respect of one mining property, in terms of that agreement.

[34] In essence, it was pleaded that the value of the NMC shareholding in Umthombo had to take account of three factors namely: Sumo's 60 percent participation interest in the joint ventures that were to be formed in appropriate circumstances; the contingent liability that was said to have arisen as a result of the dispute between Umthombo and Sumo that was settled by Umthombo paying Sumo R300 million; and limitations imposed by the shareholders agreement regarding the disposal of Umthombo's shares.

[35] The taxpayer argued that the value ascribed by the Commissioner to the NMC shares had to be reduced by 60 percent to account for Sumo's participation interest in the joint venture; by the contingent liability of R300 million, which later became an actual liability; and to reflect the uncertainties attendant on the disposal of Umthombo's shares because of the terms of the shareholders agreement. The result, he pleaded, was that no value could be ascribed to the NMC shares, and consequently no donations tax or capital gains tax liabilities arose.

[36] It was further pleaded by the taxpayer that both the Venmyn and Thayser valuations were erroneous because they had failed to take the above factors into account and were, because of this flaw, both 'grossly overstated'. Had they taken these matters into account then, based on SARS' own evaluation, the value of the shares sold to the trust was the sum of –R136 million.

[37] The Commissioner pleaded to this case in his rule 33 statement. He denied that the 60 percent participation interest of Sumo was to be taken into account in the valuation because, even after having been ordered to do so in an arbitration, Umthombo still did not enter into a joint venture with Sumo in respect of the one mining property.

[38] The R300 million that Umthombo had agreed to pay to Sumo in settlement of their dispute was also not to be taken into account for purposes of the valuation because, as at the date of the sale of the shares, there was no contingent liability in this amount. In any event, in terms of the settlement, Sumo surrendered its right to 60 percent of the future profits in relation to the joint ventures with Umthombo in terms of the consultancy agreement, in return for payment of R300 million. The result was that Umthombo acquired a right to '100% of the future profits in the project(s) that would have been conducted by the JV, had it been formed'. On this basis, the Commissioner pleaded, if the R300 million was to be taken into account, so should 100 percent of anticipated future profits which would accrue to Umthombo. This would be in excess of R500 million – and would increase the value rather than reduce it.

[39] The issue that was thus before the tax court, in terms of rule 34, was whether the Venmyn and Thayser valuations were correct or whether the Fin5 valuation was correct. That issue was to be answered by determining whether Sumo's 60 percent participation interest, the R300 million payment to Sumo and the effect of the shareholders agreement were to be taken into account in the valuation. This was so because, on the taxpayer's pleaded case, the fault in the Commissioner's valuation was the failure to take these issues into account and the result of doing so would produce a valuation identical to Fin5's valuation – a valuation of -R136 million.

The tax court and full court appeals

[40] It is clear, from what I have outlined above, that the parties were in agreement as to the correctness of the method of valuation. They differed in one respect only and that was on whether the issues relating to the consultancy agreement, the payment of damages to Sumo and the shareholders agreement should have been taken into account in the valuation. The tax court found, with reference to the approach to the valuation by the taxpayer's expert witnesses, that the methodology employed by them and by SARS 'was the same' and that '[t]his was also the methodology that was proposed by the taxpayer in his objection of 24 February 2012 and when he testified in court he agreed that this was the position'.

[41] That method was that Venmyn valued the mineral assets of Umthombo as at 5 October 2009. Thayser valued Umthombo's shares from this, and using Thayser's valuation, SARS established the value of NMC's shares and halved that amount to obtain the market value of the taxpayer's shares that he had sold to the trust. Precisely the same method was used by the taxpayer's expert witness, Mr Charles Stride.

[42] Three days into the hearing of evidence in the tax court, the matter stood down to enable the expert witnesses on both sides to meet. An agreement was reached that the value of Umthombo's shares was either R152.7 million or R232 million, depending on how the mineral resources, in respect of which Umthombo had prospecting rights, were categorised.

[43] The taxpayer argued that they were 'resource targets' while the Commissioner was of the view that they were 'inferred resources'. The effect of this categorisation on the value of Umthombo was significant, being a difference in value of R79.3 million. The second issue that the tax court had to deal with was whether the consultancy agreement affected the value of the shares.

[44] Both of these issues were decided by the tax court in favour of the Commissioner, with the result that the value of the NMC shares sold by the taxpayer to the trust was determined to be half of R231 400 000, namely R115 700 000.

[45] In respect of the classification of Umthombo's mineral resources, the Commissioner adduced the evidence of an expert in the field who qualified himself as a 'competent person' for purposes of the SAMREC Code's system of categorising mineral resources. Of the witness called by the taxpayer, however, the tax court observed that he was 'reluctant to qualify himself as a competent person for purposes of the SAMREC code', he having said that he may have been 'on the fringes' of being a competent person. This being so, his evidence was inadmissible opinion evidence and the tax court correctly found, on the basis of the evidence of the Commissioner's expert witness, that Umthombo's mineral resources had been correctly categorised as 'inferred resources'.

[46] The taxpayer argued that Sumo's 60 percent participation interest in terms of the consultancy agreement had to be deducted from the value of Umthombo. The tax court rejected this argument on the basis that the consultancy agreement did not create a liability for Umthombo but, at best, 'a contingent liability in the sense that it may or may not arise depending on whether coal reserves are identified; it is viable for coal mining and Sumo Coal decide to request Umthombo to enter into a joint venture'. This contingent liability, the tax court held, 'cannot be taken into account for purposes of valuing the mineral resources of Umthombo'.

[47] As far as the R300 million paid by Umthombo to Sumo was concerned, the tax court held that it was only 11 months after the sale of the shares that the arbitrator had found that Umthombo had to enter into a joint venture with Sumo, and still later that it opted to pay damages of R300 million to Sumo instead. The tax court also made the point that Umthombo Coal, rather than Umthombo Resources, had, in terms of the settlement agreement, undertaken to pay this amount to Sumo. Furthermore, if this amount was to be taken into account, so too should the total value of the 'joint venture'. If this was done, a further R200 million would have been added to the value of Umthombo, increasing its value.

[48] Finally, the tax court did not allow any discount on the basis of the shareholders agreement limiting the transferability of Umthombo's shares. It did so on the basis of item 31(3) of the Eighth Schedule of the Income Tax Act which states that when determining the market value of unlisted shares, no regard may be had to any provision that restricts the transferability of those shares and that 'it shall be assumed that those shares were freely transferable'.

[49] The tax court concluded that capital gains tax in respect of the sale of the NMC shares was to be calculated on the following basis: (a) the value of Umthombo was R232 million 'according to the agreement between the experts'; (b) an amount of R6 million was to be deducted 'to determine the value of the Umthombo shares' in accordance with Thayser's valuation, leaving an amount of R231.4 million; and (c) 50 percent of that amount, being R115.7 million, was attributable to the NMC shares, on the basis of 'a method that both SARS and the taxpayer applied to arrive at the

value of the NMC shares'. The result was the order that I have quoted in paragraph [7] above.

[50] Pursuant to the tax court's order, the taxpayer filed a notice of his intention to appeal against parts of the tax court's order. He sought leave to appeal directly to this court. Francis J granted leave to appeal to the full court instead.

[51] In the notice, two grounds of appeal were raised. The first was that the tax court 'erred or misdirected itself in failing to find that the sixty (60%) percent discount contained in clause 7 of the written consultancy agreement should be applied to the amount contained in Table 6 of Exhibit BB', that being the joint minute of the experts in relation to the valuation. The second related to the costs order.

[52] Later in the notice, the taxpayer made it clear that the valuation of Umthombo's shareholding was not in issue. In paragraph 4, for instance, it was stated that the tax court 'ought to have subjected the value of R232 000 000 attributed to the shareholding in Umthombo Resources (Pty) Ltd to the 60%/40% split in the determination of the value of the shareholding attributable to the taxpayer . . . '.

[53] Subsequent to leave to appeal being granted, the taxpayer filed his notice of appeal. As with the previous notice, the taxpayer's grounds related to the 'discount' arising from the consultancy agreement and to costs. These grounds mirrored what was said in the previous notice. What was sought was an order in which the value of the NMC shares was reflected as R46 280 000, calculated as follows: $R231\,400\,000 \times 40\% = R92\,560\,000$ $\times 50\% = R46\,280\,000$, for purposes of determining the taxpayer's capital gains tax and donations tax liability. Up to this point, what was evident was that both the Commissioner and the taxpayer used the same valuation methodology and worked from the same figures.

[54] The focus of the appeal to the full court changed at the last minute. In the taxpayer's heads of argument, two more issues were raised and the relief sought differed fundamentally from that stated in the notice of appeal. Now, the taxpayer sought to challenge the valuation methodology in asserting that the market value of

the shares was, in fact, never determined. He also sought to re-open the characterisation of Umthombo's mineral resources. The relief sought was altered to a setting aside of the assessment and a remittal to the Commissioner for a new assessment to be made.

[55] Not surprisingly, the Commissioner objected to the new grounds raised in the taxpayer's heads of argument, pointing out that no application to amend his notice of appeal had been made. Dippenaar J pointed out in her judgment on behalf of the full court that despite the objection, no application to amend was forthcoming during a period of nine months from the date of the objection being raised (in the Commissioner's heads of argument) until the hearing of the appeal. When the appeal was heard, an application to amend the notice of appeal was made from the bar and, as Dippenaar J pointed out, '[n]o reasons for the delay or the absence of a formal application were provided'.

[56] The full court refused the taxpayer's application in respect of the valuation method. It did so for the following reasons. First, the issue of the valuation methodology was not canvassed in the tax court, in the evidence or in the pleadings. Secondly, the taxpayer's witnesses agreed with the SARS witnesses on the valuation method and on the values, subject to the appropriate characterisation of the mineral resources. Third, the discounted cash flow method, that the taxpayer now enthusiastically propounded, could not have been used, because the information necessary for its application was not available. This was common cause. Fourth, a challenge to the valuation method would raise 'substantial new factual issues not canvassed before the Tax Court and the appellant is seeking to build a case on a foundation not previously laid'. Finally, the principle of finality in litigation would be undermined and a setting aside and remittal of the assessment would have the effect of nullifying the agreement between the expert witnesses. The full court concluded that the 'methodology issue is not a pure legal point to be determined on accepted facts, nor were the factual considerations on which it relies explored in the Tax Court'.

[57] The full court granted the application for the amendment in respect of the characterisation of the mineral resources. There were thus two grounds that it had to consider, the other being the effect of the consultancy agreement.

[58] The full court upheld the tax court's finding on the characterisation of the mineral resources. It did so on two bases. First, the Commissioner's witness qualified himself as an expert in the field, against the required standard, while the taxpayer's witness did not. That meant that the former's evidence was admissible, while the latter's was inadmissible opinion evidence. Furthermore, the evidence of the former could not be faulted while that of the latter left a lot to be desired.

[59] As far as the effect of the consultancy agreement was concerned, the full court held that the tax court's finding that the liability was contingent could not be faulted. The consultancy agreement required three conditions to be met before a joint venture could be formed. They were that coal reserves had been identified, that they were viably minable and that Sumo had decided that it wished to enter into a joint venture with Umthombo. At the date of the sale of the shares, the conditions had not been met. In respect of the R300 million paid by Umthombo to Sumo, the full court agreed with the tax court that if it was to be taken into account, so too should R200 million representing Umthombo's profits – and that would have the effect of increasing the valuation of Umthombo.

Conclusion

[60] I have set out in detail the taxpayer's objection, the pleadings in the tax court and the notice of appeal before the full court. I have also given a detailed account of the proceedings in the tax court and the full court, and the reasoning of each on the issues before them. First, it is apparent that there was never, until the filing of the taxpayer's heads of argument in the appeal to the full court, any suggestion that the taxpayer disputed the method of valuation adopted by Venmyn and Thayser. It was not a ground of objection and neither was it a ground of appeal before the tax court. In *Knox D'Arcy AG v Land and Agricultural Development Bank of South Africa*,⁹ this court held:

⁹ *Knox D'Arcy AG v Land and Agricultural Bank of South Africa* [2013] ZASCA 93; [2013] 3 All SA 404 (SCA) para 35.

'It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet. And a party may not plead one issue and then at the trial, and in this case on appeal, attempt to canvass another which was not put in issue and fully investigated. The Land Bank (and the trial court for that matter) was never put on notice that it would answer a case that it had frustrated, deliberately or otherwise, the performance of the obligation imposed by clause 2.1 of the settlement agreement. Clearly, we cannot now, on appeal, decide issues that have neither been raised nor fully ventilated previously.'

Precisely the same holds good in this appeal. The valuation method was not an issue before the tax court or the full court, and consequently, it was not an issue before this court.

[61] Secondly, it was common cause that the valuation method that was used was the correct one. There was also agreement as to the value, subject to the characterisation of Umthombo's mineral resources and the effect of the consultancy agreement. Both parties applied the same valuation method. There was thus never a dispute as to the valuation method. This issue was, in effect, settled between the parties. As a result, it was not permissible for the taxpayer to raise it, late and opportunistically as he did, as a ground of appeal. The position in this case is similar to that in *Gusha v Road Accident Fund*.¹⁰ In that case, the parties had concluded an agreement, prior to the issue of summons in which the respondent had accepted liability in unqualified terms for the injuries suffered by the appellant in a motor vehicle accident. Later, the respondent applied to amend its pleadings to include a prayer for an apportionment of damages due to what it averred was contributory negligence on the part of the appellant. It was, Leach JA held, impermissible in the face of the unqualified concession of liability for the respondent 'to attempt to introduce the appellant's alleged contributory negligence in order to seek a reduction in the extent of its liability'.¹¹ And for the same reasons, the full court was correct to refuse to allow the taxpayer's application to amend the notice of appeal to include, as a ground, the valuation method. It had been agreed to and consequently was not an issue that could be appealed against.

¹⁰ *Gusha v Road Accident Fund* [2012] ZASCA 242; 2012 (2) SA 371 (SCA).

¹¹ Para 15.

[62] Thirdly, even on the assumption that the issue had been appealable, the taxpayer would have had to establish a misdirection on the part of the full court in the exercise of its discretion to disallow the amendment. I have set out the full court's reasoning. It furnished a full and complete justification for its decision. The taxpayer has not even attempted to assail the exercise of that discretion. We are not simply at large and there has been no suggestion that the discretion was not judicially exercised or was influenced by an application of the wrong principles or a misdirection of fact. The appeal must fail on this point on account of all three of the reasons that I have given.

[63] In my view, the characterisation of Umthombo's mineral resources was appealable. I am mindful of Corbett JA's observation in *Matla Coal*¹² that a court should not be unduly technical or rigid in its approach to a taxpayer's objection and notice of appeal and should focus on 'the substance of the objection' within the context of the particular facts of the case. While the issue was not raised expressly as an objection and as a ground of appeal, it was an issue concerned with the proper application of the agreed valuation method and it was fully canvassed in the evidence.

[64] I have set out above the reasoning of the tax court and the full court on the characterization of Umthombo's mineral resources and the effect of the consultancy agreement. In respect of both issues, the reasoning of the tax court and of the full court was firmly grounded in the credible evidence of the expert witnesses called by the Commissioner and cannot be faulted. As a result, the appeal must fail.

[65] I make the following order.

The appeal is dismissed with costs, including the costs of two counsel.

C Plasket
Judge of Appeal

¹² Note 3 at 125I-J.

APPEARANCES

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