THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 855/2021

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD **APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Mobile Telephone Networks (Pty) Ltd v Commissioner for the South African Revenue Service* (805/2021) [2022] ZASCA 142 (24 October 2022)

Coram: DAMBUZA ADP, MAKGOKA and GORVEN JJA and WEINER and SALIE-HLOPHE AJJA

Heard: 9 September 2022

Delivered: 24 October 2022

Summary: Tax law – Value-Added Tax Act 89 of 1991 – declaratory order – under which of ss 10(18) or 10(19) pre-paid vouchers fall – fact specific test – narrow basis for declaration of rights in tax matters – clear, uncontested facts necessary – no basis for declaration of rights.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel where used.

JUDGMENT

Gorven JA (Dambuza ADP, Makgoka JA and Weiner and Salie-Hlophe AJJA concurring)

[1] This appeal concerns the sale of certain vouchers by the appellant, Mobile Telephone Networks (Pty) Ltd (MTN). The respondent is the Commissioner for the South African Revenue Service (SARS).[1] MTN provides a range of services to customers. As part of its offering, MTN sells what it refers to in the papers as 'pre-paid multi-purpose vouchers' (the pre-paid vouchers). Historically, the sale of the pre-paid vouchers was dealt with by MTN as falling under s 10(19) of the Value-Added Tax Act 89 of 1991 (the Act). On 15 November 2017, MTN sought a private binding ruling from SARS under s 41B of the Act, to the effect that the sale of the pre-paid vouchers could thenceforth be dealt with as falling under s 10(18) of the Act.

[1] For the sake of convenience, I shall refer to the respondent as SARS despite the Commissioner of SARS being the party. The rulings mentioned hereunder are issued by the Commissioner but SARS as an entity gives effect to the rulings. I am mindful of the distinction between the Commissioner and SARS but this distinction is not material in this matter.

[2] On 4 April 2019, after an extensive exchange of correspondence, SARS issued a private binding ruling to the effect that s 10(19), and not s 10(18), of the Act applied. Aggrieved by the ruling, MTN approached the Gauteng Division of the High Court, Pretoria, (the high court) for the following relief:

'1. Declaring that the supply by the Applicant of pre-paid tokens or vouchers for a consideration denominated in Rand, entitling the holder to receive available services and products on the MTN mobile network, as selected by the holder, to the extent of the monetary value stated on or attributed to the tokens or vouchers (multi-purpose vouchers), constitutes a supply as envisaged in section 10(18) of the [Act].

2. Declaring, accordingly, that the supply of such token or voucher is disregarded for the purposes of the [Act], except to the extent (if any) that the consideration for the multi-purpose voucher exceeds the monetary value stated thereon.

3. To the extent necessary declaring to be incorrect and/or setting aside the ruling issued by the Respondent on 4 April 2019, to the effect that the pre-paid vouchers fall within the ambit of section 10(19) of the [Act] and that value-added tax must accordingly be accounted for by the Applicant when the voucher is sold to the subscriber.

4. Directing the Respondent to pay the costs of this application.'

The high court, per Hughes J, entertained the application for declaratory relief but dismissed the application with costs. It is against that order that MTN appeals, with her leave.

[3] The legislative backdrop to the matter frames the dispute. Section 7(1) of the Act levies a tax on 'the supply by any vendor of goods or services supplied by him'. And ss 10(18) and (19) provide:

'(18) Where a right to receive goods or services to the extent of a monetary value stated on any token, voucher or stamp (other than a postage stamp as defined in section 1 of the Postal Services Act, 1998, and any token, voucher or stamp contemplated in subsection (19)) is granted for a consideration in money, the supply of such token, voucher or stamp is disregarded for the

purposes of this Act, except to the extent (if any) that such consideration exceeds such monetary value.

(19) Where any token, voucher or stamp (other than a postage stamp as defined in section 1 of the Postal Services Act, 1998) is issued for a consideration in money and the holder thereof is entitled on the surrender thereof to receive goods or services specified on such token, voucher or stamp or which by usage or arrangement entitles the holder to specified goods or services, without any further charge, the value of the supply of the goods or services made upon the surrender of such token, voucher or stamp is regarded as nil.'

The former attracts VAT only at the time a voucher is used to procure goods or services rather than at the time the voucher is supplied. In the latter instance, VAT is levied on the sale of a voucher but no further VAT is levied when the voucher is 'surrendered'.

[4] MTN submitted that two types of vouchers supplied by it fall under the different sections concerned. The first type specifies the goods which can be obtained by using the voucher. An example given was a data voucher. What is purchased is the right to use the volume of data purchased. It cannot be used to access anything else. This type of voucher falls under s 10(19). The second type is the pre-paid vouchers. These have a rand value and can be used to access a wide range of services offered by MTN. They are not limited to specific services such as data. These are, MTN said, 'typically referred to as "*airtime*" vouchers'.[2] These, it contended, fall under s 10(18).

[5] MTN analysed the key difference between the two provisions.[3] Under s 10(18), the voucher specifies the value of goods or services that may be selected rather than specifying the goods or services which the voucher may be used to acquire from the vendor. Under s 10(19), the particular goods or services to which

[2] Their emphasis.
[3] SARS used slightly different wording but agreed on the distinction.

the holder is entitled are specified rather than their value. SARS submitted that the enquiry was therefore whether:

a) Airtime (the voucher) itself constitutes 'goods', alternatively whether what can be exchanged for the voucher constitutes 'goods or services' that are specified by usage or arrangement; or

b) Airtime simply means the voucher itself, which is a form of currency that can be exchanged for an unspecified number of goods and services, akin to a gift voucher.

SARS contended that the pre-paid vouchers fall under the first of these and MTN that they fall under the second. This is where the lines were drawn in the litigation.

[6] In essence, this appeal relates to two main issues. The first is whether seeking a declaratory order was appropriate in the circumstances. The second is whether, if so, the ruling of SARS was incorrect.

[7] As to the first issue, SARS submitted that the procedure utilised by MTN was impermissible. There were three bases to that contention. It amounted either to a review, an appeal, or an objection to the ruling, none of which are competent.

[8] Prayer 3, which followed the declarations requested in prayers 1 and 2, sought to set aside the ruling. In general terms, decisions of functionaries may only be set aside on an application for the decision to be reviewed. SARS submitted that no review application was brought. In any event, no review could lie against the ruling because the definition of administrative action in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) requires the action in question to have a direct, external and final effect.[4] In the present matter, the ruling would only

[4] The relevant parts of the definition of administrative action are:

have an effect once it was applied to an assessment. As such, it did not fall within the definition of administrative action and could not be reviewed under PAJA.

[9] MTN conceded that the ruling did not amount to administrative action as defined in PAJA and was not reviewable. It submitted, however, that, if the declarators were granted and the ruling was not set aside, it would remain intact. But such a ruling binds only SARS.[5] SARS can withdraw it at any time unless the withdrawal were to prejudice MTN. That would not be the case in this matter where the ruling was against the interpretation contended for by MTN. In any event, SARS submitted that the ruling would be withdrawn if it was contrary to declarations made by a court. MTN accepted this to be the case and, as a result, conceded that it was not entitled to the relief sought in prayer 3.

[10] As regards the application amounting to an impermissible appeal, SARS contended that the ruling was not appealable, whether to the Tax Court or the High Court. Section 32(1) of the Act specifies those decisions of SARS which are susceptible of objection or appeal. Rulings under s 41B are not included. This much was also conceded by MTN. It submitted, however, that the application did not amount to an appeal.

[11] That leaves the question of an objection. SARS submitted that there are no provisions in the Act in terms of which to object to such a ruling. This is correct. In terms of s 83(1) of the Tax Administration Act 28 of 2011 (the TAA), the ruling

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'. . . any decision taken, or any failure to take a decision, by-
(a) an organ of state, when-
(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
which adversely affects the rights of any person and which has a direct, external legal effect . . .'.

[5] Section 82(1) of the Tax Administration Act 28 of 2011 (the TAA) which provides:
'If an "advance ruling" applies to a person in accordance with section 83, then SARS must interpret or apply the applicable tax Act to the person in accordance with the ruling.'

only ‘applies’ to a taxpayer when it is put into effect. Once again, the ruling would be applied by SARS once a return had been submitted. Only at that point could an objection be lodged.

[12] SARS drew attention to the special machinery created by the TAA for such disputes between SARS and taxpayers. It submitted that the appropriate course to be adopted by MTN was to utilise that machinery. It should submit a return which treats the supply of the pre-paid vouchers as falling under s 10(18). SARS would presumably reject such a return and issue an assessment based on the pre-paid vouchers falling under s 10(19). MTN would then be entitled to object to the assessment. If the objection was turned down, MTN could approach the Tax Court, which is a specialist court, and lead full evidence in support of its contention. If unsuccessful before the Tax Court, an appeal might thereafter lie to the full bench of the relevant High Court or to this Court.[6]

[13] MTN conceded that this procedure was available to it. However, it submitted that the application was not one which, in effect, objected to the ruling but was a legitimate approach to the high court for a declaration of rights. In this regard, it placed reliance on the matter of *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd*.[7] In that matter, Langholm Farms had submitted a claim for diesel rebates. This triggered an audit by SARS. Following the audit, SARS indicated that it would issue a revised assessment disallowing the

[6] 10 *Lawsa* 3 ed para 488 explains:
‘An appeal from the tax court lies to the full bench of the provincial division of the High Court having jurisdiction in the area where the tax court sat, or in two circumstances to the Supreme Court of Appeal. Those circumstances are where the court was initially composed of three judges and where the president of the tax court grants leave for a direct appeal.’
As authority for an appeal lying to the full bench rather than the full court, the learned author says, in footnote 18:
‘The language of s 133(2) has not been amended to take account of the Superior Courts Act 10 of 2013. As a result it is unclear whether an appeal from a tax court may lie to the full bench of a division sitting at a local seat of that division. It is submitted that it can in the light of s 6(4)(a) of the latter Act.’

[7] *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd* [2019] ZASCA 163.

claim on grounds relating to the interpretation of s 75(1C)*(a)*(iii) of the Customs and Excise Act 91 of 1964. Langholm Farms approached the high court and succeeded in obtaining declaratory relief. On appeal, this Court set aside the declaratory order.

[14] In dealing with an argument that the procedure of applying for declaratory relief was not competent, this Court held:

'SARS made it clear that refunds may only be claimed on fuel that was delivered, stored and dispensed from storage facilities on the premises of Langholm. In so doing SARS expressed a clear view as to the proper construction of s 75(1C)*(a)*(iii). Langholm disagreed and responded with the application, in an effort to resolve this dispute. It is true that Langholm could have waited and provided SARS with the documents it required for a revised assessment, and then challenged such an assessment, and argued the point of law at that stage. The issue is whether it was obliged to do so. In my view there was nothing objectionable in Langholm seeking clarity on an issue of statutory interpretation that would clearly influence the outcome of SARS' audit. If the court accepted Langholm's view of the proper interpretation of s 75(1C)*(a)*(iii) of the Act, SARS would have had to return to the audit and re-assess its position in the light of any further information and debate with Langholm. There was little point in Langholm entering into a debate or providing further information when none of it would be at all relevant given SARS' legal view. That is exactly the situation for which declaratory orders are made and seeking one in the context of a taxing statute was endorsed by the Constitutional Court in *Metcash*.'[8]

[15] SARS conceded that declaratory relief is competent in tax matters. Its contention, however, was the ambit for the grant of declaratory relief in such matters is narrow. It submitted that the present matter did not meet the required criteria. It is not necessary to decide whether the application amounted to an

[8] Ibid para 10. The reference is to *Metcash Trading Limited v Commissioner South African Revenue Services and Another* [2000] ZACC 21; 2001 (1) SA 1109 (CC) para 44.

impermissible objection. This part of the appeal must turn on whether MTN made out a case for the high court to entertain the application for declaratory relief.

[16] It is correct that courts have jurisdiction to grant a declaration of rights in tax matters as was done in *Langholm Farms*. *Metcash* also made this clear:

'But that does not mean that a court is prohibited from hearing an application for interlocutory relief in the face of a pending VAT appeal, or from granting other appropriate relief. Nor does it mean that the jurisdiction is theoretically extant but actually illusory. A court would certainly have jurisdiction to grant declaratory relief to such a vendor if, for instance, it were to be alleged that the Commissioner had erred in law in regarding the applicant as a vendor; or had misapplied the law in holding a particular transaction to be liable to VAT; or had acted capriciously or in bad faith; or had failed to apply the proper legal test to any particular set of facts.'[9]

In *Metcash*, Kriegler J referred with approval to the following dictum of McCreath J in *Friedman and Others NNO v Commissioner for Inland Revenue: In re Phillip Frame Will Trust v Commissioner for Inland Revenue*:[10]

'I am in agreement with the finding of the Court in that case that where the dispute involved no question of fact and is simply one of law the Commissioner and the Special Court are not the only competent authorities to decide the issue - at any rate when a declaratory order such as that in the present case is being sought.'

[17] It is worth reviewing matters when the courts have exercised their jurisdiction to entertain applications for declaratory orders in tax matters. The facts in *Langholm Farms*[11] were clear and uncontested. A discrete legal issue had arisen for decision. No further factual information was necessary to resolve that legal issue. The dispute was therefore ripe for a declaration of rights. In *Friedman and*

[9] *Metcash* para 71.

[10] *Friedman and Others NNO v Commissioner for Inland Revenue: In re Phillip Frame Will Trust v Commissioner for Inland Revenue* 1991 (2) SA 340 (W) at 341I-J. The judgment of McCreath J was confirmed by this Court in *Commissioner for Inland Revenue v Friedman and Others NNO* [1992] ZASCA 190; 1993 (1) SA 353 (A); [1993] 1 All SA 306 (A). It dealt with the merits of the declaration granted by him without discussion of the point at issue here.

[11] Footnote 6.

Others NNO,[12] the high court was asked to determine the legal question whether a testamentary trust was a person as defined in the Income Tax Act. There was once more an undisputed factual situation on which the court was asked to pronounce. In *Chancellor, Masters and Scholars of the University of Oxford v Commissioner for Inland Revenue*,[13] the respondent did not dispute the facts put up by the appellant or provide any additional material facts.[14] The matter turned on whether the appellant was liable to pay income tax on income derived from the activities of its publishing branch. In *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund*,[15] no affidavits were filed by SARS in answer to the application for a declaration. There was no factual dispute or lack of clarity. The issue was whether payment of a lump sum to a dependant of a member of the pension fund at the discretion of the fund's committee constituted gross income or remuneration. And, finally, in the matter of *Shell's Annandale Farm (Pty) Ltd v Commissioner, South African Revenue Service*,[16] the question was whether Shell was liable for payment of VAT on compensation received for expropriation. SARS was content to argue on the facts put up by the applicant.

[18] The matters referred to above show that proceedings for declaratory relief in tax matters are entertained only in limited circumstances. All of them dealt with applications where there were clear and uncontested facts. That is the bare minimum requirement for a court to entertain declaratory relief. Even where that is the case, there are circumstances where a court will nevertheless decline to exercise its discretion to grant a declaratory order. This was explained by Van

[12] Footnote 9.
[13] *Chancellor, Masters and Scholars of the University of Oxford v Commissioner for Inland Revenue* [1995] ZASCA 157; 1996 (1) SA 1196 (SCA); [1996] 1 All SA 287 (A).
[14] *University of Oxford* at 1202C-E.
[15] *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* 1984 (1) SA 672 (A).
[16] *Shell's Annandale Farm (Pty) Ltd v Commissioner, South African Revenue Service* 2000 (3) SA 564 (C).

Dijkhorst J in *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another*:[17]

'When a Court has to determine whether it should exercise its discretion in favour of a declaratory order considerations of public policy come into play. In matters like the present it is a weighty consideration that the Commissioner for Inland Revenue is placed in an invidious position. He is requested for a ruling, which he is not obliged to give. He gives an opinion *ex gratia*. Should it be favourable the taxpayer accepts it. Should it not be in his favour and the taxpayer is free to approach the Court to hear the dispute, then there is a danger that the Courts may be flooded with cases wherein entrepreneurs seek certainty about their tax liability before embarking on new ventures or schemes. The Commissioner would be in an invidious position if he is forced to defend every tentative opinion he expresses in a Court of law.'

In other words, there are considerations other than the question concerning clear and uncontested facts which weigh with courts. A primary concern is the opening of the floodgates for applications to court where certainty is sought from the court prior to applying a new strategy.

[19] In the present matter, the first question is whether there is a clear, uncontested, sufficient, set of facts. The distinction between s 10(18) and s 10(19) of the Act is clear. The latter applies where the goods or services to which the holder of the voucher is entitled are specified on the voucher or, where not specified, where usage or arrangement entitles the holder to such specified goods or services. On the other hand, s 10(18) applies where there is no specification of goods or services, either by indication on the voucher, or by usage or arrangement. The factual enquiry is whether the pre-paid vouchers fall into one category or the other. Without that enquiry rendering a clear answer, the grant of declaratory relief would not be warranted.

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[17] *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another* 1995 (4) SA 120 (T) at 126C.

[20] SARS submitted that the factual position was far from clear. It said that MTN dealt with the application largely in the abstract. It had not put up sufficient or clear facts to allow the court to finally determine the entitlement of MTN to apply s 10(18) rather than s 10(19). In particular, the facts were not clear as to precisely how the pre-paid vouchers functioned. MTN had provided no evidence of 'how vouchers are purchased, what information is provided to customers, and the manner in which vouchers are actually used by customers'. In addition, the concept of 'airtime' has evolved over time due to technology and the use of data and the like. In the result SARS submitted that, on the facts presented, it was not clear what 'airtime' actually connoted. Therefore the matter did not fall within the narrow purview of when a declaratory order would be entertained in tax matters.

[21] MTN submitted that the facts were common cause. It might be so that certain explanations were accepted by SARS. However, the sticking point was the nature of what MTN termed 'airtime'. The assertion of MTN was that airtime was not something in and of itself – it should be construed as a right to the supply of services. It explained that the pre-paid vouchers are purchased for a rand value. When activated, the subscriber:

'. . . can access any services on the network, up to the value of the voucher. As the selected services are used or acquired, they are charged to the subscriber at the then prevailing tariff, and paid for through allocation or redemption of the available pre-paid funds attributable to the subscriber . . . The pre-paid amount is effectively currency from which the subscriber pays for the services selected from time to time.'

In support of that contention, MTN explained its administrative approach to the pre-paid vouchers. When such a voucher is activated, MTN 'credits a sum of money equal to the face value of the voucher to a ledger account linked to the relevant SIM card . . .'. This was referred to by MTN as the subscriber's 'main

wallet'. When the subscriber accesses a service on the network, MTN debits the cost of that service from the balance in the 'main wallet'.

[22] MTN sought to compare the pre-paid vouchers to retail vouchers issued by a shop or shopping centre. Retail vouchers are issued for a value and allow the purchase of any goods stocked at the shop or centre up to that value. They effectively function as currency when presented for the purchase of the selected item. So, too, submitted MTN, the pre-paid vouchers. They are issued for a value. The holder can redeem them for any services offered by MTN up to that value.

[23] SARS submitted that this, and further explanations of MTN, were far from clear. It referred as an example to the terms and conditions governing the pre-paid vouchers. These stated:

'"Airtime" means the prepaid value which when loaded onto your mobile device enables you to make or receive calls and/or send or receive SMSs and/or allows you to utilise internet services, or content services on the MTN network.'

SARS also pointed to the document put up by MTN to explain what was meant by Digital Services:

'Digital services consist of content subscription services that allow MTN subscribers to subscribe to and consume Digital services like Gaming, Music, Video, Text based notification services etc in exchange for a daily/weekly/monthly/once off fee settled via airtime payment.'

[24] These explanations, it said, appear to support the notion that airtime is a commodity, contrary to what MTN claimed. Airtime is what is acquired by way of the pre-paid vouchers. It can then be utilised to obtain the other services offered by MTN. Hence the word 'settled via airtime payment.' There was, accordingly, no clear explanation of what is meant by airtime or how it functions. It seems to me that the submission of SARS concerning this lack of clarity has considerable merit.

[25] SARS contended that there was a further less than clear aspect. MTN offers an extensive range of ‘services on the network’ to holders of the pre-paid vouchers. MTN submitted that the services offered were constantly expanding. In addition, it said that when a particular service was accessed, the subscriber cannot expect the cost to be the same as when the airtime voucher was purchased. When these were accessed, the current ruling cost would be deducted from the subscriber’s airtime balance. As a result, the services were not specified and did not fall under s 10(19).

[26] But MTN put up some nine pages listing the services offered by it. SARS submitted that this tended to show that the pre-paid vouchers fell within s 10(19). This was because, even though those services were not specified on the pre-paid vouchers, the vouchers entitled them ‘to receive goods or services . . . which by usage or arrangement [entitled] the holder to specified goods or services’. In the result, SARS submitted that it was not clear that the services to which holders of the pre-paid vouchers were entitled were not specified by usage or arrangement. If they were so specified, the pre-paid vouchers would fall under s 10(19).

[27] Considerable difficulty was experienced during argument in obtaining clarity on the nature of airtime as used by MTN and how the pre-paid vouchers function in practice. This also applied to the question of whether the services offered were specified by usage or arrangement. It seems to me that, at best, the factual position as to both of these aspects is distinctly opaque. This is not a matter where there is a set of clear, sufficient, uncontested, facts. The present matter therefore differs markedly from those mentioned above where our courts have entertained applications for declaratory orders in tax matters. In that regard, the high court erred when it held that ‘no . . . further facts or information would alter

the respondent's legal view' and that 'the applicant's declaratory application is properly before this court'.

[28] In any event, even if the facts were clear and uncontested, it is doubtful whether this matter warranted the exercise of the discretion of the high court to entertain the grant of declaratory relief. It was a classic case of MTN wishing to obtain clarity from the high court on whether it could depart from its prior practice of treating the pre-paid vouchers as falling under s 10(19) and apply a new approach of treating them as falling under s 10(18). It seems to me that the nature of the dispute lent itself more properly to resolution by use of the special machinery of the TAA set up for that purpose. To hold otherwise might well result in a deluge of similar applications.

[29] For these reasons, I consider that the application for declaratory relief was not appropriate in this matter. That being the case, the second issue in the appeal as to whether the ruling was correct or not need not, indeed cannot, be decided. This all means that, although the high court incorrectly entertained declaratory relief, it was correct in dismissing the application. The appeal must therefore fail. Both parties agreed that the costs should follow the result. The use of two counsel was warranted.

[30] In the result, the appeal is dismissed with costs, including those of two counsel where used.

T R GORVEN

JUDGE OF APPEAL

Appearances

For appellant:	M W Janisch SC
Instructed by:	Werksmans Attorneys, Sandton
	Symington De Kok Attorneys, Bloemfontein
For respondent:	A R Sholto-Douglas SC (with him S Dzakwa)
Instructed by:	State Attorney, Cape Town
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