Barnard Labuschagne Incorporated v The South African Revenue Service and Another (Case no: CCT 60/21)

Introduction

This matter which was heard in the Constitutional Court (CC) on 4 March 2022, dealt with the question of whether a tax judgment in terms of the Tax Administration Act, 28 of 2011 (TAA) is susceptible of rescission.

By way of background, s172 of the TAA provides that where a taxpayer has an outstanding tax debt, the South African Revenue Service (SARS) may, after providing the taxpayer with at least 10 business days, file with a competent court a certified statement[1] setting out the amount of the tax debt payable by the taxpayer. Such a certified statement must be treated, in accordance with the provisions of s174 of the TAA, as a civil judgment lawfully granted by the relevant court in favour of SARS.

Considering the above background, the relevant facts, question before and findings of the CC are summarised below.

Facts

The applicant, Barnard Labuschagne Incorporated (Applicant) is an incorporated firm of attorneys. On 15 December 2017, SARS filed with the Registrar of the Western Cape High Court (High Court) a certified statement in terms of s172 of the TAA noting that the Applicant owed SARS just over R800 000. In accordance with s174, the certified statement was treated as a civil judgment (i.e. the CC referred to this judgment as a 'tax judgment'), which the Applicant applied to the High Court to be rescinded. SARS opposed this rescission application on the basis that a tax judgment is not susceptible of rescission. In response, the Applicant contended that if SARS' contention was correct, ss172 and 174 of the TAA are unconstitutional.

The certified statement arose from the Applicant's self-assessments for VAT, PAYE, UIF contributions and SDL. The Applicant's complaint was that the certified statement was incorrect due to the fact the Applicant made payments which SARS had failed to allocate to the relevant assessed taxes.

The High Court dismissed the Applicant's rescission application and held that the tax judgment was not susceptible of rescission. The High Court refused an application for leave to appeal, as did the Supreme Court of Appeal.

Questions before the Constitutional Court

The CC was asked to consider, *inter alia*, the following questions -

- Is a certified statement filed in terms of s172 read with s174 of the TAA in principle susceptible of rescission?
- If the CC were to hold that a certified statement is in principle susceptible of rescission, was the Applicant's attack on the certified statement in its rescission application, i.e. an attack that the certified statement disregarded payments allegedly made in respect of the self-assessments, a grievance within the scope of Chapter 9 of the TAA?

Findings of the Constitutional Court

On the issue of rescindability of tax judgments, the CC found that the High Court was bound by precedent contained in a number of cases, such as *Kruger v Commissioner for Inland Revenue*[2], *Kruger v Sekretaris van Binnelandse Inkomste*[3], *Traco Marketing (Pty) Ltd v Minister of Finance*[4], *Barnard v Kommissaris van*

[1] Section 172(2) provides that such a statement may be filed even though the tax debt is subject to an objection or appeal under Chapter 9 of the TAA.
[2] 1966 (1) SA 457 (C).
[3] 1973 (1) SA 394 (A).
[4] 1998 (4) SA 74 (SE).

Binnelandse Inkomste[5] and *Metcash Trading Ltd v CSARS*[6], which all found that a tax judgment was in principle susceptible of rescission.

The CC found that it was 'unacceptable' that the High Court did not discuss the abovementioned case law or 'either follow them or explain why it thought they were distinguishable'. It was held that a tax judgment in terms of the TAA is susceptible of rescission, in terms of s36(1)(a) of the Magistrates' Courts Act or in terms of the common law jurisdiction to rescind judgments taken in the absence of the other party.

With reference to the question whether a grievance to the effect that a certified statement disregarded payments allegedly made in respect of self-assessments fell within the scope of Chapter 9, the CC found that the High Court should have found that the tax judgment was susceptible of rescission and should have considered whether the Applicant had made out a case for rescission at common law[7].

The CC decided that the matter should be referred back to the High Court before a different judge to decide the merits of the rescission application. SARS was ordered to pay the Applicant's costs incurred for the leave to appeal applications to the High Court, the Supreme Court of Appeal, and the costs incurred in the CC application.

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[5] Unreported judgment of the Cape Provincial Division, Case No A127/97 (19 May 2000).
[6] [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC).
[7] The CC set out the requirements for a case of rescission:

- first, the applicant must give a reasonable and satisfactory explanation for its default; and
- second, it must show that on the merits it has a *bona fide* defence which *prima facie* carries some prospect of success.