



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgment of the Supreme Court of Appeal

Christoffel Hendrik Wiese and Others v CSARS (1307/2022) [2024] ZASCA 111 (12 July 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing with costs, including that of two counsel, an appeal against the decision of the Western Cape Division of the High Court, Cape Town.

The Commissioner for the South African Revenue Services (SARS) instituted action against the appellants, in terms of s 183 of the Tax Administration Act 28 of 2011 (the TAA) for payment of R216.6 million. SARS claimed that the appellants caused, or assisted in causing, Energy Africa Proprietary Limited, (Energy Africa or the taxpayer) to dissipate its assets in order to obstruct the collection of a tax debt owed by it to SARS. The dissipation was alleged to have occurred by transferring a loan account claim Energy Africa held in Titan Share Dealers Proprietary Limited (TSD) as a dividend in specie to Elandspad Investments Proprietary Limited (Elandspad), its holding company. The trial proceeded in the Western Cape High Court, Cape Town (the high court) upon an agreed separation of issues. The high court was required to decide: (a) Whether the transcript of evidence presented by the appellants at an inquiry held in terms of s 50 of the TAA during 2015 and 2016, was admissible in the trial proceedings and, if so, for what purpose. (b) Whether the assessments raised by SARS against Energy Africa for secondary tax on companies (STC) and capital gains tax (CGT) constituted 'tax debts' for purposes of s 183 of the TAA. The high court found that the transcript was admissible. The high court also found that the STC and CGT tax assessments constituted tax debts for purposes of s 183 of the TAA.

Aggrieved by these findings, the appellants with leave of the high court, brought an appeal before this Court on similar issues. Namely (a) whether the term 'tax debt' as used in s 183 of the TAA envisaged that an assessed tax debt should have existed at the time that the dissipation of assets occurred, and (b) whether the transcript of proceedings at an inquiry was admissible upon production in subsequent civil proceedings in terms of s 56 of the TAA.

Before the SCA, the appellants argued that in order to establish liability under s 183, the person concerned must have knowingly assisted in the dissipation of assets 'in order to obstruct the collection of a tax debt'. A 'tax debt' must have necessarily existed at the time of the alleged dissipation and the person concerned must have known that the tax debt existed. A tax debt is an amount which is due and payable, as the ordinary meaning of the term suggests. In this instance, the tax debt only arose upon notice of assessment. The particular assessments to tax, in this case, did not constitute tax debts as contemplated by s 183 of the TAA. In its findings, the SCA, was of a different view and held that the concern was not what the third party knew or with what constituted known assistance in the dissipation of assets in order to obstruct the collection of a tax debt. That was not the subject of the separated issue. The separated issue was whether 'tax debt' was envisaged to refer to an assessed indebtedness at the time of the dissipation. The SCA further held that s 169(1) referred to a debt due to SARS as being an amount due or payable. Section 169(3) described SARS as a creditor for the purposes of recovery as envisaged by Chapter 11. The language of s 183, construed within its context, did not

require that the taxpayer's liability to pay tax due to SARS should have been determined by assessment at the time that the dissipation of assets occurred. To hold otherwise would defeat the purpose of the section. It would also give rise to absurdity, in that a culpable third party who intentionally assisted a taxpayer to dissipate assets to evade tax would escape liability on the basis that an anticipated assessment had not yet been issued. Upon the separated issue as framed, the SCA held that the high court order was correct.

On the issue of admissibility of the transcript, the appellants testified at an inquiry during 2015 and 2016 as envisaged in s 50 of the TAA. SARS wished to rely upon the evidence obtained during that inquiry at the trial. The appellants contended that the evidence was inadmissible. Their stance, in essence, was that the evidence was inadmissible because relying on it would conflict with s 69 of the TAA and that s 56(4) did not allow for the admissibility of evidence procured in a s 50 inquiry in subsequent civil proceedings. The appellants relied upon *Commissioner for South African Revenue Services v Sassin and Others* (*Sassin*) where the court stated that the transcript of an inquiry under s 50 of the TAA was inadmissible in subsequent civil proceedings. The high court, however, did not follow *Sassin* and pointed out that the view expressed was obiter. The SCA agreed with the high court. The purpose of chapter 5 of the TAA, in which s 56 occurs, was to facilitate the execution of SARS' statutory mandate to collect tax. The TAA recognised the fact that SARS stood as a stranger to transactions between taxpayers. For that reason SARS was empowered to obtain information it would otherwise not be able to acquire, in order to perform its statutory functions. Section 56(4) provided specifically that the evidence may be used against another person. Section 69(1) was qualified by s 69(2) which made provision for the disclosure of a taxpayer's information under specified circumstances. The confidentiality of such information was therefore not without restriction. Section 69(2)(a) specifically authorised the disclosure of a taxpayer's information in a variety of circumstances, including by a SARS official as a witness in civil proceedings. Additionally, s 56(3) provided for restrictions on the application of s 69 to the extent necessary, depending upon the circumstances of the case. There was accordingly no contradiction between these sections. As a result, the SCA agreed with the high court and held that the transcripts were indeed admissible and ordered that the appeal be dismissed with costs, including the costs of two counsel.

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