

SOUTH AFRICA / JUDGMENT

Marshall N.O. and Others v Commission For The South African Revenue Service (39219/2014) [2015] ZAGPPHC 304; 77 SATC 395 (6 May 2015)

[2015] ZAGPPHC 304

COURT

North Gauteng High Court, Pretoria

BEFORE

C Pretorius

CASE / FILE NUMBER

39219/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 39219/2014

In

the matter between:

ALAN

GEORGE MARSHALL

N.O.....1ST

APPLICANT

RENE

PIETER DE WET

N.O.....2ND

APPLICANT

KNOWLEDGE

LWAZI MBOYI

N.O.....3RD

APPLICANT

JOHN

ANDREW DE MARTIN

N.O.....4TH

APPLICANT

RAY

SIPHOSOMHLE

SITHEMBELE.....5TH

APPLICANT
 MSENGANA
 N.O.....6TH
 APPLICANT
 KOVIN
 SHUNMUGAM
 NAIDOO.....7TH
 APPLICANT
 SAMSON
 MAKHUDU
 GULUBE.....8TH
 APPLICANT
 And
 THE
 COMMISSIONER FOR THE SOUTH
 AFRICAN
 REVENUE
 SERVICE.....RESPONDENT

JUDGMENT

PRETORIUS J

[1] The applicants apply for a declaratory order in terms of:

“1.1 Section 8(5) of the Value-Added Tax Act 89 of 1991 (as amended) (“the VAT Act”) applies not only to services deemed to be rendered but also to actual services rendered;

1.2 The services rendered by or on behalf of the SA RED CROSS AIR MERCY SERVICE TRUST (the particulars of which appear from a reading of the attached founding affidavit) to the various health departments of provincial governments situated within the Republic of South Africa should be zero rated in terms of section 11(2)(n) of the VAT Act;”

[2] At the outset counsel for the respondent indicated that the respondent abandons the opposition to the application on the ground of jurisdiction.

[3]

Background:

The applicants are the seven trustees for the time being of SA Red Cross Air Mercy Service Trust (“the Trust”), who brought the application on behalf of the Trust.

[4] The Trust provides an aero-medical service throughout South Africa which consists of the flying doctor and rural health outreach service, the air ambulance service and rescue service. These services have been rendered since 1994.

- [5] The Trust entered into agreements with various health departments of provincial governments to provide services to the provinces.

The provincial government departments pay a fee to the Trust as agreed by the parties in the relevant written contracts, which

generally consists of a fixed monthly fee and an agreed hourly rate in respect of each flight.

- [6] On 30 October 2012 the Trust applied to the respondent for a private binding VAT ruling regarding the VAT status of the services supplied by the Trust to the provincial government departments.

- [7] The respondent issued its binding private ruling on 25 January 2013, which caused the present dispute. The ruling was:

“The payments (I.e. the availability fee and the flight fee) received by AMS from the Department of Health are in respect of a taxable supply of goods and services. The supply of such goods and services are in the course of furtherance of AMS’ enterprise and are subject to VAT at the standard rate of 14 per cent in terms of section 7(1)(a). Accordingly, AMS is required to levy and account for VAT at the standard rate of 14 per cent on the supplies made to the Department of Health.”

- [8] The dispute relates to the interpretation and application of section 8(5) of the VAT Act. On 13 May 2013 the Trust, through its attorneys of record, requested the respondent to reconsider the private binding ruling. This request was refused by the respondent and hence the present application.

- [9] The Legal Interpretation:

Section 7(1)(a) of the Value-Added Tax Act 89 of 1991 (“the Act”) provides:

“(1) Subject to the exemptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax-

- (a) On the supply by any vendor of goods or services supplied by him on or after the commencement date in the course of furtherance of any enterprise carried on by him;”

- [10] Section 8(5) of the Act provides:

“(5) For the purposes of this Act a designated entity shall be deemed to supply services to any public authority or municipality to the extent of any payment made by the public authority or municipality concerned to or on behalf of that designated entity in the course or furtherance of an enterprise carried on by the designated entity.” (Court’s emphasis)

- [11] Section 1 of the Act defines a designated entity as “a vendor... (iv) which is a welfare organisation”.

- [12] A “welfare organisation” is defined in section 1 of the Act as:

“‘welfare organisation’ means any public benefit organisation contemplated in paragraph (a) of the definition of ‘public benefit organisation’ in section 30(1) of the Income Tax Act that has been approved by the Commissioner in terms of section 30(3) of that Act, if it carries on or intends to carry on any welfare activity determined by the Minister for purposes of this Act, relating to those activities that fall under the headings-

(a) Welfare and humanitarian;

(b) Health care;....”

[13] A “public authority” is defined in section 1 to mean, inter alia:

“(i) any department or division of the public service as listed in Schedules 1, 2 or 3 of the Public Service Act, 1994 (Act 103 of

1994);”

[14] The applicants rely on section 11(2)(n) of the Act which provides:

“(n) the services comprise the carrying on by a welfare organisation of the activities referred to in the definition of ‘welfare

organisation’ in section 1 and to the extent that any payment in respect of those services is made in terms of section 8(5) those services shall be deemed to be supplied by that organisation to a public authority or municipality;” (Court’s emphasis)

[15] It is important to note that the Trust has been approved as a public benefit organisation as contemplated in section 30 of the Income Tax Act to which reference is made in section 1 of the VAT Act.

[16] In Government Gazette No. 27235 (Government Notice 112) published on 11 February 2005 the Minister of Finance published the activities listed which constitutes welfare activities for the purpose of a “welfare organisation” in the VAT Act, which included:

“(e) The rescue or care of persons in distress”

[17] Is the Trust to be exempt from VAT?:

Statutory Interpretation:

The Law of South Africa Volume 1 second edition para 130 set out:

“...The legislative function is a purposive activity: the real question is what did the Legislature intend to achieve with the particular legislative instrument? In determining the purpose of legislation one is seeking the clear or manifest purpose – in other words one is actually seeking the object, aim, ambit or function of the statute as determined by the use of legally

recognised rules of interpretation. The most important rule of statutory interpretation is that the interpretation must ultimately

reflect the purpose of the legislation...”

[18] The court made it clear in *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000(2) SA 797 (SCA) at para 20:

“[20] In terms of section 43 of the Constitution, the legislative authority of the national sphere of government is vested in Parliament. Parliament exercises its authority mainly by enacting Acts. Acts are expressed in words. There is therefore elementary merit in what was said by Harms JA in Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse 1997(4) SA 613 (SCA) at 632G-H:

‘Interpretation concerns the meaning of the words used by the Legislature and it is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later’.

[21] ... However, as I have endeavoured to show, our law is an enthusiastic supporter of ‘purposive construction’ in the sense stated by Smalberger JA in *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990(1) SA 925 (A) at 943G-H:

‘Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity.’” (Court’s emphasis)

[19] In *Standard General Ins v Commissioner for Customs and Excise* 2005(2) SA 166 (SCA) at paragraph 25 the court held:

“[25] Rather than attempting to draw inferences as to the drafter’s intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation. As pointed out by Nienaber JA in De Beers Marine (supra at para [7]) when dealing with the meaning of ‘export’ for the purpose of section 20(4) – which draws a distinction between export and home consumption – the word must ‘take its colour, like a chameleon, from its setting and surrounds in the Act’.”

[20] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) at para 18 Wallis JA held:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words

used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.” (Court’s emphasis)

- [21] The respondent explained that the definition of “grant” specifically excludes payments made by public authorities for the actual supply of goods and services to the public authority. It is a gratuitous payment with no reciprocity of goods and services expected in return. I have no quarrel with this interpretation of the word “grant”.
- [22] According to the respondent section 8(5) of the Act will only apply if no actual supply of goods and/or services was made to the respective provincial departments of health in turn for the payment received by the Trust. The availability and usage fees paid to the respective departments of health are thus actual payments and not deemed payments as it is an availability fee as well as for actual services rendered and is therefore not a grant.
- [23] The respondent is of the opinion that the provisions of section 11(2)(n) of the Act only applies where it is “a deemed supply” and not on actual supply. The respondent set out that the Trust did not qualify for zero-rating in terms of section 11(2)(n) of the act, as it is not deemed to supply to a public authority in terms of section 8(5). I cannot agree with this interpretation as section 11(2)(n) of the Act is clear that it deals with “services” supplied by a welfare organisation to a “public authority”, which will include the respective Departments of Health of the provinces with which the applicant had contracted.
- [24] The respondent admitted that the services rendered by the Trust constitute aeromedical rescue, healthcare and relief network to all communities in need and that the services provided comprise the carrying on by a welfare organisation of the activities referred to in the definition of “welfare organisation”.
- [25] In the present instant the Trust, a welfare organisation, receives payment by a “public authority”, the various contracted

provincial departments of health. Section 8(5) provides that such an entity as the Trust shall be deemed to make a supply of services to the public authority in the furtherance of the enterprise carried on by the Trust.

- [26] The services provided by the Trust to the provincial government departments of health have not been granted to the respective provincial government departments, but the right to use the aircraft remains with the trust.

[27] Section 11(2)(n) of the Act does not provide that zero rate is only applicable to deemed supplies falling within the ambit of section

8(5). The Afrikaans translation for deem should be “geag”. If that is so, then section 8(5) merely sets out that if services supplied by a designated enterprise to the various provincial departments of health for payment those services are deemed to make a taxable supply of services to the furtherance of an enterprise, which is a welfare organisation.

[28] I must agree with counsel for the applicant that the argument that section 8(5) must be used to qualify for zero rating in terms of section 11(2)(n) is not supported by the meaning of the wording of section 11(2)(n) of the Act. Section 8(5) makes provision in regard to the use of the word “deem”, deems the supply of services to be made and deems the supply of such services to be made to the relevant authority or municipality concerned.

[29] A “designated entity” must be a vendor in terms of the Act and involved with the actual supply of services or goods to be able to claim a zero rating in terms of section 11(2)(n). If that was not the case then the provisions of section 8(5) and section 11(2)(n) would not have been necessary.

[30] Section 1 of the Act makes it clear that the term “consideration” includes payments by one entity to another in respect of supplies made to the other entity, which is the case in the present instance.

[31] I agree with the argument that the purpose of the deeming provision contained in section 8(5) of the Act is to deem payments received by a designated entity from a public authority or municipality to be consideration in respect of “services” as opposed to “goods”.

[32] I find in the present instance that the wording of section 8(5) and section 11(2)(n) of the Act are quite clear when the ordinary meaning of the words in these sections are examined in the context of the VAT Act.

[33] I cannot find that an additional purposive approach is required as there is no ambiguous or unclear words in these sections, which

should be clarified as the words in these sections are clear as they stand.

[34] I have applied the principles enunciated in the authorities and have considered the context and the wording in these two sections

objectively. I cannot find any reason why the wording should not be given its ordinary meaning in this context once an objective

process has been followed.

[35] I have listened to and read all the arguments of both parties, but I cannot find that I agree with the respondent's argument that "deem" in section 8(5) means that this section does not deal with actual services. The payment received by the Trust from the provincial governments, being public authorities as defined, are received in the furtherance of the enterprise activities of the Trust, being a designated entity as defined. The payments received from the provincial governments are subject to VAT.

[36] Therefore I find that section 11(2)(n) of the Act applies as the services rendered by the Trust qualify for the zero rate of VAT. The services rendered by the Trust comprise the activities listed in paragraph 1(e) of Government Notice 112 which provides:

"Welfare and Humanitarian

(e) The rescue or care of persons in distress"

[37] Section 11(2)(n) further provides that to the extent that the payment in respect of the services are made in terms of section 8(5) it is deemed that it is supplied to the particular provincial governments. Therefor these payments received by the Trust for the services should be subject to VAT at zero per cent in terms of section 11(2)(n).

[38] I therefor make the following order:

1. Section 8(5) of the Value-Added Tax Act 89 of 1991 (as amended) ("the VAT Act") applies not only to services deemed to be rendered but also to actual services rendered;
2. The services rendered by or on behalf of the SA RED CROSS AIR MERCY SERVICE TRUST to the various health departments of provincial

governments situated within the Republic of South Africa should be zero rated in terms of section 11(2)(n) of the VAT Act;

2. That the Respondent be and is hereby ordered to pay the costs of this application.

Judge C Pretorius

Case number: 39219/2014

Matter heard on: 14 April 2015

For the Applicant: Adv. PA Swanepoel

Instructed by : Edward Nathan Sonnenbergs Inc.

For the Defendant: Adv. A Sholto-Douglas SC / Adv. M. Ncumisa

Instructed by : State Attorney

Date of Judgment: 6 May 2015

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