



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 Commissioner for the South African Revenue Service v Erasmus (864/2024) [2026] ZASCA 22 (05 March 2026)

Today the Supreme Court of Appeal (SCA) handed down judgment in which it dismissed, with costs, the appellant's appeal against an order of the Tax Court of South Africa, Western Cape (the tax court).

The tax court set aside, as an irregular step, a statement (the rule 31 statement) delivered by the appellant, the Commissioner for the South African Revenue Service (the Commissioner), in terms of rule 31 of the rules promulgated under s 103 of the Tax Administration Act 28 of 2011 (the TAA rules, and the TAA, respectively). In the rule 31 statement, the Commissioner set out his grounds for opposing a tax appeal lodged by a taxpayer, Mr Pieter Johan Erasmus (the taxpayer), against a dividends tax assessment in respect of which the Commissioner had applied the general anti-avoidance rule (the GAAR) under ss 80A to 80L of the Income Tax Act 58 of 1962 (the ITA).

The taxpayer, the respondent before the SCA, filed an application under rule 30 of the Uniform Rules of Court, seeking to have the rule 31 statement set aside as an irregular step. The tax court granted that order. It subsequently granted the Commissioner leave to appeal against its judgment and order in terms of s 135 of the TAA.

The disputed tax assessment related to dividends of over R1,2 billion, paid to the taxpayer by Treemo (Pty) Ltd (Treemo) on 27 March 2017. The taxpayer had declared the dividends for purposes of his 2016 year of assessment but had claimed that any tax that may have been payable was offset by a significant balance of secondary tax on companies credit (STC credit) that had been acquired by Treemo in terms of the then applicable s 64J of the ITA. The taxpayer declared that no tax was due by him in respect of the dividends payments he had received.

The Commissioner, however, viewed a series of complex transactions leading to the payment of the dividends, as an impermissible avoidance arrangement as envisaged under the GAAR. On 30 July 2020, the Commissioner issued a notice in terms of s 80J of the ITA (the s 80J notice), setting out his reasons for believing that the GAAR applied. In that notice, the Commissioner described an arrangement involving a complex set of share transfer transactions involving several entities, the taxpayer and Black River View Trust (the trust). The taxpayer is a discretionary beneficiary and creditor of the Trust.

Initially, the Commissioner contended that the parties facilitated the dividend strip and the taxpayer/Treemo investment in order to contrive a situation whereby the repurchase dividend would flow through Treemo to the

taxpayer and the Trust and the liability for dividends tax could be offset via the STC credits obtained (via the dividend strip). The Commissioner alleged that Newshelf 1093 (Pty) Ltd (Newshelf) had repurchased its own shares from Treemo and that the substantial proceeds from this share repurchase were then paid to the taxpayer as dividends, shielded from tax by credits that Treemo had acquired in an earlier 'dividend strip' transaction. The Commissioner's proposed remedy, as proposed in the s 80J notice was to apply the GAAR by disregarding all transactions and entities other than the repurchase by Newshelf and the flow of the repurchase dividend to the taxpayer and the Trust.

The taxpayer responded to this notice, disputing the Commissioner's factual findings and explained that the dividends were not funded by the Newshelf share repurchase, but by a different transaction involving the trust. He explained that the proceeds of the Newshelf repurchase had not flowed to the taxpayer via the dividends declared and paid to him by Treemo, and that because of this, the proposed remedy could not be applied.

Despite the taxpayer's explanations, the Commissioner issued a GAAR assessment for R183,5 million in dividends tax, plus penalties and interest. In the assessment, the Commissioner stated that despite the contents of the s 80J(2) response and the taxpayer's 25 January 2021 response, he was not dissuaded from his findings as set out in the s 80J notice. The Commissioner reiterated that the dividends arose from the Newshelf share repurchase and that the remedy remained the same, ie, disregarding all transactions other than that repurchase and the flow of funds to the taxpayer.

The taxpayer objected to the assessment and, after his objection was disallowed, lodged an appeal with the tax court. In his rule 31 statement, the Commissioner changed his case. He abandoned his reliance on the Newshelf share repurchase and instead contended that the avoidance arrangement was a circular flow of funds involving the trust's subscription for shares in Treemo and a related call option agreement. The Commissioner claimed he was entitled to make these changes based on a bank statement annexed to the taxpayer's replying affidavit in the review proceedings he had launched to challenge the GAAR assessment.

The taxpayer approached the tax court, contending that this new statement was an irregular step. He contended that the Commissioner was not legally permitted to change his reasons for applying the GAAR and his proposed remedy after the assessment had already been issued. The tax court agreed and set aside the Commissioner's statement, leading to the appeal before the SCA.

The key issue for determination before the SCA was whether the Commissioner had authority to change the factual grounds for the GAAR assessment and his proposed remedy in his statement opposing the appeal. The SCA noted that at its heart, this is a question of powers rather than procedure.

With regard to the Commissioner's power under s 80J(4) of the ITA, the SCA found that this section allows the Commissioner to modify his reasons for applying the GAAR only before he issues the actual tax assessment. The SCA held that once a GAAR assessment is raised, the s 80J(1) notice is overtaken and no purpose could be served by giving the Commissioner the power to modify it. It agreed with the tax court that s 80J(4) does not justify introducing a new GAAR assessment through a rule 31 statement. Therefore, the Commissioner could not rely on this section to justify the changes made long after the assessment was finalised. The SCA concluded that the authority in s 80J(4) is time-bound and is only available to the Commissioner before he makes a determination under s 80B.

With regard to the Commissioner's power under rule 31(3) of the TAA rules, the SCA found that this rule cannot be used as an independent source of power to introduce changes that amount to a new exercise of the Commissioner's GAAR powers. The SCA held that the modifications made by the Commissioner went to the very core of its original decision, altering both the description of the avoidance arrangement and the remedy applied. The SCA stated that in effect, this amounted to a new exercise of that power without the requisite prior legal steps having been followed. This is not permitted under the GAAR provisions.

As a result, the SCA found that the Commissioner's amended statement was fundamentally flawed and constituted an irregular step. The SCA upheld the tax court's decision to set it aside. Consequently, the SCA made an order dismissing the appeal with costs, including the costs of two counsel where so employed.

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