THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Krok v CSARS (20230/2014 & 20232/2014) [2015] ZASCA 107 (20 August 2015)

The Supreme Court of Appeal (SCA) today handed down judgment in a matter concerning the correctness of granting a preservation order under a double taxation agreement in respect of an alleged income tax debt owed to Australia by a South African expatriate.

South Africa and Australia concluded a double taxation agreement (the DTA) for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income on 1 July 1999. The DTA was subsequently amended by a protocol signed on 31 March 2008 (the protocol) which made provision for mutual assistance between the States in the collection of taxes. The Australian Tax Office (ATO) made requests to SARS under the agreement in January 2012 and February 2013 for the collection of income taxes in the sum of Australian $25 361 875.79 (approximately R235 705 169.19) plus interest, which were allegedly due by Mr Krok to the Australian Commissioner of Taxation for the income period from 30 June 2004 to 30 June 2009.

Acting on the request received from the ATO, SARS approached the Gauteng Division of the High Court, Pretoria on an ex parte basis. It sought a preservation order coupled with an order for the appointment of a curator *bonis* in terms of sections 163 and 185 of the Tax Administration Act 28 of 2011 read with the DTA and the protocol for the preservation of Mr Krok's assets situated in South Africa in order to meet his tax liability to Australia. The High Court granted the preservation order and ancillary relief and subsequently confirmed the order.

Mr Krok had inherited considerable capital assets valued at R71 713 807 as at February 2003. The saga began when he emigrated to Australia in April 2002. Prior his departure, he had sought professional advice on the tax implications relating to his assets which eventually led to him setting up an elaborate scheme to avoid adverse exchange control implications. The scheme involved him, inter alia, vesting the beneficial interests in both the assets and the income in a British Virgin Islands company through a series of agreements. In consequence to all his transactional activity, according to Mr Krok, he ceded all his South African income and assets to a company except for the bare ownership thereof, and he had no income or capital gains on which he could be taxed by the ATO under the agreements. On 29 December 2008, Mr Krok again emigrated from Australia to the United

Kingdom. He set up a similar tax avoidance scheme in respect of which he purported to transfer to the second appellant, Jucool Enterprises Inc. (Jucool), a company incorporated in the British Virgin Islands, his assets situated in South Africa. In 2009, the ATO launched an audit of Mr Krok's taxation affairs as part of a government initiative investigating participation by Australians in internationally promoted tax arrangements to identify taxpayers involved in significant offshore transactions or large transfers of funds to or from Australia. Resultantly, the ATO held Mr Krok liable for $25 361 875.79 plus interest.

The SCA rejected the arguments made on behalf of Mr Krok and Jucool that: (a) that the relevant provisions of the DTA can only be invoked if the taxes claimed by the ATO arose on or after 1 July 2009 – after the protocol came into effect and (b) that Jucool was the beneficial owner of Mr Krok's South African assets.

The SCA held, in relation to (a), that on a proper interpretation thereof having regard to the approach to be adopted in construing the relevant provisions, the DTA and the protocol applied to taxes of every kind and description, including tax liabilities which arose prior to the commencement date of the protocol.

In relation to (b), the SCA held that as Mr Krok's assets are situated in South Africa and not in the British Virgin Islands their fate must accordingly be decided in terms of the relevant South Africa law (the forum *rei lex situs*). The ATO's investigation had revealed among other things that for a period in excess of two years, during 2002 to 2004, Mr Krok used his South African credit cards funded from blocked assets for his personal expenditure. Between January 2004 and April 2010 he repeatedly applied through Investec Bank to the South African Reserve Bank, which had directed Investec to control his assets for his benefit, to use the blocked funds for his and his family's expenditure in South Africa. These included such diverse matters as the acquisition and decoration of a home in an exclusive suburb of Cape Town; the building, furnishing and equipping of a holiday home in Hermanus; the acquisition of a motor vehicle; the payment of amounts to support his aged mother and to provide pensions for former employees; and the cost of acquisition of tickets for the 2010 football World Cup. The SCA held that none of the legal requirements for the transfer of the assets were met in the circumstances and that Mr Krok remained the beneficial owner thereof.

The SCA accordingly dismissed the appeal with costs, including the costs of two counsel.

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