



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case number: **537/06**

In the matter between:

**COMMISSIONER: SOUTH AFRICAN
REVENUE SERVICES, GAUTENG WEST**

Appellant

and

LEVUE INVESTMENTS (PTY) LTD

Respondent

CORAM: **HOWIE P, STREICHER, FARLAM, BRAND and COMBRINCK JJA**

HEARD: **2 MARCH 2007**

DELIVERED: **23 MARCH 2007**

Summary: Appeal – condonation for late filing of record refused despite good prospects of success

Neutral citation: This judgment may be cited as *CSARS, Gauteng West v Levue Investments (Pty) Ltd* [2007] SCA 22 RSA

COMBRINCK JA:

- [1] The appellant ('the Commissioner') in this appeal seeks the following:
- (a) an order condoning, in terms of Rule 11 read with Rule 12 of the Rules of this court, the late filing of the record;
 - (b) reinstatement of the lapsed appeal;
 - (c) an order that:
 - (i) the appeal be upheld;
 - (ii) the order of the court below be set aside; and
 - (iii) costs of the appeal and of the application in the court below, such costs to include the costs of two counsel.

The appeal is against an order made by Victor AJ in the Johannesburg High Court consequent upon an urgent application brought by the respondent ('Levue'). The order was that the Commissioner unconditionally pay to Levue an amount of R2 581 317 plus costs of the application. This amount was claimed by Levue as a VAT refund the entitlement to which was disputed by the Commissioner. Resolution of the dispute in terms of the Value Added Tax Act 89 of 1991 ('the Act') read with the Income Tax Act 58 of 1962 was pending at the time. The appeal is with leave of the court *a quo*.

[2] The origin of the dispute between the parties is the purchase by Levue of a number of properties constituting the little town of Kragbron in the Heilbron district. Kragbron is a decommissioned Eskom power facility. It consists of 540 residential properties, roads, a school, church and shops and has a population of some 1 660 residents. The town was sold to Levue by Vennprop (Pty) Ltd for a price of R25 650 000. The price was paid by means of a loan from Investec Bank in whose favour a bond of R27m was registered over the property. Levue, a registered vendor in terms of the Act, intended, (so it said), establishing a township, selling the existing homes and developing a golf course and equestrian estate. The properties were registered in Levue's name on 5 January 2005. Transfer duty paid by Levue amounted to R2 565 000. On 25 February 2005 Levue's shareholders sold their shares to Fairfax Marketing Limited, a company registered in the British Virgin Islands for R113m.

[3] For the tax period ending January 2005 Levue on 3 February 2005 rendered a VAT return which reflected an amount of R2 581 317 as input tax and a nil amount as

output tax. It accordingly in terms of s 16(5) read with s 44 claimed a refund of this amount. The amount claimed was the aggregate of R2 581 317 being the transfer duty paid on the properties and R16 317 in respect of taxable supplies. Levue's contention was that it had acquired second hand goods in the form of fixed property, the input tax on which was, in terms of the definition of input tax in s 1, limited to the amount of transfer duty. The properties, so it was alleged, were acquired wholly for the purpose of making taxable supplies. (S 17(1)(i) of the Act.) The taxable supplies were the individual properties it intended selling once the township had been established.

[4] In a letter dated 22 April 2005 the Commissioner disallowed the claim. The reasons given were the following:

'In terms of section 12(c) of the Value Added Tax Act (The Act), the supply of a dwelling will constitute an exempt supply. As such the letting and hiring of the vacant houses will constitute an exempt supply.

In terms of section 17(1) of the Act, one may claim an input tax credit to the extent that one is making taxable supplies. As the purchase from Vennprop relates to the making of exempt supplies no input tax credit may be made.

With regard to the vacant land, one must demonstrate that the acquisition was to make taxable supplies with. As the property is not zoned yet for the purposes of making taxable supplies, you have not discharged the onus of demonstrating the intention of making taxable supplies.

As such the transfer duty may not be claimed as an input tax credit in terms of section 17(1) supra.'

Despite protest by Levue that of the 540 residential properties 415 were subject to existing leases when it acquired ownership and that it had by June 2005 already sold 141 houses, the Commissioner remained adamant – no payment was going to be made until further investigation had been made.

[5] On 24 June 2005 Levue, in terms of s 32(3) of the Act, lodged a notice of objection. By this time it was experiencing pressing financial problems. Investec Bank was demanding the first instalment of R5m which was due on the loan and was threatening foreclosure. The local municipality was demanding payment of an amount of R 617 210,24 outstanding in respect of water supplied to Kragbron. Despite frantic letters and telephonic calls from Levue's attorney, the Commissioner remained

unrepentant. Levue then launched the urgent application referred to earlier. The substantive relief sought was a mandatory interim interdict that the Commissioner pay Levue the sum of R2 581 317. Although the order sought in the Notice of Motion was for unconditional payment of the amount, it is clear from the founding affidavit that what was being claimed was an interim order pending resolution of the dispute between the parties. The Commissioner opposed the application principally on three grounds. Firstly that the matter was not urgent. Secondly that the court had no jurisdiction as a determination of the dispute was one which had to be determined by a Tax Court and thirdly that the application was premature as the Commissioner had then as yet not decided whether to allow or disallow the objection (s 32(4)).

[6] The judge in the court *a quo* found that Levue had established grounds for urgency. Relying on the judgment in *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2000 (1) SA 1109 (CC) she found that the court had jurisdiction to grant what she termed interlocutory relief while a dispute was pending in the Tax Court. Although the order she made was in terms unconditional, properly interpreted in the light of the judgment as a whole, it was a form of interim order. Levue in its founding affidavit stated that it was advised to tender security. It did not, despite the advice, tender any security. From the judgment it appears that at the hearing of the application there was a debate about security. The judge says that she suggested that security be put up pending the appeal process in the Tax Court. She records that the Commissioner's attitude was that he would only accept cash and not even a bank or other form of guarantee. Instead of then deciding what reasonable and adequate security would be and making an order subject to the furnishing of such security, a finding was made that the Commissioner's demand for cash was unreasonable and would destroy Levue. No security was therefore ordered. Elsewhere in the judgment it is said that an order that the VAT refund be made will not result in prejudice to the Commissioner as the shareholding in Levue had been sold for R113m and he would be able to recover the refund should it ultimately be found that payment should not have been ordered.

[7] As recorded at the commencement of this judgment the Commissioner seeks condonation for the late filing of the record and reinstatement of the appeal. A

substantive application on notice of motion has been filed. Levue opposes the application and has filed an opposing affidavit. The Commissioner replied. The affidavits filed by the Commissioner were attested to by the attorney of record. In the founding affidavit he sets out the history of events from the time leave to appeal to this court was granted. Principally the delay in filing the record is ascribed to the transcribers who were instructed to compile the record, Sneller Verbatim (Pty) Ltd ('Sneller'). The attorney claims that he did everything in his power and control to expedite the compilation and filing of the record. No blame for the late filing can, he says, be attributed to any failure on his part. The Commissioner, he concludes should be granted condonation because he has reasonable prospects of success on appeal.

[8] An analysis of events does not support the attorney's claim that he was not at fault. The record runs to 119 pages. It consists of the formal application papers, the main judgment and the application for and judgment on leave to appeal. No evidence was led and no transcription of oral evidence was therefore required. An attorney's office the size of the Deputy State Attorney, Johannesburg ought to be able to compile a record of this nature within a day or two. It took from the 30th November 2005 when leave to appeal was granted, to 29th September 2006 to file the record – a period of 10 months. The claim that the delay was due to Sneller does not stand up to scrutiny. On his own version the attorney waited 55 days before he on the 13th February 2006 instructed Sneller to compile the record. No reason whatsoever is given for this delay. Thereafter it is apparent from the correspondence that Sneller had not been furnished with all the documents necessary to make up the record. Sneller wrote a number of letters asking for a complete set of court papers. In May 2006 it was still calling for the application papers making up the Commissioner's complete answering affidavit, the application for leave to appeal and the name and address of Levue's Bloemfontein correspondent. On 29 June 2006 Levue launched an application seeking an order declaring the appeal to have lapsed and leave to execute on the original order granted. One would have thought this would have galvanised the attorney into action. In his founding affidavit, having recorded the launch of the application, and the fact that the Commissioner opposed the application, he describes his actions during July and until the 17th August when he went to see Sneller in these words:

'Despite that application by the Respondent I continued to push Sneller to expedite compilation of the

appeal record.'

On his own version despite the fact that the appeal had lapsed months earlier, he remained virtually supine. Even when he received the record, which he says was on 6 September 2006, he waited till 29 September before lodging it.

[9] On two occasions before the application was launched Levue through its attorney advised the Commissioner that the appeal had lapsed. The first was in a letter dated 20 February 2006 which wrongly recorded that the appeal had lapsed by that date. In fact it only lapsed on 6 March 2006. Nevertheless it alerted the attorney of the danger of the appeal lapsing. The second was at a meeting on 9 May 2006 between representatives of the parties. When advised that the appeal had lapsed the Commissioner's official, a senior auditor, responded with words interpreted by the respondent to mean that she was aware that the appeal had lapsed, the Commissioner had no intention of taking steps to reinstate the appeal, that there was a prohibition against execution against the Commissioner and he therefore intended disregarding the order. Despite the official being named in Levue's answering affidavit, no affidavit by the official contesting these allegations was filed in reply. The attorney in his affidavit states that he could not get hold of her to find out what she said and meant. This evidence lends credence to Levue's contention that members of the Commissioner's staff deliberately delayed the appeal proceedings in the hope that the financial embarrassment caused to Levue would cripple it financially.

[10] It is indeed so that the Commissioner has good prospects of success. The order granted is an extraordinary one. It is unprecedented that where a creditor seeks to recover a disputed debt from a debtor, the latter can be ordered pending resolution of the dispute to pay the debt. Even if the order were to be made against the furnishing of security, it is still one which should only be granted in exceptional circumstances, if at all. In this case the balance of convenience which has to be considered in an application for interim relief has not been addressed at all.

[11] This court has repeatedly warned that a party seeking condonation cannot rely solely on prospects of success to entitle it to be excused for not complying with the rules. I need only refer to two judgments of this court. *P E Bosman Transport Works*

Committee v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (AD) and *Ferreira v Ntshingila* 1990 (4) SA 271 (AD) at 281D-282A. Muller JA in the former case said the following (at 799 D-E):

'In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be.'

These remarks were endorsed in the *Ferreira* judgment (*supra*) at the passage cited.

[12] I consider the explanation tendered for the delay to be unconvincing and inadequate. Despite knowledge that the appeal had lapsed nothing was done about applying for condonation until the day of the hearing of the application for a declarator and leave to execute, 13 September 2006, when the present application was filed. There was in my view a flagrant disregard of the rules which despite the Commissioner's prospects of success does not entitle him to condonation. In addition, I consider the attitude adopted by the Commissioner's official towards the court order and the appeal to be inexcusable.

[13] The application for condonation of the late filing of the record is refused with costs. The appellant is ordered to pay respondent's costs of appeal, such costs to include the costs of two counsel.

P C COMBRINCK JA

CONCUR:

HOWIE P

STREICHER JA

FARLAM JA

BRAND JA