THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 560/03
REPORTABLE

In the matter between

ESKOM **APPELLANT**

and

BOJANALA PLATINUM DISTRICT MUNICIPALITY **FIRST RESPONDENT**

RUSTENBURG DISTRICT COUNCIL **SECOND RESPONDENT**

Before: Scott, Cameron, Heher JJA et Comrie, Jafta AJJA

Heard: 15 November 2004

Delivered: 30 November 2004

Summary: Prescription – Regional Service Council levies paid without liability – claim for refund – s 11(a)(iii) of Act 68 of 1969 – 30 years in respect of taxation – operates in favour of taxgatherer only – prescriptive period applicable to refund claim 3 years in terms of s 11(d).

JUDGMENT

COMRIE AJA

[1] The appellant ('Eskom') has existed since about 1922. See Act 42 of 1922. It generates and provides electrical power. In the nature of things it is an employer and an enterprise. As such it paid, for several years, regional establishment and service levies ('RSC levies') to various local authorities including the two respondents or their predecessors. In 1995 another local authority sought to impose an additional levy. This caused Eskom to take a closer look at its own current enabling statute, Act 40 of 1987, in particular s 24. It sought the advice of two senior counsel. One opinion was adverse, the other favourable. On the strength of the latter opinion, Eskom objected to the additional assessment. Its objection was upheld by Southwood J sitting in the Special Income Tax Court (judgment delivered: 9 July 1997). The Council's appeal to the Supreme Court of Appeal failed: *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 (1) SA 866 (SCA) (judgment delivered: 30 November 1999). At the relevant time s 24 exempted Eskom from the payment of *inter alia* levies and fees 'to the State'. This court held that the council in question, and similar local authorities, formed part of 'the State'. Hence Eskom was exempt from the payment of RSC levies.

[2] When Eskom received the conflicting opinions of counsel, it did not cease paying RSC levies. Nor did it stop paying when it won

its case before Southwood J. Various reasons were given for this in evidence, among them that the matter was on appeal to this court. There were also some political considerations involved. The apparent solution was Eskom's decision to continue paying RSC levies, but 'under protest'. The evidence showed, however, that this decision was only implemented partially.

[3] Some time after its success in the appeal to this court, Eskom instituted separate actions against the two respondents for the recovery of RSC levies paid to them or their predecessors. The actions were later consolidated. From the first respondent (Bojanala Platinum District Municipality) it claimed R316 416,02 in respect of levies paid for the period January 1998 to December 1998. The summons was served on 2 January 2002. From the second respondent (Rustenburg District Council) it claimed R2 636 595,94 in respect of levies paid for the period January 1991 to December 1998. The summons was served on 3 December 2001.

[4] The matter came before Moseneke J in the Pretoria High Court who, by agreement and an appropriate order, decided certain issues first, the rest standing over for later determination if need be. I summarise his conclusions:

(a) that until 6 December 1995 Eskom paid RSC levies in the *bona fide* and reasonable, but mistaken belief that it was liable to do so;

(b) that after 6 December 1995 the continued payments of RSC levies were not made in error;

(c) alternatively to (a) and (b), and at best for Eskom, the continued payments of RSC levies ceased to be erroneous from 9 July 1997 (being the date when Southwood J gave judgment in its favour);

(d) that as between Eskom and Rustenburg District Council there was a tacit agreement that all payments of RSC levies made to the latter from mid-October 1997 onwards would be refunded in the event of this court finding in favour of Eskom in the Greater Johannesburg case; and

(e) that Eskom's claims against Bojanala Platinum District Municipality had prescribed, and that its claims against Rustenburg District Council up to mid-October 1997 had prescribed.

[5] I should mention that in the court *a quo* Eskom advanced three causes of action. The first was the *condictio indebiti* which, it can be seen, the learned judge dealt with on its merits. The second, an alternative, was a constitutionally based claim to a right of

restitution. The learned judge had sympathy for this claim but found it unnecessary to decide the matter because, so he concluded, such a claim, if otherwise good, had prescribed. The third cause of action was the tacit agreement which, we have seen, was upheld in part.

[6] The appeal is with leave granted by Ponnan J (in the absence of the learned trial judge).

Prescription

[7] On appeal Eskom accepts the findings of fact of the court below in relation to prescription and error. It appears that *a quo* both sides, and the court, approached the prescription issue on the basis that the relevant period of prescription was three years. See s 11(d) of the Prescription Act 68 of 1969: 'three years in respect of any other debt'. If that was correct, then it would be the end of the appeal. However, Eskom submits on appeal that the applicable period of prescription is thirty years as provided by s 11(a)(iii) of that act:

'(a) thirty years in respect of –

(iii) any debt in respect of any taxation imposed or levied by or under any law.'

If that contention is sound, then other issues will require consideration.

[8] Counsel appeared to assume that RSC levies properly assessed, due and payable would constitute 'taxation'. See s 3 and s 12 of the Regional Services Councils Act 109 of 1985. Compare *The Master v I L Back & Co. Ltd* 1983 (1) SA 986 (A). Without deciding the point, I shall make the same assumption in favour of the appellant. I shall thus assume that a council's claim for RSC levies – properly assessed, but unpaid –prescribes after only 30 years.

[9] It does not necessarily follow, however, that a taxpayer's claim for a refund of RSC levies improperly assessed, and therefore not due, also constitutes taxation. The respondent councils had no power to levy or collect more by way of tax than was due to them in terms of Act 109 of 1985 and the regulations made thereunder. Such payments, even if believed to be due at the time, were thus not taxes but something else. Equally, the 'debt' underlying the claim for a refund would not be a tax debt imposed or levied under any law.

[10] The point was well brought out in *Commissioner of Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A). The bank disputed liability for stamp duties on a credit card scheme, but paid the disputed duties under protest. Section 32(1)(a) of the Stamp Duties Act 77 of 1968 empowered the Commissioner to

'make . . . a refund in respect of: (a) the amount of any overpayment of duty . . . properly chargeable' if application was made within two years. Nienaber AJA said at 645I-646A:

'What the section contemplates is a payment made in respect of duties rightly chargeable but wrongly calculated. To the extent of any excess there would be an "overpayment" and it would be an overpayment of duties "properly chargeable". The taxpayer could then claim, and the Commissioner would be empowered to authorise, a repayment in terms of the section without recourse to the technicalities of a common law *condictio*. But this was not such a case. Here the Court *a quo* found that the payments were made by the Bank and accepted by the Commissioner in respect of "an instrument" which did not, in reality, attract duty at all. This was not, therefore, a case where the Bank paid in excess of what it should have paid; this was a case where it should not have paid anything at all. Hence there was no *overpayment* of duties "properly chargeable". Section 32(1)(a) accordingly did not apply.'

[11] Mr Tuchten, for the appellant, sought to broaden the meaning of 'taxation' in various ways. In the first place he pointed to the fact that s 11(a)(iii) does not mention the 'State', whereas in respect of certain other specified debts both s 11(a)(iv) and s 11(b) expressly provide: 'any debt owed to the State'. He conceded, however, that there was no need for the legislature to mention the 'State' in s 11(a)(iii) because only an organ of state, in the wide sense, could be empowered to impose or levy taxation by or under any law.

[12] Secondly, reliance was placed by counsel for the appellant on the phase ‘in respect of’ (Afrikaans: ‘ten opsigte van’). We were referred to a long line of decisions of this court which show that the phrase is capable of a wide meaning and a narrow meaning, and of shades of meaning in between. The nature or degree of the relationship or connection thereby connoted is a matter of legislative intention to be determined by the court in each case in the light of the statutory context and purpose. See *Mak Mediterranee Sarl v The Fund Constituting the Proceeds of the Judicial Sale of the M C Thunder (S D Arch, Interested Party)* 1994 (3) SA 599 (C) at 605G-606G. See too *Montesse Township and Investment Corporation (Pty) Ltd and another v Gouws NO and another* 1965 (4) SA 373 (A) at 383F-4H where, in the context, a wider meaning was adopted in regard to s 3(2)(c)(iv) and s 3(2)(d) of the previous Prescription Act 18 of 1943. Among other cases Mr Tuchten cited *Israelsohn v Commissioner of Inland Revenue* 1952 (3) SA 529 (A) at 540D-H where Centlivres CJ said:

‘But it may be said that the words 'in respect of' are of wide import and not capable of any precise definition. There is something to be said for the view that the additional amount of tax payable is payable in respect of the wife's income when that income has been omitted by the husband in his return. Indeed that was the view taken by Murray, J. Even if a husband in his income tax return omits a portion of his own income but includes the whole of his wife's income

there is a good deal to be said, on the wide meaning of the words “in respect of”, for the view that the treble tax which the husband must pay is also in respect of his wife's income. For that tax is three times the tax chargeable on the combined incomes of himself and his wife and is therefore in respect of both his own and his wife's income. Consequently it seems to me that sec. 85 (3) is reasonably capable of two constructions. That being so, that construction should be placed on the section which imposes the smaller burden on the taxpayer. See *Borcherds, N.O v Rhodesia Chrome & Asbestos Co. Ltd*., 1930 AD 112 at p. 119, where Stratford, J.A., in delivering the judgment of the Court said, in reference to a taxing statute:

> “In a case of doubt a court of law would have to construe such an Ordinance against the larger imposition.”

This is in consonance with what Lord Thankerton said in *Inland Revenue Commissioners v Ross & Coulter and Others*, 1948 (1) A.E.R. 616 at p. 625. In dealing with a taxing section he said that if it is “reasonably capable of two alternative meanings, the courts will prefer the meaning more favourable to the subject”.’

[13] We are not here concerned with a taxing statute, but with a subsection of the Prescription Act dealing with taxation. Sections 11 (a)-(c) favour certain classes of creditor according to the nature of the debt and provide for periods of prescription of 30, 15 and 6 years. The policy reasons underlying this classification are discussed by M M Loubser: *Extinctive Prescription* at 35-7. It is clear, in my view, that the state is intended to be a preferred creditor

in the three instances which I have earlier mentioned, viz s 11(a)(iii), s 11(a)(iv) and s 11(b). Counsel contended that this was inequitable or, to borrow his word, discriminatory. But the legislative intention is plain. No argument of constitutional invalidity was advanced. I should point out that generally the prescriptive period for *condictiones* is three years, be it for or against the State or for or against an individual person or legal *persona*. The argument for the appellant seeks to carve out an exception to that generality in cases of what counsel contended were 'taxation'. But this is not persuasive. It seems to me rather that the expression 'in respect of' was used by the legislature to cover ancillary debts claimable by the state such as interest and penalties. Compare *Commissioner of Customs and Excise v Tayob and others* 2002 (6) SA 86 (T) at 96B-D.

[14] Thirdly, Mr Tuchten made some play on the words 'imposed or levied' (Afrikaans: 'opgelê of gehef'). He referred us to dictionary definitions to the effect that the verb 'levy' can mean either the imposition of taxes or duties, or the collection thereof. Since the word 'levied' in s 11(a)(iii) is used in juxtaposition to the word 'imposed', he submitted that, in order to avoid tautology, the collection meaning should be assigned to 'levied'. I do not agree. The word 'levy' is frequently used to connote the imposition of taxes,

for example in reference to the assessment of duties such as customs duties. I think the legislature intended no more than to make it clear that all forms of taxation were included, and that the 30 year prescriptive period was not confined to the most obvious forms of taxation such as income tax.

[15] Finally, we were referred to the unreported judgment of Basson J in *Sage Life Ltd v Minister of Finance and SARS* (TPD, case no 24379/00, 10 October 2001). By way of an amendment to the Income Tax Act 58 of 1962, Sage Life became retrospectively entitled to the refund of certain secondary tax which it had properly paid. The Commissioner refunded the capital payments but without interest. Sage Life sued for interest and was met *inter alia* with a defence of prescription. The court held that the Commissioner was obliged to pay interest. The court held further that the period of prescription was 30 years. Basson J said:

'There is nothing in the wording of section 11(a)(iii) of the Prescription Act that shows that such "debt" is to be regarded to mean only a debt in respect of any taxation imposed or levied by or under any law, as long as the debt is one owed to the commissioner or *fiscus*. In my view, there is no reason to limit such description of "debt" to the position where the commissioner or the *fiscus* is the creditor and not also to apply to the position where the taxpayer is the creditor (as is the position *in casu*). In other words, such forced interpretation is not

supported by the clear meaning of the wording of section 11(a)(iii) of the Prescription Act (quoted above).

In my view, therefore, a debt such as the present debt that is owed to the applicant by the commissioner (*fiscus*) on the basis of a tax which was imposed and levied but later became repayable due to an exemption granted statutorily falls within the description of "debt" in section 11(a)(iii) of the Prescription Act.'

[16] The actual decision in *Sage Life* is manifestly distinguishable *inter alia* because the tax was properly payable in the first place and because the insurer's claim was for interest. For the reasons already given however I do not share the opinion that s 11(a)(iii) operates in favour of the taxpayer or that to hold otherwise would be a forced interpretation. In my view Basson J's construction was, with respect, wrong.

[17] I conclude therefore that s 11(a)(iii) of the Prescription Act, properly interpreted, operates in favour of the state but not in favour of the taxpayer. Eskom's claims for refunds of RSC levies wrongly paid, whether at common law or constitutional, are accordingly subject to the three year period of prescription laid down by s 11(d). Since it was common cause that this conclusion would dispose of the appeal, it is not necessary for me to canvass the other questions which were debated in argument.

[18] The appeal is dismissed with costs, including the costs of two counsel.

R G COMRIE
ACTING JUDGE OF APPEAL

CONCUR:
SCOTT JA
CAMERON JA
HEHER JA
JAFTA AJA