**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case no: 908/2017

In the matter between:

**THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES** **APPELLANT**

and

**AMAWELE JOINT VENTURE CC** **RESPONDENT**

**Neutral citation:** *CSARS v Amawele Joint Venture CC* (908/2017) [2018] ZASCA 115 (19 September 2018)

**Coram:** LEWIS, WALLIS, MBHA, DAMBUZA and VAN DER MERWE JJA

**Heard**: 3 September 2018

**Delivered**: 19 September 2018

**Summary:** VAT – zero rating of supplies of services in terms of s 11(2)(*s*), read with s 8(23) of the Value-Added Tax Act 89 of 1991 – whether supplies made in terms of the Housing Subsidy Scheme referred to in s 8(23).

## ORDER

**On appeal from:** Gauteng Division of the High Court, Pretoria (Hughes J, Molopa-Sethose and Mothle JJ concurring), sitting on appeal from the Tax Court:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the High Court is set aside and the following order substituted:

'(a) The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

(b) The order of the Tax Court is set aside and replaced by an order dismissing the appeal.'

## JUDGMENT

**Wallis JA (Lewis, Mbha, Dambuza and Van der Merwe JJA concurring)**

[1] The respondent, Amawele Joint Venture CC (Amawele), is a contracting firm with a single client, the KwaZulu-Natal Provincial Department of Human Settlements. During the period from July 2008 to September 2010 it undertook three projects for the Department. Two of these, known as the Umsunduzi Project and the Mooi River Project, involved the 'revitalisation and rectification' of housing projects undertaken between 1994 and 2002, where the workmanship was

inadequate, the houses defective and extensive remedial work, including in some instances demolition and reconstruction, was necessary. The third, known as the Emnambithi Project, involved the rehabilitation and repair of 610 houses damaged by a storm in the Emnambithi (Ladysmith) municipal area in December 2008.

[2] Was Amawele liable to charge, collect and pay Value Added Tax (VAT) to the South African Revenue Services (SARS), at the then standard rate of 14 per cent, on the amounts it was paid for this work? It said not, because it took the view that the services it was supplying were zero rated in terms of the provisions of s 11(2)(*s*), read with s 8(23), of the Value-Added Tax Act, 89 of 1991 (the VAT Act). It sought a refund of amounts that it claimed it had paid in error by way of VAT. In response to this claim SARS conducted an audit and issued an additional assessment in an amount of some R38 million. Amawele appealed to the Tax Court against this additional assessment.

[3] The Tax Court upheld Amawele's contentions, set aside the additional assessment and ordered SARS to refund R38 162 303.07 to Amawele. SARS' appeal to the Full Court of the Gauteng Division of the High Court, Pretoria, was dismissed and a cross-appeal in respect of the payment of interest on the refund was upheld. Its further appeal is with the special leave of this court. The sole issue for decision is whether Amawele was correct in contending that the services it supplied under the contracts referred to earlier were zero rated.

**The statutory provisions**

[4] The provision of the VAT Act, on which Amawele relied in claiming its services were zero rated was s 11(2)(s), read with s 8(23).

These two sections followed a slightly tortuous route before they came into operation. They were initially enacted in 2003,[1] but not put into operation until 2006,[2] after s 8(23) underwent a minor amendment.[3]

[5] Prior to 2003 there was no provision of the VAT Act providing for services rendered in terms of any national housing programmes to be zero rated. There were provisions similar to those eventually incorporated into the VAT Act in 1996, in the form of a deeming provision in s 8(5)[4] and zero rating provisions related to that deeming provision in ss 11(2)(*n*), (*p*) and (*q*), but there is nothing to suggest that services under contracts relating to the implementation of national housing programmes fell within these. There may have been circumstances in which payments to vendors by a public authority in respect of a taxable supply to a third party would have qualified for zero rating as 'transfer payments', but the position in that regard was unclear. Generally it seems that rendering such services constituted a VAT-able supply and attracted VAT at the standard rate.

[6] Once the two sections came into operation, s 11(2)(*s*) provided that services deemed to be supplied to a public authority under s 8(23) of the VAT Act would be zero rated. Section 8(23) read:

'For the purposes of this Act a vendor shall be deemed to supply services to any public authority or local authority to the extent of any payment in terms of the Housing Subsidy Scheme referred to in section 3(5)*(a)* of the Housing Act, 1997 (Act

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[1] Under ss 166(1)(*d*) and 169(1)(*k*) of the Revenue Laws Amendment Act 45 of 2003.
[2] Under ss 42 (1)(*e*) and 44(1)(*e*) of the Small Business Amnesty and Amendment of Taxation Laws Act 9 of 1996.
[3] The original section 8(23) referred to a municipality while the final version referred to a local authority.
[4] Considered by this court in *Commissioner, South African Revenue Service v Marshall NO and Others* [2016] ZASCA 158; 2017 (1) SA 114 (SCA).

No 107 of 1997), made to or on behalf of the vendor in respect of the taxable supply of goods and services by the vendor.'

Beyond this cross-reference, the VAT Act did not identify the scheme it referred to as the Housing Subsidy Scheme. Unfortunately, neither did s 3(5)(*a*) of the Housing Act 107 of 1997 (the Housing Act). It referred in terms to the Housing Subsidy Scheme, but did not define or circumscribe that description in any way.

[7] The problem this raised is a familiar one in the context of construing documents. The difficulty lies not in understanding the meaning of the words used, because they are entirely clear. It is instead a matter of identifying something or someone referred to in these provisions, in this case the Housing Subsidy Scheme. The authorities show that the court is entitled to look to evidence extrinsic to the document itself in order to identify that to which it refers.[5] In argument it was suggested that some guidance could be obtained from the later history of ss 8(23) and 11(2)(*s*) and it is convenient to set that out at this stage, before turning to deal with the history of legislation governing public assistance for the development of housing and its implementation.

[8] No amendments to ss 8(23) and 11(2)(*s*) were made between July 2008 and September 2010, being the period relevant to the supplies in issue in this appeal. In 2010 s 8(23) was amended to remove the reference to the Housing Subsidy Scheme and replace it with the words:

'… a national housing programme contemplated in the Housing Act 1997 …, which is approved by the Minister by regulation after consultation with the Minister of Human Settlements.'

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[5] See the authorities collected in *Hill v Faiga* 1964 (4) SA 594 (W) at 596H-597A.

Under this provision the identification of services provided under a national housing programme that would enjoy zero rating was left to the Minister of Finance in consultation with the Minister for Human Settlements. There was no automatic zero rating of such services. According to correspondence in the record the Minister of Finance expressly excluded payments for the rectification and repair of existing housing stock from the ambit of s 8(23). This would have included both the rectification and revitalisation programme (RRP), which will be discussed later, and an earlier programme for renovating and repairing social housing constructed prior to 1994.

[9] To complete the legislative picture in regard to VAT, with effect from 1 January 2017, both ss 8(23) and 11(2)(*s*) were repealed and replaced.[6] The replacement sections provide that any payment to or on behalf of a vendor in terms of a national housing programme is deemed to be a supply to a public authority or municipality making the payment and the deemed supply is zero rated.[7]

**The origins of the Housing Subsidy Scheme**

[10] In the pre-democratic era public housing was dealt with in terms of the Housing Act 4 of 1966 (the 1966 Act). In 1993, the South African Housing Fund (the Fund) was established in terms of s 12B(1)*(a)* of the Housing Arrangements Act 155 of 1993. The purpose was to centralise in a single fund all amounts appropriated for the purpose of housing development and to provide for its control and distribution. In 1994 ss 10A to 10C were inserted in the 1966 Act to make provision for the

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[6] By ss 129 and 132 of the Taxation Laws Amendment Act 25 of 2015.
[7] Sections 8(23) and 11(2)(*s*) of the VAT Act inserted by ss 78(1)(*a*) and 81(1)(*d*) of the Taxation Laws Amendment Act 17 of 2017.

uses to which the Fund could be put. These were of the widest amplitude. Funds could be made available for any purpose arising from or related to the provision of housing to members of the public. In the case of natural persons money could be made available for that person's housing purposes. The recipients of those funds could be local authorities, natural persons, institutions, trusts or any other body in respect of the provision of housing. In each instance the National Housing Commission was entitled to make the funds available on the basis that no interest would be charged and no amount would be repayable to the Fund.

[11] In March 1994 a scheme, called the Housing Subsidy Scheme, was instituted as the primary housing assistance measure to consolidate all existing government subsidy schemes, other than instances where commitments had already been made. By 1995 it consisted of five component schemes, namely, an individual subsidy, a consolidation subsidy, an institutional subsidy, a project linked subsidy and relocation assistance. The Hosuing Subsidy Scheme was one of four housing assistance measures in operation at the time, the others being the Discount Benefit Scheme, the Public Sector Hostel Redevelopment Programme and the Bulk and Connector Infrastructure Grant. In 1997, when the 1966 Act was repealed, provision was made in s 3(5)(*a*) for these four housing assistance measures to continue as national housing programmes under s 3(4)(*g*) of the Housing Act. Each one was referred to by name without more.

[12] Section 3(4)(*g*) authorised the Minister of Housing to institute and finance national housing programmes. In terms of the definition of that expression in s 1 of the Housing Act a national housing programme

meant any national policy framework to facilitate housing development, including both the existing four programmes and any other measures to:

'(*a*) assist persons who cannot independently provide for their own housing needs;

(*b*) facilitate housing delivery; or

(*c*) rehabilitate and upgrade existing housing stock, including municipal services and infrastructure.'

[13] The Housing Act required the responsible Minister to publish a National Housing Code (the Code) containing national housing policy.[8] This was done in 2000. Under the general heading of National Housing Programmes it identified general rules for the Housing Subsidy Scheme and then, in separate chapters, dealt with seven different subsidiary schemes it described as forming part of the Housing Subsidy Scheme. These were the original five component schemes and two further component schemes, namely, rural subsidy and Peoples' Housing Process. The Discount Benefit Scheme and the Hostels Redevelopment Programme were listed as National Housing Programmes and clearly identified as not forming part of the Housing Subsidy Scheme. The other original programme, the Bulk and Connector Infrastructure Grant, had by this stage been transferred to another department and no longer fell under housing.

[14] The General Rules in Chapter 2 of the Code dealt with the criteria for qualifying for a housing subsidy. There were six of these. Applicants had to be married[9] or have financial dependants; be lawful residents of South Africa; be competent to contract; have gross monthly household incomes not exceeding R3 500; not yet have benefited from government

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[8] Housing Act s 4(1).

[9] Or in a customary union or habitually cohabiting with any other person.

funding and be first time property owners. All of the component schemes of the Housing Subsidy Scheme were based on the entitlement of individuals to receive a housing subsidy in terms of these criteria, albeit that in certain instances they would not receive the subsidy in cash. This latter would apply to both institutional subsidies, under which accommodation would be provided to beneficiaries by the institution, and project linked subsidies, which related to the construction and provision of low cost housing to enable beneficiaries to acquire such housing. The Discount Benefit Scheme did not involve the construction of homes, but was based on the sale to qualifying persons at a discount of existing housing stock, usually owned by local authorities. As a result the question of VAT did not arise. The programme for redeveloping hostels was supported by grants to public sector institutions, not by subsidies to individuals.

[15] When the Code was revised in 2009, it ceased to use the expression Housing Subsidy Scheme, but listed a number of separate national housing programmes. These included individual, consolidation, institutional and rural subsidy programmes, as well as an enhanced peoples' housing process, all of which appear to correspond with some of the previously existing components of the Housing Subsidy Scheme. It is unclear whether project linked or relocation subsidies continued to exist or whether they had been given different names. Apart from a few references to persons qualifying for benefits under some of these programmes, if the household qualified under the Housing Subsidy Scheme criteria, there were no other references to that scheme under that name. Instead, all National Housing Programmes were said to fall under the Housing Subsidy System. Included among these programmes was a programme to provide housing assistance in emergency circumstances.

**The EAP and the RRP**

[16] None of the services rendered by Amawele in terms of the Umsunduzi Project, the Mooi River Project and the Emnambithi Project fell within any of the seven components of the Housing Subsidy Scheme identified above. All three were undertaken in terms of two new national housing programmes. The first of these in point of time was the Emergency Assistance Programme (EAP) formulated in April 2004 and inserted as Chapter 12 of the Housing Code. It was the scheme relevant to the Emnambithi Project. The second new national housing programme was the RRP. The other two projects were funded under the RRP.

[17] The EAP was introduced largely as a result of the Constitutional Court's judgment in *Grootboom*,[10] which held that the government's housing policy was unconstitutional in failing to make reasonable provision within its available resources for people with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations. The response was to formulate and incorporate Chapter 12 into the Code, dealing with assistance to be provided in emergency housing circumstances. Several features of the scheme embodied in Chapter 12 should be highlighted.

[18] Unlike the other schemes falling within the ambit of the Housing Subsidy Scheme the assistance provided under the EAP falls short of formal housing as provided in 'other Programmes of the Housing Subsidy Scheme', although wherever possible it should represent an initial phase

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[10] *Government of Republic of South Africa and Others v Grootboom and others* [2000] ZACC 19; 2000 (1) SA 46 (CC).

towards a permanent housing solution. Presumably for that reason it was separately instituted in terms of s 3(4)(*g*) of the Housing Act. In other words it was a scheme instituted and financed by the Minister exercising his powers under that section. Unlike the components of the Housing Subsidy Scheme, the assistance would take the form of grants to municipalities to enable them to respond to emergency situations. The municipalities would apply for these grants. The beneficiaries of the EAP were not restricted to those meeting the criteria for a subsidy under the General Rules of the Code. They could include households with a monthly income exceeding the R3 500 threshold; non-lawful residents; minors heading households but unable to contract; persons without dependants; persons who were not first time home owners; and, persons who had previously received housing assistance.

[19] A person's entitlement to a subsidy was unaffected by any assistance provided under the EAP, unless it contributed materially to a permanent housing solution for the beneficiary. Any future subsidy could then be discounted by the amount of an emergency grant to the extent of that contribution. Chapter 12 contained detailed specifications regarding the assistance that could be rendered under the EAP and the amounts available for different types of expenditure. Of interest is that all the amounts are specified as including VAT.

[20] The RRP was instituted because many low cost houses erected pursuant to the RDP policy after 1994 were poorly built and structurally unsound. It was approved at a MINMEC[11] on 3 March 2005, with effect

[11] An acronym to describe meetings dealing with issues of national and provincial concern between the minister at national level and the MEC's of the various provinces.

from 1 April 2005 and came into operation in KwaZulu in November 2006. Any project in terms of this programme would have to be part of a municipal infrastructure development plan or a housing plan. Rectification would only take place where the original subsidy beneficiary occupied the house, or if approved by the MEC. The municipality would make the application, but payment on satisfactory completion of the work would be by the provincial Department of Housing.

[21] Like the EAP, the RRP was instituted as a separate national housing programme. That occurred on 3 March 2005 in terms of s 3(4)(*g)* of the Housing Act. It was described as the National Policy on Rectification of Houses delivered between 15 March 1994 and 31 March 2002. Its implementation in KwaZulu-Natal occurred in the light of policies and procedures promulgated by the MEC for Local Government, Housing and Traditional Affairs.

**Discussion**

[22] The legislative history traversed above reveals that, when the VAT Act was first amended in 2003 to provide for zero rating of the deemed provision of services to public authorities and municipalities funded by the Housing Subsidy Scheme, it did not apply to the EAP and the RRP for the simple reason that they were not in existence at the time. The constituent elements of the Housing Subsidy Scheme were by that stage clear. The Scheme had been in existence since 1994, when it had five subsidiary elements. Two more were added when the Scheme was incorporated in the Code in 2000. Neither the EAP nor the RRP were included. In order for payments to vendors in respect of projects falling under either the EAP or the RRP to enjoy the zero rating on payments to

them, it needed to be demonstrated that after their creation something occurred to bring them within the scope of the Housing Subsidy Scheme. A failure to show that would be fatal to Amawele's contentions.

[23] If either of these programmes had been introduced on a basis that brought them within the scope of the Housing Subsidy Scheme, another question would arise. Would it be permissible, as a matter of interpretation of s 8(23), to construe it as applying to national housing programmes under that scheme that did not exist at the time the section was formulated? Any such programme could not have been in the contemplation of those who drafted the section, or the officials from National Treasury and the Department of Human Settlements (as it was then known) responsible for negotiating the zero rating, much less the members of parliament who voted in favour of the new sections. While statutes must often be construed as 'always speaking',[12] that principle cannot ordinarily be used to make legislation apply to matters to which it plainly did not apply when enacted.[13]

[24] I do not discount the possibility that the subsidy programmes that existed and formed part of the Housing Subsidy Scheme in 2003 could be varied and changed to meet changing needs, without removing the advantages of zero rating on payments to or on behalf of vendors. However, it would be an entirely different matter for a new programme to be introduced and, without more, enjoy the advantages of zero rating. One would expect that if the Department of Human Settlements wished to

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[12] *Malcolm v Premier, Western Cape Government* [2014] ZASCA 9; 2014 (3) SA 177; [2014] 2 All SA 251 (SCA) paras 10 and 11.

[13] See *R v Secretary of State for Health: Ex parte Quintavalle* [2003] UKHL 13; [2003] 2 AC 687; [2003] 2 All ER 113 paras 8–10 and Lord Bingham's illustration of this point in saying that the always speaking principle could not be used to extend the application of a statute concerning dogs to cats.

achieve that purpose it would have raised the matter with National Treasury, to ensure that adverse fiscal consequences in the form of lower collections of VAT were appreciated and accepted and that a possible amendment to the VAT Act to make that clear was canvassed. Before reaching those difficult questions, however, it is first necessary to determine whether either the EAP or the RRP was introduced on a basis that brought them within the Housing Subsidy Scheme as identified in s 8(23).

[25] Starting with the EAP there are a number of obstacles to that conclusion. Firstly, it was established as a separate national housing programme, not as part of the overall Housing Subsidy Scheme in the Code. It appears to have been on the same footing as the Discount Benefit Scheme and the Hostels Redevelopment Programme, both of which were part of the Code, but separate and distinct from the Housing Subsidy Scheme.

[26] Secondly, the manner in which the EAP functioned was distinct from the manner in which the various components of the Housing Subsidy Scheme functioned. Unlike them it was not restricted by eligibility criteria in providing relief, and payments under the EAP were made by way of grant to municipalities. They were not earmarked as relating to eligible beneficiaries of subsidies. Apart from cases where the emergency relief provided a stepping stone towards permanent accommodation, receipt of emergency relief had no impact on a person's entitlement to a subsidy.

[27] Thirdly, there was no indication of an intention that the EAP be incorporated in the Housing Subsidy Scheme and payments made to or on

behalf of vendors thereunder be zero rated. Such a significant extension of the right to zero rate supplies would have required input from National Treasury and could not have been done inadvertently or without discussion and careful consideration. At the very least it would be expected that the Department of Human Settlements would have sought clarification and consent from Treasury before embarking on such a course. There is no evidence in the documents in the record of that occurring, and my own researches have not disclosed any material suggesting an intention to incorporate the EAP into the Housing Subsidy Scheme.

[28] The position of the RRP is, if anything, even more precarious. It too was constituted separately as a national housing programme. It provided for the rehabilitation and upgrading of existing housing stock, including municipal services and infrastructure. In terms of the definition of 'national housing programme' in s 1 of the Housing Act, this was a permissible purpose for such a programme. However, that means that it stood in stark contrast to programmes directed at assisting persons unable independently to provide for their own accommodation needs or to facilitate housing delivery, under which latter head the Housing Subsidy Scheme and its component parts fell.

[29] The second and third points made earlier, in relation to the EAP, apply with equal force to the RRP. In regard to the latter it is clear from the correspondence in regard to Amawele's claim for a refund that SARS adopted a consistent stance that the RRP did not form part of the Housing Subsidy Scheme. The endeavour to invoke the subsequent amendment of s 8(23) to support Amawele's contentions also did not stand up to scrutiny. While in some circumstances an amendment of a statute can be

seen as an exposition and clarification of the meaning of the provision prior to its amendment,[14] the amendment in 2010, if anything, pointed away from Amawele's contention. The issue of zero rating was determined by the Minister of Finance after consulting the Minister of Human Settlements and resulted in it being stated expressly that it did not cover payments made for the rehabilitation of existing housing stock.

[30] For those reasons it seems to me that Amawele's case foundered at the first hurdle. All the evidence showed that the Housing Subsidy Scheme referred to in s 8(23) of the VAT Act, from 2003 until 2010, covering the entire period with which we are concerned, was the Scheme that had existed since 1994 as incorporated in the Housing Code in 2000 with two additional components. Neither the EAP nor the RRP formed part of the Housing Subsidy Scheme as so identified and there was no evidence to show that either of them had, after their creation, been incorporated in some way into the Housing Subsidy Scheme. The services rendered in respect of the three projects in issue in this case were rendered directly to the Department of Housing, KwaZulu-Natal and attracted an obligation to charge, collect and account for VAT at the standard rate under s 7 of the VAT Act.

**Result**

[31] The appeal must therefore succeed. The following order is made:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

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[14] *NEHAWU v University of Cape Town and others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154; para 66

2 The order of the High Court is set aside and the following order substituted:

‘(a) The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

(b) The order of the Tax Court is set aside and replaced by an order dismissing the appeal.’

M J D WALLIS
JUDGE OF APPEAL

Appearances

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|---|---|
| For appellant: | A R Sholto-Douglas SC (with him H Cassim) |
| Instructed by: | MacRobert Incorporated, Pretoria |
| | Honey Attorneys, Bloemfontein. |
| For respondent: | H G A Snyman SC (with him H A Mpshe and K D Magano) |
| Instructed by: | Kgokong Nameng Tumagole Inc, Pretoria |
| | Motaung Attorneys, Bloemfontein. |