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Case No. 14/1984

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE COMMISSIONER FOR INLAND REVENUE — Appellant

and

M.N. DA COSTA — Respondent

CORAM: CORBETT, JOUBERT, VAN HEERDEN, JJA,
GALGUT et NICHOLAS, AJJA

HEARD: 6 MAY 1985

DELIVERED: 24 MAY 1985

JUDGMENT

/VAN HEERDEN, JA ...

VAN HEERDEN, JA:

In respect of the years of assessment ended 28 February 1971 to 1977 the respondent submitted returns of his income together with supporting accounts. The Secretary for Inland Revenue, as the incumbent of the appellant's office was known from 1964 to 1980, was dissatisfied with the returns and caused an investigation to be carried out into the respondent's financial affairs. In the result the Secretary issued additional assessments for the tax years in question and, following on an objection by the respondent, reduced assessments for 1971, 1972 and 1976, on the basis that the respondent's income had been understated by a substantial amount. The additional, read with the reduced, assessments reflected that additional normal tax was payable in respect of each of the relevant years. Acting in terms of s 76 of the Income Tax Act the Secretary furthermore imposed a penalty equal to the additional normal tax. The upshot was that a total amount of

R15 590 was payable as additional tax and a like amount as a penalty.

The respondent lodged an appeal which was eventually confined to the alleged excessiveness of the penalty. The Cape Income Tax Special Court (Berman, AJ, presiding) allowed the appeal and reduced the amount of the penalty to R3 000. With the leave of the President of the Special Court the appellant in turn appealed to this Court.

It appears from a letter written on behalf of the Secretary to the respondent's representatives that the extent of the penalty was determined by a committee in Pretoria. The Special Court expressed doubt as to whether it was competent for the Secretary to delegate his function in terms of s 76 (2) (a) to the committee (or, for that matter, to any person or body) but found it unnecessary to decide the point. The court's approach was that assuming that it was competent for the committee

to fix the penalty, the court was in terms of s 83 (13) (b) at large to reduce, confirm or increase the amount of the penalty, unfettered by any discretion exercised by or on behalf of the Secretary. The court expressed agreement with what was said by Melamet, J, in I T C 1331, 43 S A T C 76, 84, and disagreement with the contrary view entertained by Friedman, J, in I T C 1295, 42 S A T C 19, 30-31, read with I T C 1351, 44 S A T C 58, 62-63.

S 76 (1) (b) provides that if a taxpayer omits from his return any amount which ought to have been included therein, he shall be required to pay, in addition to the tax chargeable in respect of his taxable income, "an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted". Subsections 2 (a) and (b) read as follows:

/"(a) ...

"(a) The Commissioner may remit the additional charge imposed under sub-section (1) or any part thereof as he may think fit: Provided that, unless he is of the opinion that there were extenuating circumstances, he shall not so remit if he is satisfied that any act or omission of the taxpayer referred to in paragraph (a), (b) or (c) of sub-section (1) was done with intent to evade taxation.

(b) In the event of the Commissioner deciding not to remit the whole of the additional charge imposed under sub-section (1), his decision shall be subject to objection and appeal."

S 83 (13) (b) provides that, subject to the provisions of the Act, in the case of any appeal against the amount of the additional charge (the penalty) imposed under s 76 (1) the Special Court may reduce, confirm or increase the amount of the penalty.

With regard to the discretion conferred upon the Commissioner (previously the Secretary) by s 76 (2) (a) Friedman, J, said in I T C 1295 at p 30:

"The Secretary deals with a large number of

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cases of this kind. He has yardsticks by which to go and is in a far better position to decide upon appropriate remissions than this court. Where, of course, the Secretary exercises his discretion on an incorrect basis or by taking into account matters which he is not entitled to take into account, this court will disregard the Secretary's decision and be at large to itself decide upon an appropriate remission. Where, however, the Secretary has properly exercised his discretion in a bona fide manner, then it seems to me that this court will interfere only where there has been an unreasonable exercise by the Secretary of his discretion. In order, however, to decide what is or is not an unreasonable exercise of discretion, it is, as I have already indicated, necessary for this court itself to decide what it regards as an appropriate remission and if there is a significant difference between that which this court regards as appropriate and that which the Secretary has decided is appropriate, this court is entitled to infer that there has been an unreasonable exercise by the Secretary of his discretion and will interfere.

In this regard it seems to me that the position is not entirely different from that of, for example, a court of appeal hearing an appeal in a criminal case against a sentence imposed by a lower court, ..."

In I T C 1351 at p 63 Friedman, J, reiterated

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his view and added:

> "It seems to me ... that where one is concerned with a permitted appeal against the exercise by the Commissioner of a discretionary power, then the approach of this court should be similar to that adopted by appeal courts in general when considering appeals against decisions involving the exercise by the court a quo of a discretion."

In my view the above passages cannot be reconciled with the approach of this Court in Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue 1944 AD 142. With reference to the provisions of the Income Tax Act 40 of 1925, Centlivres, JA said (at p 150):

> "That the Legislature apparently thought that it was necessary to give a special right of appeal in cases where a matter is left to the discretion of the Commissioner appears from a number of instances where that special right is conferred. ... In all these cases it seems to me that the Legislature intended that there should be a re-hearing of the whole matter by the Special Court and that that Court could substitute its own decision for that of the Commissioner. For, as CURLEWIS, J.A., pointed out in Bailey v. Commissioner for Inland Revenue (1933, A.D. at p. 220), the

Special Court is not a Court of appeal in the ordinary sense: it is a court of revision."

It seems clear, therefore, that in cases involving the exercise of a discretion by the Commissioner the Special Court on appeal to it is called upon to exercise its own, original, discretion and that the views expressed by Friedman, J, are not well-founded. That much was indeed common cause at the hearing of this appeal. And since the appeal is directed against the penalty determined by the court a quo, it is immaterial whether the Commissioner was entitled to delegate his function to the aforesaid committee.

It was also common cause that this Court will interfere with the determination of the extent of a penalty (or the exercise of any discretion) by a Special Court only on the limited grounds on which a value judgment of a court of first instance may be set aside or varied on appeal. Prior to the enactment of s 86A

/of ...

of the Act in 1976 (by virtue of Act 103 of 1976) such a determination would have been final unless it was erroneous in law: Rand Ropes case at p 150. S 86 A now provides for a full right of appeal against any decision of a Special Court on issues of fact or law. As was pointed out by Trollip, JA, in Hicklin v Secretary for Inland Revenue 1980 (1) SA 481 (A) 485, such an appeal "is therefore a re-hearing of the case in the ordinary well-known way in which this Court, while paying due regard to the findings of the Special Court on the facts and credibility of witnesses, is not necessarily bound by them". Having pointed out that the section is silent about the powers of this Court in such an appeal, Trollip, JA, went on to say that it was manifestly the intention of the legislature that this Court was to have those general powers that are conferred upon it by s 22 of the Supreme Court Act 59 of 1959. In my view it is implicit in these dicta that

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in an appeal from a Special Court those powers should be exercised according to the principles and subject to the restrictions applicable to appeals in general. And, there is indeed no reason to differentiate between an appeal from a Special Court and an appeal from a local or provincial division. Unlike the position obtaining in a Special Court where a decision is given on facts which may not have been considered by the Commissioner, this Court hears an appeal from a Special Court on the record of the proceedings in that court. It follows that if a decision of a Special Court is based on the exercise of a discretion, this Court will interfere only if the Special Court did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle: Ex parte Neethling and Others 1951 (4) SA 331 (A) 335.

I turn to the facts of the present appeal. Only the respondent gave evidence but his testimony must be read in conjunction with certain information

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conveyed on his behalf to the appellant. That information is contained in the respondent's formal objection to the additional assessments which formed part of the dossier placed before the Special Court by the appellant in terms of regulation B 3 of the regulations made under the Act (GN R105, Government Gazette Extraordinary 1011 of 22 January 1965). The gist of the letter of objection was that throughout the relevant period the respondent employed a firm of accountants to maintain proper books of account for the respondent's business from information supplied by the respondent and to draw up tax returns reflecting the respondent's true income and expenditure; that the firm chose to disregard the figures in the respondent's rough cash books and employed a "short-cut" method of bookkeeping which had the effect of drastically reducing the true revenue of the business; that this caused the firm to understate the respondent's income in the tax returns prepared and

/submitted ...

submitted by it on behalf of the respondent, and that the latter was unaware of the firm's failure to maintain proper books and to submit accurate returns, there being no question of collusion between the firm and the respondent.

There is no doubt that the appellant's representative in the court a quo accepted that these explanations were true. At the outset, and before evidence was led, he made it clear that no intention to deceive was being imputed to the respondent and that the latter was not to blame for the understatement of his income in the relevant returns. The appellant's representative also accepted that those facts constituted extenuating circumstances but submitted that the respondent should be penalised for the deceit of his agents.

The gist of the respondent's evidence, and the court's impressions of the respondent as a witness, appear from the following extract from the judgment of

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> taking all the circumstances into account and without setting off with any mathematical precision interest which might have been earned by the taxpayer from the tax withheld over the years against that which the full R15 590,00 paid by the taxpayer as a penalty might have yielded to the revenue, an appropriate penalty should not exceed the sum of R3 000,00. Such an amount, which cannot conceivably be regarded as trifling to a person of the taxpayer's means, enjoying the life-style he does, will certainly bring home to him the lesson which the legislature sought to teach errant taxpayers by providing for a penalty in circumstances such as are present here. A lesser penalty would not serve the legislature's purpose. On the other hand, one as heavy as that deemed proper by the 'penalty fixing committee' is out of all proportion to the wrong committed. The punishment must fit the crime, in tax matters no less than elsewhere."

It will be recalled that in terms of s 76 (2) (a) the Commissioner may not remit the penalty imposed under subsection (1), or any part thereof, if he is satisfied that any act or omission of the taxpayer referred to in that subsection was done with intent to evade taxation, unless he is of the opinion that there were extenuating circumstances. The Special Court's

/approach ...

approach was clearly that because in its view the respondent's agents had acted with intent to evade taxation, the penalty could not be remitted unless extenuation existed. Assuming that such intent can be ascribed to the aforesaid firm, I am not satisfied that the court a quo adopted the correct approach. The key words of s 76 (2) (a) are "any act or omission of the taxpayer ... done with the intent to deceive", and it is certainly arguable that this phrase applies only to an actual - and not also an imputed - intention of the taxpayer. However, in view of the conclusion at which I have arrived, I find it unnecessary to decide this point. I shall therefore assume in favour of the appellant that the penalty could not be remitted unless extenuating circumstances were present.

Counsel for the appellant submitted that the court a quo misdirected itself in a number of respects.

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In the first place it was contended, with reliance on I T C 1331, 43 S A T C 76, 84, that the court's approach should have been by how much the penalty prescribed by s 76 (1) should be abated downwards (if at all), and that the court erred in law in simply coming to the decision that a penalty of R3 000 should be imposed. Now, it it true that one should have regard to the fact that unless s 76 (2) is applied, the penalty payable in terms of subsection 1 (b) is an amount equal to twice the additional normal tax assessed with reference to the undisclosed income. But although this was not spelled out in the judgment there is no reason to doubt that the court was aware of the effect of s 76 (1) (b). Indeed, in the judgment the penalty determined on behalf of the appellant was referred to as "being 50% of the maximum penalty". Consequently it cannot be said that the court fixed a penalty of R3 000 without regard to the fact that some R31 000 would have

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been payable in the absence of a remission in terms of s 76 (2) (a) (read with s 83 (13) (b)).

In the second place it was submitted that the court erred in taking into account the respondent's financial position as an extenuating factor. The short answer is that the court did not do so. Having found that there were extenuating circumstances, the court merely said that a penalty of R3 000 could not conceivably "be regarded as trifling to a person of the taxpayer's means, enjoying the life-style he does". It appears to me that the submission in question tends to confuse two separate enquiries. If intent to evade taxation was present, the first enquiry in terms of s 76 (2) (a) is whether there were extenuating circumstances. If the answer is in the affirmative, the second enquiry is whether the additional charge or any part thereof should be remitted. For the purposes of the second enquiry regard may be had not only to the extenuating

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circumstances but to all relevant factors. And the means of the taxpayer clearly may be - and in the present case were - a relevant factor in determining the quantum of the reduced penalty.

Counsel for the appellant also submitted that the court a quo misdirected itself in regard to other aspects. It suffices to say that the further submissions are without substance.

It was not contended that the penalty determined by the court a quo was one at which no reasonable court could have arrived. Nor do I think that it was.

The appeal is dismissed with costs.

H.J.O. VAN HEERDEN, JA

CORBETT, JA
JOUBERT, JA
GALGUT, AJA
NICHOLAS, AJA

CONCUR