IN THE KWAZULU-NATAL HIGH COURT

DURBAN AND COAST LOCAL DIVISION

REPUBLIC OF SOUTH AFRICA

CASE NO: 14551/2009

In the matter between:

PETER DAVIS Applicant

and

THE COMMISSIONER:

SOUTH AFRICAN REVENUE SERVICES Respondent

Delivered:

July 2010

JUDGMENT

HUGHES-MADONDO AJ

In these motion court proceedings the applicant seeks an interim order interdicting the respondent from utilising the collection measures provided for in the Income Tax Act 58 of 1962 in order to collect an amount of R330, 299.59 together with interest thereon. The applicant seeks a further order namely that the respondent be directed to institute a civil action in accordance with the Rules of Court to recover the aforesaid amount.

The salient background facts which are relevant to the adjudication of the application are set out in brief outline below.

The applicant is a 63 year old former editor of the Independent Newspaper. Before he retired in 2005 the applicant was compelled to change from a pension fund to that of a provident fund. When this came about he noticed and in fact brought it to his employers (human resources department) attention, that too much tax was being deducted from his provident fund. The Human Resources Department promised to look into the matter. According to the Applicant he had duly paid taxes in respect of both funds.

Shortly after his retirement he received a cheque in the amount of R330, 299.59 from the respondent. No explanation accompanied this cheque and the applicant assumed that the cheque was a refund, resulting from him being overtaxed by the respondent. He banked the cheque and has since used the entire amount.

Sometime in 2006 the applicant received notification of his annual assessment from the respondent. This notification indicated for the very first time that he owed an amount of R330, 299.59 which was attracting interest. This amount it would seem had been brought forward from a previous year's assessment. The applicant immediately approached the respondent's Durban office. At these offices of the respondent he was attended to by one of the respondent's employees, Mr. Robertson, who advised him that his pension had

been ‘double taxed’. Mr. Robertson said he would assist the applicant and apply for the amount to be written off as clearly there had been a mistake. Robertson also warned that the process was a lengthy one and would take a while.

In 2008 the applicant was telephonically contacted by Dolly Dlamini who advised that she was in the employ of the respondent, specifically the collections department. Ms. Dlamini told the applicant that the respondent intended to proceed with collection proceedings against him for the amount owed plus the interest thereon.

A meeting was held at the respondent’s Durban offices on the 5 February 2008. Present at the aforesaid meeting were the applicant and his attorney. On behalf of the respondents were Ms Dlamini, Mr. Mabaso and Anand Govender, the later was employed in the respondent’s legal department. The applicant alleges that at this meeting the respondent was unable to provide an explanation as to how it had come about that the applicant came to owe the amount claimed by the respondent. At this stage the amount due inclusive of interest was R619, 817.40.

In the circumstances the applicant’s case is that the respondent is not entitled to invoke the collections procedure at its disposal set out in section 91(1)(b) and 99 of the Income Tax Act,1962(“the Act”). Sections 91(1) (b) and 99 of the Act respectively allows the respondent to take judgment against a taxpayer without notice and further allows the respondent to have any amounts due to taxpayers by third parties paid over directly to

the respondent also without any notification to the taxpayer. The applicant contends that the amount being claimed by the respondent does not constitute a tax debt but was rather an ordinary debt and as such the respondent had to proceed by way of a civil action to recover the amount owed and could not invoke the collection procedure mentioned above. That being the case the applicant submitted that in terms of section 11 (d) of the Prescription Act 68 of 1969 ("Prescription Act") the time period for the respondent to claim for the ordinary debt owed by the applicant had in fact prescribed.

The respondent on the other hand averred that the payment received by the applicant in 2006 was an amount that was supposed to have been credited to the applicants employers account, Independent Newspapers, and *"By reason of an administrative error"* the amount was credited to the applicant's account instead.

The respondent averred that the erroneous payment made to the applicant had been paid in terms of the fourth schedule of the Act. It argued, however, that in terms of paragraph 28 (1) (b) of the aforesaid schedule it was entitled to invoke paragraph 28 (7) of the same schedule. The respondent contended that in terms of paragraph 28(7) any amount paid or due in terms of paragraph 28 was recoverable in terms of paragraph 28(7) 'as if it were a tax'.

Regarding the issue of prescription the respondent averred that the debt of the applicant fell into the category of "a debt in respect of any taxation imposed or levied by or under

any law" in terms of the provisions of section 11(a) (iii) of the Prescription Act and as such the aforesaid debt in terms of section 11 (a) of the Prescription Act, would prescribe after 30 years.

A good starting point is to set out paragraph 28 (1) (a) and (b) of the fourth schedule of the Act the relevance will become apparent later in the judgment.

"28(1) (a) and (b)-

28(1) There shall be set off against the liability of the taxpayer in respect of any taxes (as defined in subparagraph (8) due by the taxpayer, the amounts of employees tax deducted or withheld by the taxpayer's employer during any year of assessment for which the taxpayer's liability for normal tax has been assessed by the Commissioner and the amount of provisional tax paid by the taxpayer in respect of any such year, and if-

(a) The sum of the said amounts of employ tax and provisional tax exceeds the amount of the taxpayer's total liability for the said taxes, the excess amount shall be refunded to the taxpayer; or

(b) The taxpayer's total liability for the aforesaid taxes exceeds the sum of the said amounts of employees tax and provisional tax, the amount of the excess shall be payable by the taxpayer to the Commissioner."

The crisp issue in this matter, is to establish whether the amount owed by the applicant amounts to a tax debt or an ordinary debt.

The starting point therefore is to establish if the amount owed falls within that defined in paragraph 28 above. If it does fall within paragraph 28, the respondent may invoke paragraph 28 (7) to recover from the applicant the amount owed. Obviously if the amount owed falls within that defined in paragraph 28, the amounts can only be regarded as a tax debt that is 'a debt in respect of any taxation imposed or levied by or under any law' and therefore as such, the applicant's indebtedness to the respondent would not have prescribed. However, if the amount owed is an ordinary debt then the respondents claim against the applicant would indeed have prescribed.

I set out paragraph 28(7) below for easy reference:

Section 28(7) reads as follows:

"If the Commissioner, *purporting to act* under the provisions of this paragraph, *pays to any person by way of a refund any amount which was not properly payable to that person under those provisions or which was in excess of the amount due to such a person by way of a refund under those provisions,* such amount or the excess, as the case may be, shall forthwith be repaid by the person concerned to the Commissioner and *shall be recoverable by the Commissioner* under this Act as if it were a tax." [My emphasis in italics]

On analysing the evidence it is important to establish what meaning is given to the word purport [ing] as a verb. In the Oxford Shorter Dictionary the word *purport* denotes:

"**1**.*trans*...; to convey to the mind; to mean, imply. **b**. Const. inf.: to profess or to claim by its tenor ..."

Turning to deal with the various affidavits filed, it is noted that as at paragraph 6 of the applicant's replying affidavit, the applicant admits that his employer deducted the tax from the lump sum payment portion of the provident fund due to him and paid it over to the respondent in terms of the provisions of the fourth schedule of the Act and thus the said payment fell into the category of employees tax or as commonly known, "pay as you earn" (PAYE) tax.

In paragraph 8 of the respondents answering affidavit, the respondent states that the PAYE payments received emanated from the employer of the applicant and as such should have been credited to the employer's account, however in error, was credited to the applicant's account instead.

It is common cause that the respondent paid monies over to the applicant. It would seem that the amount paid differs between the parties. The respondent says that an amount of R332, 000.00 amongst others was paid while the applicant avers that the amount was in fact R 330, 299.59. The respondent though has put up a schedule of the amounts paid over to the applicant and the former amount amongst others is reflected.

In the applicant's founding affidavit paragraph 8, he states that when he received the payment from the respondent he "assumed that he (sic) had been overtaxed and that this was a refund from the respondent".

On a careful analysis of the aforesaid, to my mind, both parties knew when the payment was being made and received, that the payment was linked to the applicant's lump sum payment in terms of PAYE. On the one hand we had the applicant who assumed it was a PAYE refund while on the other hand the respondent had thought it was crediting the applicant's employer in respect of PAYE it had received in terms of the provisions of the fourth schedule of the Act.

It is common cause that when the respondent received the monies from the employer it did so in terms of the fourth schedule of the Act. Further as stated above when the applicant received the monies he assumed it was a refund linked to the over payment of taxes associated with his provident fund.

According to paragraph 28 (1) (a), a refund is payable, if a taxpayer pays taxes in excess of that taxpayers liability, whilst, paragraph 28(1) (b), requires a taxpayer to pay to the Commissioner any excess payable by the taxpayer.

In my view the applicant rightly conceded that the deduction and payment of the amount in question by his employer was associated with the payment of the employee's tax in

terms of the fourth schedule and furthermore that he regarded the monies paid to him by the respondent as being a refund associated or linked to the aforesaid taxes. That to my mind clearly brings paragraph 28(1) (a) set out above into play and the inference is inescapable that the monies were refunded in terms of the aforesaid paragraph. The problem arises when the respondent realised that in the entire transaction it now has credited the wrong account with the refund. In my view this is when paragraph 28(1) (b) comes to the fore. The respondent by virtue of an error has credited the wrong account. In doing so the applicant has received an amount in excess of what was rightfully due to him. To my mind the payment made to the applicant can only be construed as a payment related to taxes and as such even though an error has occurred that payment must be taken as being tax related. Can the respondent then invoke paragraph 28(7)?

It is my view that it can. The only conclusion that I arrive at is that when the respondent credited the applicant it did so "thinking, professing or claiming" to do so in terms of paragraph 28 (1) (a) and through an administrative error it paid the wrong party. In short the error in payment was executed in accordance with paragraph 28 (1) (a). This was because the respondent was processing a refund in favour of the employer when the error occurred and the applicant was paid instead. Having made the aforesaid payment to the applicant the respondent was purporting to act in terms of 28(1) (a) since it "thought, professed or claimed" to make the payment to the employer of the refund in terms of paragraph 28(1) (a). It therefore stands to reason that when the applicant received such amount which was in excess of what he was entitled, the respondent thought, professed or

claimed to be acting in terms of the provisions of paragraph 28. Therefore the respondent could invoke paragraph 28(7) in order to recover the excess received by the applicant that it was not entitled to as is provided for in paragraph 28 (1)(b).

It is common cause that there have been no reported cases in South African jurisprudence since 1927, in which the expression "purporting to act" has been considered.

In the case of *Heinz v Friedrick* **1927 SWA 100 at page 103** the court recognised that the expression "purporting to act" can be ambiguous. In this case the plaintiff had entered into an agreement with the mother of the defendant who "purported to act" as natural guardian of the defendant. The court found that the expression purporting to act 'might mean she [the mother] was not the guardian but held herself out to be such, or she was the guardian and intimated that she was acting as such. This ambiguity is embarrassing and must be clarified...'

The respondent in the present case argued that this court must find as was done as far back as in *Heinz* case in 1927, that the expression "purport to act" in this case is ambiguous. In support of this proposition the respondent argued that "purport to act" has been used interchangeably as 'holding oneself out as acting in terms of a specific provision in a statue or contract', *Heathfield v Maqelepo* **2004 (2) SA 636 (SCA)** and 'intending to act in terms of such provision but, for any number of reasons, not actually doing so or being authorised to do so', *Nel & Others v Metequity Ltd & Another* **2007 (3)**

SA34 (SCA). According to the respondent the first meaning connotes some outward manifestation of an intention to act while the second requires only a subjective intention to act. The respondent contends that in this case the second meaning is appropriate when analysing the word purport as it appears in paragraph 28(7).

The applicant on the other hand argued that the proposition of the expression "purporting to act" made in *Heinz* cannot be so in the present case. It submitted that the ambiguity in *Heinz* case was as a result of there being two possible interpretations to the phase "purporting to act". Further, that both interpretations depended on a person outwardly conveying that she was acting as the guardian and therefore there was no consideration that a person was "purporting to act" without outwardly demonstrating that they were so acting. The applicant further argued that the ordinary grammatical meaning of purport was clear and therefore as *per Lord Denning at page* **490** in the case of *Joseph v Joseph* **1966 3 All E.R. 486**, the ordinary grammatical meaning should be given to purport as it appeared in paragraph 28(7).

I disagree with the respondent's argument and am of the view that the ordinary grammatical meaning should be given to "purporting to act" as appears in paragraph 28(7). I have clearly set out above that if the ordinary meaning is given, no ambiguity arises when one reads paragraph 28(7) with the rest of paragraph 28 of the fourth schedule of the Act.

In the result the respondent is entitled to invoke paragraph 28(7) of the fourth schedule of the Act in order to recover what it thought, professed or claimed to have paid to the applicant in error. The application instituted by the applicant seeking an interdict must therefore fail. As regards the costs, these are awarded to the successful party that being the respondent.

The order I make is as follows:

The application is dismissed with costs.

HUGHES-MADONDO AJ

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APPEARANCES:

Counsel for the plaintiffs: A.A.Gabriel

Attorneys for plaintiffs: Garlicke & Bousfeild Inc.

Counsel for the defendants: C.J.Pammenter SC

Attorney for defendants: The Office of the State Attorney

Heard on: 26 March 2010

Delivered on: July 2010