ADEQUATE REASONS: SPRIGG'S PREJUDICE ADDS TO JURISPRUDENCE

By Johan Kotze

A basic constitutional right comprises the provision of written reasons where one's rights have been adversely affected by administrative action. This right is given effect in section 5 of the Promotion of Administrative Justice Act.

It is interesting to compare the current cautious right to reason with the generous right to reason per the Interim Constitution, which gave every person the right to be furnished with reasons, in writing, for administrative action that affected any of his/her rights or interest, unless the reasons for such action have been made public.

Taxpayers aggrieved by an assessment may request SARS, in terms of rule 3 of the Tax Court Rules, to provide "adequate reasons" for the assessment. These rules are promulgated in terms of section 107 of the Income Tax Act, the rules of which prescribe:

- the procedures to be observed in lodging objections and noting appeals against assessments;
- procedures for alternative dispute resolution; and
- the conduct and hearing of appeals before a tax court.

SARS may, where adequate reasons have already been provided, refuse to give further reasons. But it is obliged to refer the taxpayer to the documents providing those reasons.

Where a taxpayer is not furnished with adequate reasons the Tax Court can, in terms of rule 26(1)(b)(ii), order SARS, with or without direction, to furnish reasons that, in its opinion, are adequate.

What would be adequate for one person may not be adequate for another, and for a SARS emanating from a previous regime, where even the right to reasons was a foreign concept, the provision of "adequate reasons" would require a total mind shift.

The standard for what constitutes "adequate reason" – and accepted by our Supreme Court of Appeal (SCA) in the *Minister of Environmental Affairs & Tourism & others v Phambili Fisheries (Pty) Ltd & another* case, now commonly referred to as the "Phambili test") – was described by the Federal Court of Australia in *Ansett Transport Industries (Operations) Pty Ltd & another v Wraith & others* as follows:

> "[T]he decision-maker [must] explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'
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> "This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only."

It seems that SARS, per its Guide on Tax Dispute Resolution, may only subscribe to what the decision-maker should explain so that the aggrieved taxpayer would be in a position to decide whether the decision is worth challenging, and not how to explain it.

The Phambili test actually prescribes a step-by-step approach on how the decision-maker should approach this request for reasons. It does so by setting out the decision-maker's understanding of the relevant law, the facts and the reasoning processes.

The late Judge Jajbhay considered rule 26(1)(b) in ITC 1811 by way of an excellent exposé of "adequate reasons" It was a victory for taxpayers in general. He ruled that the Tax Court could direct SARS to provide *"such reasons as in the opinion of the court are adequate"*, but the court might also remit back to SARS without directions.

The judge considered that a more instructive interpretation would have been to read rule 26(1)(*b*)(ii) to offer the court the option of directing SARS to provide reasons, *simpliciter*, leaving it to the discretion of SARS to decide what reasons would be adequate. The other option was to give such directions to SARS as would, in the opinion of the court, ensure as far as possible, that the reasons would be adequate.

Surely where SARS has neglected its obligation and found not to have given adequate reasons, the court must take control of the matter and ensure that SARS provides reasons that the Court considers adequate. This literal interpretation seems to be the intention of the legislature.

Judge Jajbhay remitted the matter to SARS for the provision of adequate reasons, but without direction on the substance of the reasons.

The law pertaining to "adequate reasons" for aggrieved taxpayers was again considered in *Commissioner for South African Revenue Service v Sprigg Investment 117CC t/a Global Investment.*

Sprigg was the subject of one of SARS's tax audits. SARS took issue with Sprigg's income tax, VAT and employees' tax. Sprigg was aggrieved by SARS's assessments and requested SARS to furnish reasons for the assessment in terms of rule 3.

The request contained 97 detailed questions, the product of an over-enthusiastic attorney. According to SARS the "request require[d] a response of such extraordinary nature that any response would be akin to responding to questions usually asked in a Court of law". SARS then gave brief explanations of each tax item assessed and referred Sprigg to SARS's letter of assessment and an earlier letter of findings.

Not content with SARS's response, Sprigg requested the Tax Court to order that its request for reasons be remitted to SARS for reconsideration, with directions issued by the Tax Court to ensure that SARS provided adequate reasons.

The Tax Court ordered SARS to give adequate reasons for the assessments that were structured (a la Phambili) "so as to motivate his assessment clearly and set out the findings of fact on which his conclusions depend; the relevant law upon which his conclusions are based; and the reasoning process which led to those conclusions".

SARS appealed the Tax Court decision, directly to the SCA, but Sprigg was not content to merely defend the Tax Court's decision. He questioned the SCA's jurisdiction to entertain the matter, SARS's *locus standi* to appeal directly to this court and the appealability of the order of the Tax Court.

Regrettably for Sprigg, his defence failed.

The SCA held that adequate reasons had been provided in the letter of assessment – which Sprigg was to have read with the letter of findings – which explained SARS's reasoning; that there was therefore no reason why Sprigg could not formulate his objection. The SCA was also inclined to agree that Sprigg was employing delaying tactics.

The SCA held that the issue was indeed appealable, but then had a go at the Tax Court, questioning its composition and the manner in which the judge had dealt with the matter.

Section 83(4) of the Income Tax Act provides that the Tax Court should comprise:

- a judge or an acting judge of the High Court, who shall be the President of the Tax Court;
- an accountant; and
- a representative of the commercial community who shall be of good standing and have appropriate experience.

In matters of law the President of the Tax Court shall sit alone.

Rule 26(8), however, provides that where application is brought under this rule the President of the Tax Court may also sit alone. To the extent that rule 26(8) provided otherwise, the SCA held that it had to be *ultra vires*.

The SCA held that Sprigg's enquiry involved both questions of law and fact and should have been conducted by the full court. The Tax Court's proceedings were, therefore, a nullity and the Tax Court's order was of no force or effect.

Nor was the manner in which the Tax Court dealt with the application acceptable to the SCA. The judge of the Tax Court had not demonstrated independent reasoning, and the judgment was "as good as a bare order and quite meaningless". The SCA found it regrettably impossible to fathom why the Tax Court had found in Sprigg's favour.

The SCA then referred to the Constitutional Court's reiteration of the importance of a court's written reasons; that the failure to furnish reasons might have been a constitutional violation.

The Phambili test seemingly sets not so high a standard as for SARS to convince a taxpayer of its view; it merely requires SARS to explain why a taxpayer dissented and to furnish the actual reasons for the assessments, which should then enable the taxpayer to launch his objection.

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