Constitutional rights and the Sprigg paradox

By Johan Kotze and Kelly Pretorius

Benjamin Franklin famously said: "Certainty? In this world nothing is certain but death and taxes."

While both are inevitable, we suggest that SARS is a far more cunning adversary than the Grim Reaper, who calls but once to collect his dues and does not enlist the help of the judiciary.

All taxation, in one way or another, may impact upon fundamental human rights. Yet to ensure that the imposition is not absolute, section 5 of the Promotion of Administrative Justice Act provides that every person whose rights may have been materially and adversely affected by administrative action may request written reasons for that action from the administrator responsible.

When a court is dealing with a person's constitutional rights and having to consider whether they are being infringed, a purposive approach to the democratic values derived from the Constitution's birth and the circumstances from it evolved is desirable.

In addition, rule 3 of the Tax Court Rules provides that taxpayers aggrieved by an assessment may request SARS to provide "adequate reasons" for the assessment.

Should a taxpayer consider that adequate reasons have not been furnished, rule 26(1)(b)(ii) provides that the Tax Court may order SARS, with or without direction, to furnish reasons that, in its opinion, are appropriate and adequate.

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

Perusal of the relevant judgement leaves the impression that these precious constitutional values have not been nurtured; that the SCA's approach was illogical, as despite having been couched as the *ratio decidendi,* the bulk of the judgment is mere *obiter dicta,* i.e. mere observations that should not have affected the reasons for the decision.

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

Sprigg's request for reasons contained 97 detailed questions – seemingly the product of an over-zealous 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 the taxpayer to SARS' letter of assessment and an earlier letter of findings.

Not content with SARS' response, Sprigg requested the Tax Court to order that its request for reasons be returned to SARS for reconsideration, with the necessary direction to ensure that SARS provided adequate reasons.

The Tax Court ordered SARS to give adequate reasons for the assessments that were structured "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 took the decision of the Tax Court on appeal to the SCA, but Sprigg was not content to merely defend the decision of the court *a quo*. Sprigg questioned the SCA's jurisdiction to hear the matter, SARS' *locus standi* to appeal directly to the appeal court, as well as whether the order of the Tax Court could lawfully be appealed against.

The SCA's judgment is critical, as many lawyers will no doubt be confronted with similar pitfalls in the future. And it is contentious because the SCA held that the Tax Court was not properly constituted, and was therefore not empowered to consider the taxpayer's application or to issue its order.

Some may argue that this finding renders the rest of the judgment *obiter*, whereas others may even go so far as to argue that the SCA was not constitutionally entitled to consider the appeal at all, regardless of whether the statements made by it were mere *obiter* or not.

This all turns on the SCA's finding that the Tax Court was, ironically, not properly constituted to consider the taxpayer's application and to issue the order.

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 of good standing and appropriate experience.

In matters of law the President of the Tax Court sits alone.

However, rule 26(8) provides that where an application is brought under this rule the President of the Tax Court will also sit alone. The SCA held that to the extent that rule 26(8) provided otherwise, the rule is *ultra vires*.

Sprigg's case had been heard before a single judge in the tax court. However, the SCA held that Sprigg's inquiry involved both questions of law and fact and as such, should have been conducted by a full Tax Court. The Tax Court's proceedings were therefore held to be a nullity and the order of the court *a quo* was held to be of no force or effect.

If the case *a quo* was a nullity, it is as if previous proceedings never occurred. How then can there be a valid appeal? The SCA is only empowered to hear matters on appeal in terms of the Constitution. It should therefore have declared the matter a mistrial and refused to hear any further argument on the matter.

Ironically, the SCA chastised the judge *a quo* for handing down a poor judgment and violating Constitutional principles. We recommend that the SCA should consider removing the plank from its own eye.

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