

VAT vendor wins case against State

By  Heinrich Louw

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The Supreme Court of Appeal (SCA) on 12 December 2014 handed down judgment in the matter of Director of Public Prosecutions, Western Cape v Parker (103/14) [2014] ZASCA 223.



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In this matter a close corporation, being a registered vendor for purposes of value-added tax (VAT), together with its sole representative, Parker, were charged in the regional court on several counts.

The charges included:

- breaching s28(1)(a) of the VAT Act No 89 of 1991 by failing to submit certain VAT returns; and
- common law theft for failing to pay certain amounts of VAT to the South African Revenue Service (SARS).

The close corporation and Parker pleaded guilty and were convicted and sentenced.

Parker was sentenced to a fine in respect of breaching s28(1)(a) of the VAT Act, and was sentenced to five years' imprisonment in respect of the common law theft conviction.

Parker appealed to the Western Cape High Court in respect of his sentence of imprisonment.

However, after certain questions were raised by the High Court as to whether Parker should have been charged with common law theft in the first instance, Parker also appealed against his conviction. The close corporation did not appeal. The High Court held that Parker did not commit common law theft because the money belonged to the vendor and not to SARS, and set the conviction (and sentence) aside.

The State subsequently approached the SCA on a point of law. The SCA was tasked with answering the question whether a

VAT vendor who has misappropriated an amount of VAT which it has collected on behalf of SARS can be charged with the common law crime of theft?

The State argued that:

- a vendor acts as an agent for SARS;
- a vendor effectively holds VAT in trust for SARS;
- if the vendor uses such VAT for another purpose, the vendor is guilty of theft, irrespective of whether the vendor is the owner of the money; and
- only if the vendor is not obliged to keep the VAT in a separate account, and it has sufficient liquid fund available to cover the VAT, would it not be theft to use the VAT amount for other purposes.

The SCA disagreed with SARS, stating: "I do not believe, however, that s7(1) of the [VAT] Act either expressly or impliedly creates a relationship of trust. On the contrary, it is clear to me that the relationship created by the [VAT] Act is one of a debtor and his creditor."

Peculiar nature

The SCA further described the relationship between a VAT vendor and SARS as follows:

"It is clear that the [VAT] Act is a scheme with its own directives, processes and penalties. The relationship it creates between SARS and the registered vendor is sui generis - one with its own peculiar nature. The [VAT] Act does not confer on the vendor the status of a trustee or an agent of SARS. If it did, the vendor would either have to keep separate books of account or alternatively, would have to be sufficiently liquid at any given time in order to cover the outstanding VAT. The Act makes no provision for this situation nor does it seek to compel a vendor to keep separate books of account in respect of VAT."

It became clear during the hearing that the reason for the State having charged Parker with theft, and for approaching the SCA to rule on the matter, was that it sought to procure more severe penalties where transgressions involving VAT are concerned. The penalties contemplated in the VAT Act were too lenient. The SCA was not in favour of extending the crime of common law theft to apply to the failure to pay VAT, and suggested that the appropriate solution for the State would be to approach the legislature and amend the VAT Act.

Accordingly, the State's appeal failed. The State was also ordered to pay the costs of Parker in opposing the appeal. The judgment is a welcome clarification of the position that a VAT vendor holds in relation to SARS. It is clear that a VAT vendor does not 'collect' VAT 'on behalf of' SARS from the recipients of goods or services, but that VAT (at least in terms of section 7(1)(a) of the VAT Act) is a tax imposed on the VAT vendor itself, which the VAT vendor is obliged to pay as debtor to SARS.

This analysis is however not necessarily applicable to, for example, the relationship between an employer and SARS in respect of employees tax. It is submitted that in such circumstances, an employer may very well be regarded as an agent for SARS, holding amounts deducted from the remuneration of employees in trust for SARS. Where such amounts are misappropriated, a charge of common law theft could very well succeed.

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