

Case Note

Marshall NO and Others v Commissioner, South African Revenue Service [2018] ZACC 11

Constitutional Court

By: Martin van Staden

Facts

The South African Red Cross Air Mercy Service Trust (the Trust), an NPO, argued against the South African Revenue Service (SARS) that the services it provides to provincial health departments qualifies as “deemed services” under section 8(5) of the Value-Added Tax Act. It thus argued that payments made to it by the health departments qualified for VAT zero-rating under section 11(2)(n) of the Act.

In the Supreme Court of Appeal, Dambuza JA referred to an interpretation note of SARS which sets out how “public authorities” would be treated under VAT. Dambuza JA wrote that interpretation notes “constitute persuasive explanations in relation to the interpretation and application of the statutory provision in question”.

The Trust argued that the court should give no consideration to interpretation notes and must come to the meaning of a statutory provision independently. By giving consideration to interpretation notes, the right to equality (section 9) and that of access to the courts (section 34) in the Constitution would be violated, as there would be unequal treatment of the parties in the case (and thus fall foul of a fair hearing). The Trust also argued that it would violate the rule that ambiguous tax provisions should be interpreted in favour of the taxpayer (the *contra fiscum* rule).

SARS argued that the court may consider an administrative body’s interpretation of statutory provisions to the extent that it proves that the legislation has been interpreted consistently for a substantial period of time by those who apply it.

Legal issue(s)

The relevant legal issue in this case note is as follows:

Whether a government entity’s own interpretation of the laws it must apply, can play a substantive, if any role, in the final interpretation of the law by courts.

In other words; is it as simple as government formulating its own, beneficial, interpretations of statutory provisions, for that legislation to be interpreted in its favour?

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Judgment

The unanimous Constitutional Court, per Froneman J, held that the Supreme Court of Appeal came to its conclusion independently of what the interpretation note said, and simply used the interpretation note to confirm its interpretation. The Trust's application for leave to appeal was thus refused, as the prospects of success were not good.

Paragraphs 9 and 10 of the judgment, are, however, of interest.

Froneman J asked why a "unilateral practice" (for instance, formulation of its own interpretation notes) by the executive government should play a role in the determination of the meaning of statutory provisions, especially if that entity within government is one of the litigating parties before the court – as is the case with SARS, in this context. Froneman J concludes:

"In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided."

Where the government's interpretation is simply evidence of practice recognised by all relevant parties, it is conceivably allowable.

Analysis

The fifth and sixth Imperatives of the Rule of Law are relevant to the significance of this case. For more on the Imperatives, see <https://ruleoflaw.org.za/rule-of-law/>.

The Fifth Imperative declares:

"The sole legitimate authority for making substantive law rests with the legislature, which authority shall not be delegated to any other entity."

The Sixth Imperative declares:

"No law shall have the aim or effect of circumventing the final authority of the courts."

Giving interpretive weight to a note from the executive government would have fallen foul of both these implications of the Rule of Law, which is co-equally supreme with the written text of the Constitution, by virtue of section 1(c) of the latter.

By considering an interpretive note by government as having weight in the interpretation of a piece of legislation, the executive branch of government would have been given law-making power. This is so because any language used by the legislature in the original legislation can simply be diluted and reinterpreted in interpretive notes, to produce whatever the respective executive entity wants.

Similarly, the notion of an interpretive note is itself problematic. The interpretation of statutes has historically been the domain of the judiciary. The First Imperative of the Rule of Law requires that the law must be clear, and, as a result, if there is a need for an interpretive note in the first place, it means the legislation in question was likely not clear and unambiguous enough for the administering entity to apply it as is. In any event, if this is the case, the courts must be called upon to bring clarity to the legislation. The executive entity must not, as a general rule, assume for itself the authority to do so.

Besides these general principles, the case itself has brought clarity to the status of government's own interpretation of legislation it has to apply. Having regard to government's interpretive notes must best be avoided and the courts must interpret the legislation in question independently.

While not an exhaustive endorsement of the fifth and sixth Imperatives of the Rule of Law, the judgment still stands as a ringing defence of the independence of the judiciary in the interpretation of the law and of the legislature in the making of the law; to the exclusion of the executive.

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