THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 218/2015

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **APPELLANT**

and

MARULA PLATINUM MINES LIMITED **RESPONDENT**

Neutral citation: *CSARS v Marula Platinum Mines* (218/2015) [2015] ZASCA 121 (22 September 2016)

Coram: Navsa, Cachalia, Tshiqi and Mathopo JJA and Fourie AJA

Heard: 08 September 2016

Delivered: 22 September 2016

Summary: Interpretation of s 23F(2) of the Income Tax Act 58 of 1962 (the ITA), read with the definition of 'trading stock' in s 1 of the ITA and the application thereof to the respondent's business operations: such operations involving a manufacturing process: respondent excluded unquantified sales of concentrate from its gross income under s 24M of the ITA: commissioner entitled to invoke s 23F(2) of the ITA by disallowing a percentage of the s 11(*a*) deductions claimed by respondent.

ORDER

On appeal from: The Tax Court of South Africa: Gauteng, (Victor J sitting as court of first instance):

1 The appeal is upheld and the cross-appeal is dismissed.

2 The respondent is ordered to pay the appellant's costs of appeal and cross-appeal, including the costs of two counsel.

3 The order of the Tax Court is set aside and replaced with an order in the following terms:

'(a) The appeal is dismissed.

(b) The assessments for the years 2007, 2008 and 2009 are referred back to the Commissioner for the South African Revenue Service to calculate the amounts added back in terms of s 23F(2) of the Income Tax Act 58 of 1962 so as to exclude overheads, but to include on-mine operation costs, concentrating and smelting operation costs, royalty fees and drying charges.

(c) The appellant is ordered to pay the respondent's costs of appeal.'

JUDGMENT

Fourie AJA (Navsa, Cachalia, Tshiqi and Mathopo JJA concurring)

[1] The appellant, the Commissioner for the South African Revenue Service (the Commissioner), appeals against the judgment of the Tax Court of South Africa, Gauteng (the Tax Court), upholding in part the appeal of the respondent, Marula Platinum Mines (Pty) Ltd (Marula), against the Commissioner's

assessments of the income tax payable by Marula for the 2007, 2008 and 2009 years of assessment (the years of assessment). The appeal is in terms of s 133(2)(*b*)(i) read with s 135 of the Tax Administration Act 28 of 2011 (the TAA). Marula has lodged a cross-appeal in terms of s 139 of the TAA, against the partial dismissal by the Tax Court of Marula's appeal against the Commissioner's assessments.

[2] The adjudication of the appeal involves the application and interpretation of s 23F(2) of the Income Tax Act 58 of 1962 (the ITA), read with the definition of 'trading stock' in s 1 of the ITA. In essence, the central issue for determination is whether the operations of Marula whereby mineral-bearing ore was extracted from the land and subjected to processes resulting in a mineral-bearing concentrate, amounted to a manufacturing process, with the result that the ore and concentrate constituted 'trading stock' as contemplated in s 1 of the ITA.

[3] It is necessary, firstly, to provide the factual background to the dispute between the parties. Those facts are largely common cause.

[4] Marula is a subsidiary of Impala Platinum Holdings Ltd, one of the world's primary producers of platinum group metals, ie platinum, palladium, gold rhodium, uridium and ruthenium (pgm's), as well as base metals such as nickel, copper and cobalt. During the years of assessment Marula was involved in mining in Limpopo. It did not own the land which it mined, but held mining rights in respect of the areas where it conducted its operations.

[5] Marula's operations comprised two distinct phases, namely:

Phase 1: The extracting of the ore from the underground rock and bringing it to the surface, such ore containing pgm's as well as base metals.

Phase 2: The crushing and milling of the mineral-bearing ore to expose the mineral elements and then subjecting it to a froth floatation process from which a mineral-bearing concentrate in powder form was derived.

[6] From the inception of its operations, Marula planned to sell the pgm's and base metals in the form of a concentrate. At no stage did Marula sell or trade in the mineral-bearing ore that it extracted during phase 1 of its operations. It was simply too bulky and therefore Marula was unable to economically transport the ore by road or rail. The concentrate in powder form derived from phase 2 of its operations could be economically transported and sold by Marula.

[7] Marula sold the concentrate to its fellow subsidiary company, Impala Refinery Services (Pty) Ltd (IRS),[1] in terms of a written contract concluded with IRS (the contract). The payment provisions of the contract were structured in such a way that the purchase price of the concentrate was dependent on the ruling market prices for the different pgm's, while payment by IRS in respect of the purchases of the concentrate, would only be made five months later. It is difficult to understand why it was necessary to defer payment by IRS in this manner, save that it allowed Marula, as recorded hereunder, to defer part of its income to the next tax year.

[8] In the result, Marula submitted returns for the years of assessment wherein it deferred, in terms of s 24M of the ITA, the inclusion in its gross income of the selling price for the concentrate to IRS (in respect of the last four months of each year), to the following year of assessment. However, the expenditure incurred by Marula in respect of the sales of the concentrate, was claimed as a deduction under s 11(*a*) of the ITA in the year that it was incurred, and not in the year of

[1] Both of which are wholly owned subsidiaries of Impala Platinum Holdings Ltd.

assessment that the selling prices of the concentrate were included in Marula's gross income. The expenditure consisted of on-mine operation costs, concentration and smelting operation costs, overheads, royalty fees and drying charges. Simply put ─ there was a disjuncture in a tax year between expenditure and income.

[9] The Commissioner took the view that, in respect of each of the years of assessment, Marula had correctly excluded unquantified sales of concentrate to IRS from its gross income under s 24M of the ITA. However, the Commissioner invoked the provisions of s 23F(2) of the ITA by disallowing a percentage of the s 11(*a*) deductions claimed by Marula in respect of each of the years of assessment. As will become apparent in due course, s 23F(2) provides that expenditure relating to the acquisition of 'trading stock' (which is generally deductible) is to be disregarded to the extent that any amounts relating to the disposal of that trading stock did not accrue during the same year of assessment in which the expenditure had been incurred. The following expenses incurred by Marula in the respective years of assessment, were disallowed:

(a) 2007: R63 254 644

(b) 2008: R220 592 861

(c) 2009: R170 388 451

[10] This disallowance of expenses incurred by Marula resulted in a substantial increase in its liability for the payment of income tax in the years of assessment, which prompted an unsuccessful objection to the assessments and the eventual appeal to the Tax Court. In essence, Marula took the view that the expenditure incurred by it related to mining activities and not to the production, manufacturing, purchasing or acquisition of trading stock. The deductions

claimed in respect thereof could therefore not be recouped under s 23F(2) of the ITA.

[11] The Tax Court held that the ore mined by Marula formed part of a mining process; that it was not economically viable to sell the ore in that form nor did Marula intend selling it in that state; and, therefore, the ore did not constitute trading stock. The Tax Court further found that once the mineral ore had been concentrated into 'a higher value product' it qualified 'to be characterised as trading stock'. It therefore held that the Commissioner was entitled, in terms of s 23F(2) of the ITA, to recoup the deduction of expenses only in respect of phase 2, and not phase 1 of Marula's operations. The Tax Court referred the assessments back to the Commissioner for reconsideration on the basis that s 23F(2) of the ITA applied only to phase 2, being the 'concentrator phase'. It further held that the deductions for administration, audit and drying charges did not fall within the purview of s 23F(2) of the ITA.

[12] The Commissioner appealed the judgment and orders made by the Tax Court, while Marula noted a cross-appeal against the Tax Court's order allowing the Commissioner to recoup the deductions for the second phase in terms of s 23F(2) of the ITA. I should add that, in argument before the Tax Court, the Commissioner conceded that the recoupment of deductions relating to administration and audit charges was incorrectly made, while Marula conceded that the royalty fees had been correctly recouped. Therefore, the remaining issues to be decided by this court relate to the application of s 23F(2) with regard to the expenditure incurred by Marula during the years of assessment in respect of:

(a) the phase 1 operation;

(b) the phase 2 operation; and

(c) the drying charges.

[13] I have already alluded to some of the legislative provisions that bear upon the issues in this appeal. For the sake of completeness, I record the provisions of the ITA that are directly relevant to the adjudication of the appeal.

Section 1: 'trading stock'

'(*a*) includes -

(i) anything produced, manufactured, constructed, assembled, purchased or in any other manner acquired by a taxpayer for the purposes of manufacture, sale or exchange by the taxpayer or on behalf of the taxpayer;

(ii) anything the proceeds from the disposal of which forms or will form part of the taxpayer's gross income . . . .'

Section 11: General deductions allowed in determination of taxable income

'For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived ─

(*a*) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature . . . .'

Section 23F: Acquisition or disposal of trading stock

'(1) . . . .

(2) Where a taxpayer has during any year of assessment disposed of any trading stock in the ordinary course of his or her trade for any consideration the full amount of which will not accrue to him or her during that year of assessment and any expenditure incurred in respect of the acquisition of that trading stock was allowed as a deduction under the provisions of section 11(*a*) during that year or any previous year of assessment, any amount which would otherwise be deducted must, to the extent that it exceeds any amount received or accrued from the disposal of that trading stock be disregarded during that year of assessment.'

Section 24M: 'Incurral and accrual of amounts in respect of assets acquired or disposed of for unquantified amount

'(1) If a person during any year of assessment disposes of an asset for consideration which consists of or includes an amount which cannot be quantified in that year of assessment, so much of that consideration as -

(*a*) cannot be quantified in that year must for purposes of this Act be deemed not to have accrued to that person in that year; and

(*b*) becomes quantifiable during any subsequent year of assessment must for purposes of this Act be deemed to have been accrued to that person from that disposal in that subsequent year.'

[14] As explained in *Silke on South African Income* Tax (Alwyn de Koker and R C Williams *Silke on South African Income Tax vol 2* at 8-294-1), s 23F(2) is an anti-avoidance provision that caters for the situation where a taxpayer has disposed of trading stock in the ordinary course of its trade during a year of assessment for a consideration, the full amount of which will not accrue to the taxpayer during that year, but in respect of which expenses incurred on the acquisition of that trading stock had, in that year or in any previous year of assessment been allowed as a deduction under s 11(*a*) of the ITA. Any amount that would otherwise have been deductible under s 11(*a*) must, to the extent that it exceeds the amount received or accrued from the disposal of that trading stock, be disregarded during that year of assessment. Therefore, the purpose and function of s 23F(2) of the ITA is to delay the s 11(*a*) deduction of the cost of trading stock until the income from the disposal of that trading stock has been included in the taxpayer's gross income.

[15] As emphasised by Corbett JA in *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* 1983 (4) SA 935 (A) at 946F-H, taxable income is the basis on which normal tax is levied, and is arrived at by first determining the taxpayer's gross income and then deducting therefrom any amounts exempt from normal tax in order to arrive at the taxpayer's income. Taxable income is then determined by deducting from income the various amounts which the ITA allows by way of deduction from income, including those deductions covered by s 11(*a*) of the ITA. In the present case the income derived by Marula from the sale of the

concentrate (in respect of the last four months of each of the years of assessment) was excluded from Marula's gross income in terms of s 24M of the ITA, to be included in the following years when it became quantifiable. Therefore, if Marula's activities constituted the disposal of 'trading stock' as defined in s 1 of the ITA, s 23F(2) would find application and prevent the 'mismatch' of the deduction of the cost of the trading stock with the taxation of the income from the disposal of that trading stock, by delaying the s 11(*a*) deduction until the year of assessment in which the corresponding income is taxed.

[16] The scope of the relevant part of the definition of 'trading stock', quoted above, was analysed as follows by this court in *Richards Bay Iron & Titanium (Pty) Ltd & another v Commissioner for Inland Revenue* [1995] ZASCA 81; 1996 (1) SA 311 (A) at 324H-325A:

'. . . the definition may be notionally and grammatically divided into two parts. The first part lays emphasis upon the purpose for which anything may have been produced, manufactured, purchased or in any other manner acquired by a taxpayer. The specified purposes are manufacture, sale or exchange by the taxpayer or on his behalf. The second part makes no direct reference to any purpose which the taxpayer must have had at the time of acquisition; it postulates an objective assessment, namely, whether, if the thing under consideration was disposed of, the proceeds would form part of his gross income . . . .'

[17] In *Richards Bay* at 325B-D, the court added the following regarding the ambit of the definition of 'trading stock' in s 1 of the ITA:

'The first part of the definition also includes

"anything produced, manufactured, purchased or in any other manner acquired by a taxpayer for purposes of manufacture . . . by him or on his behalf."

Those words are quite plain and unambiguous. It is inherent in them that, in order to fall within the definition, what the taxpayer produces, manufactures, purchases or otherwise acquires need not be intended to be disposed of in the state in which it then is. It suffices that it is intended to be used for the purpose of manufacturing something. Nor does it matter whether or not that which is intended to be used is capable of realisation or sale in the state in which it then is.'

[18] Therefore, for anything to qualify as 'trading stock' under the first part of the definition in s 1 of the ITA, it can be acquired by the taxpayer for the purposes of manufacture, sale or exchange, or it can be manufactured by the taxpayer for the purposes of sale or exchange. It is not a prerequisite that to qualify for trading stock that what the taxpayer acquires is immediately saleable or realisable. It is sufficient if that which is acquired is intended to be used for the manufacture of something else (see *Richards Bay* supra at 325C-E).

[19] In the present matter it is common cause that the mineral-bearing ore was mined by Marula for the purpose of manufacture of the concentrate. Therefore, the fact that the ore was not intended to be disposed of in the state in which it was mined, is legally irrelevant in view of the purpose for which it was mined, ie to manufacture the concentrate. The finding of the Tax Court that the ore did not constitute trading stock as it had in itself no saleable or realisable value, cannot be sustained. As held in *Richards Bay*, it suffices that the ore was intended to be used for the purpose of manufacturing the concentrate and it accordingly constituted 'trading stock' as defined in s 1 of the ITA.

[20] As recorded earlier, the Tax Court held that the concentrate qualified to be characterised as trading stock. This finding is no doubt correct, as the evidence shows that the concentrate was derived by a process of manufacturing, as envisaged in the definition of 'trading stock' in s 1 of the ITA. This involved the conversion of the ore into mineral-bearing concentrate by crushing and milling it to expose the minerals and then subjecting it to a froth floatation process. This process was analogous to those employed in *Richards Bay* and *Commissioner for the South African Revenue Services v Foskor* [2010] ZASCA 45; [2010] 3 All SA

594 (SCA), both of which were held to be processes of manufacture within the meaning of the definition of 'trading stock' in s 1 of the ITA.

[21] In *Richards Bay* at 312I-313A, the process employed was described as follows:

'The process, in broad, consists of creating in the dunes self-contained ponds of water into which dune sand is made to slump by undermining the face of the dunes; of removing the resultant slurry by suction with the aid of a floating dredger; of separating the heavy mineral concentrate from the dune sand in a floating concentrator plant by means of a gravity separation process; of separating that heavy mineral concentrate in a mineral separation plant . . . .'

[22] In *Foskor* the process involved the crushing and milling of mineral-bearing ore to liberate the mineral particles from the ore, whereafter the pulp containing the minerals was pumped to a floatation plant where the minerals of economic importance were separated by means of three metallurgical processes. The products from these processes were various concentrates, including phosphate concentrate which was then dried and stock-piled.

[23] It has to be stressed that, before Marula extracted the concentrate, the ore was not saleable, but the end product (the concentrate) was a valuable commodity available in a commercially acceptable and disposable form. As in the case of *Richards Bay* and *Foskor*, one cannot ignore the processes to which the mineral-bearing ore was subjected, with the result that an end product that was significantly different from the raw ore was derived. In this regard reference can be made to *Secretary for Inland Revenue v Safranmark (Pty) Ltd* 1982 (1) SA 113 (A) at 122H, where the following statement by Miller J in *ITC* 1247 38 SATC at 32 was quoted with approval:

'Invariably, in cases in which plant or machinery has been found to have been used in a process of manufacture, the result of such process has been the creation of a substance or an article which, although it might have contained all the various components from which it evolved in the process of manufacture, became upon completion an essentially different entity in its own right.'

What the evidence shows is that the concentrate was not only significantly different from the raw ore, but upon completion constituted an essentially different entity in its own right.

[24] In my view, the process of manufacture followed in the instant matter cannot be materially distinguished from those employed in *Richards Bay* and *Foskor*. Counsel for Marula sought to distinguish *Richards Bay* on the basis that the taxpayer in that case conceded that the relevant stockpiles had been manufactured within the meaning of the definition of 'trading stock'. However, as appears from the dictum in *Richards Bay* at 328J, the court, distinct from the concession that had been made independently, held that the evidence established that the relevant stockpiles had been produced or manufactured within the meaning of the definition of 'trading-stock'.

[25] I therefore conclude that, not only was the mineral-bearing ore extracted by Marula for the purpose of manufacture of the concentrate, but the concentrate itself was derived by a process of manufacturing, as envisaged in the first part of the definition of 'trading stock' in s 1 of the ITA. I should add that the concentrate also qualified as trading stock in terms of the second part of the definition in s 1 of the ITA, as the proceeds from its disposal formed part of Marula's gross income.

[26] From this it follows that Marula's activities constituted the disposal of trading stock, as a result of which the Commissioner was entitled to invoke s 23F(2) of the ITA, by delaying the deduction of s 11(*a*) expenses by Marula until the year of assessment in which the corresponding income was to be taxed.

[27] Marula raised several grounds for resisting the relief sought by the Commissioner in this appeal. These included a procedural ground as well as substantive grounds. With regard to the former, counsel for Marula submitted that the Commissioner was not entitled to raise the issue that the phase 2 operation constituted a manufacturing process. He contended that the issue was not covered by the pleadings, and that the Commissioner was therefore precluded from raising it by rule 12 of the ITA, which states that 'the issues in any appeal to the court will be those defined in the statement of the grounds of assessment read with the statement of the grounds of appeal'.

[28] A perusal of the pleadings shows that there is no merit in this submission. In the Commissioner's statement of the grounds of assessment (para 45) it is alleged that '[b]oth the ore and the concentrate constitute "trading stock" as defined and accordingly the provisions of section 23F of the Act apply to the cost of acquiring of the ore and the cost of producing the concentrate'. In its statement of the grounds of appeal Marula took issue with these allegations by, inter alia, denying that the ore was acquired for purposes of manufacture, sale or exchange as contemplated in the definition of trading stock. The manufacturing issue was accordingly pertinently raised and formed an integral part of the *lis* between the parties. To this I should add that, even before the pleading stage, this issue was expressly raised by the Commissioner in the SARS letter of assessment dated 18 January 2012. The document explained that the term 'manufactured' in s 1 of the ITA is interpreted broadly to extend beyond the conventional meaning of the word. It was emphasised that the concept of trading stock is thereby broadened so as to cover not only finished goods ready for sale or exchange, but also raw materials and work in progress. Express reference was also made to the

principles laid down in the decisions of *Richards Bay* and *Foskor*. Therefore, the parties were even at this early stage alive to the manufacturing issue.

[29] This brings me to the substantive grounds upon which Marula relied. These grounds were premised on the submission that the processes involved were not that of manufacturing, but constituted mining as defined in s 1 of the ITA. Whilst the ITA does not define manufacturing, mining is defined as including 'every method or process by which any mineral is won from the soil or from any substance or constituent thereof'. In my view this submission fails to take proper account of the fact that Marula extracted the ore from the land for the purpose of utilising it to render an end product in the form of a concentrate. The ore was not intended to be disposed of in its original state, and was subjected to an intricate process, described above, which rendered an end product that was not only significantly different from the raw ore, but was a highly valuable commodity saleable on the open market. Seen in this context, the processes utilised by Marula to derive the concentrate from the raw ore, did not constitute the 'mining' of the concentrate, but its manufacture as was held in analogous circumstances in *Richards Bay* and *Foskor*.

[30] The finding that the activities of Marula constituted manufacturing and not mining, effectively puts paid to Marula's substantive grounds of opposition. However, counsel for Marula had a further string to his bow. He submitted that, upon a proper construction of s 23F(2) of the ITA, the expenses incurred by Marula to extract the ore and produce the concentrate, may not be recouped, as the phrase 'any amount which would otherwise be deducted' in s 23F(2), excludes deductions claimed under s 11(*a*) of the ITA. However, this submission falters on the plain wording of s 23F(2). When this phrase is read within the context of s 23F(2), it is clear that 'any amount which would otherwise be

deducted' refers to s 11(*a*) expenses that would be deductible had the full income of the disposal of the trading stock accrued to the taxpayer during that year of assessment. That s 23F(2) refers to deductions claimed under s 11(*a*) and not to any other deductions, is also made clear by *Silke on South African Income Tax* (supra, para 14).

[31] During argument on appeal, counsel for Marula raised the concern that were this court to find that these activities of Marula constituted manufacturing, it may give rise to the recoupment by the Commissioner of a much wider range of deductions than those falling within the purview of s 23F(2) of the ITA. I do not believe that this concern is justified. This appeal deals solely with the deductions covered by s 23F(2), ie deductions under the provisions of s 11(a). This judgment is not concerned with any other deductions.

[32] I conclude that the Commissioner was entitled in terms of s 23F(2) of the ITA to recoup the relevant portion of the deductions relating to phases 1 and 2, ie the on-mine operation costs and the concentrating and smelting operation costs. I have already recorded Marula's concession that the Commissioner was entitled to recoup the expenditure in respect of royalty fees, therefore the remaining issue is that of the drying charges.

[33] It was submitted on behalf of Marula that the drying charges should not be added-back as they were not incurred to acquire the concentrate. This is so, it was argued, because IRS charged drying fees after Marula had acquired the concentrate. I do not agree with this submission. What the evidence shows is that the nature and purpose of the drying of the concentrate by IRS was to bring it into the appropriate condition, namely, to comply with the moisture levels prescribed in the contract. It therefore represented an additional cost to Marula as envisaged

by s 22(3) of the ITA, which provides that the cost of trading stock includes 'any further costs incurred by such person . . . in getting such trading stock into its then existing condition and location'. I therefore find that the Commissioner was entitled in terms of s 23F(2) to recoup the relevant portion of these drying charges.

[34] In the result the appeal should succeed while the cross-appeal should be dismissed. The Commissioner as the successful party is entitled to the costs of appeal, including the costs of two counsel.

[35] The following order is made:

1 The appeal is upheld and the cross-appeal is dismissed.

2 The respondent is ordered to pay the appellant's costs of appeal and cross-appeal, including the costs of two counsel.

3 The order of the Tax Court is set aside and replaced with an order in the following terms:

'(a) The appeal is dismissed.

(b) The assessments for the years 2007, 2008 and 2009 are referred back to the Commissioner for the South African Revenue Service to calculate the amounts added back in terms of s 23 F(2) of the Income Tax Act 58 of 1962 so as to exclude overheads, but to include on-mine operation costs, concentrating and smelting operation costs, royalty fees and drying charges.

(c) The appellant is ordered to pay the respondent's costs of appeal.'

P B Fourie
Acting Judge of Appeal

Appearances:

For the Appellant:	D M Fine SC (with him NK Nxumalo)
Instructed by:	Mothle Jooma and Sabdia Inc, Brooklyn, Pretoria Matsepes Inc, Bloemfontein
For the Respondent:	J Truter
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