IN THE TAX COURT

HELD AT CAPE TOWN

CASE NO: 14426

In the matter between:

ABC (PTY) LTD Appellant

and

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE Respondent

Date of hearing: 21-23 November 2018

Date of judgment: 13 December 2018

JUDGMENT

Introduction

[1] This appeal is concerned with the application of provisions of the Employment Tax Incentive Act 26 of 2013 (the Act),[1] which provides for an employment tax incentive ("ETI") in the form of a deduction from the employees' tax ("PAYE") payable to the employer to support the creation of new jobs for employees under the age of 30 years.

[1] Save for s 10, the Act came into operation on 1 January 2014.

[2] In issue is:

2.1 Whether the appellant, ABC (Pty) Ltd, was eligible to claim the ETI, in terms of s 4(1)(*a*) read with s 6(*f*) of the Act, for the 2014 and 2015 years of assessment (1 July 2013 to 30 June 2014, and 1 July 2014 to 30 June 2015), being the tax periods in dispute, when –

2.1.1 wage increases prescribed in the applicable wholesale and retail sector Sectoral Determination 9 ("SD9") were paid to non-union member employees on 1 May of each year, backdated to 1 February, rather than on 1 February from which date SD9 was applicable annually;

2.1.2 a qualifying employee's employment commenced and/or terminated midway through the month; and

2.1.3 qualifying employees were paid less than the minimum prescribed wage, as a result of unpaid leave taken during the month.

2.2 Whether the appellant correctly calculated the ETI for each qualifying employee, in terms of s 7(5) of the Act for the 2014 and 2015 tax periods.

2.3 Whether 100% penalties imposed on the appellant in terms of s 4(2) of the Act, with interest, were justified.

Relevant background

[3] The appellant conducts business in the fast-moving consumer goods industry to which SD9 is applicable. SD9 establishes conditions of employment and minimum wages for employees in the wholesale and retail sector. The appellant's staff complement consists of two categories: management and non-management employees. Within the category of non-management employees the appellant employs permanent full-time employees who receive monthly remuneration and permanent part-time employees who are paid on a weekly basis for the hours worked. Approximately 30% of employees of non-management employees are members of the X Union ("X").

[4] The SD9 is published in January of each year and is applicable from 1 February until 31 January of the following year. A three-year collective agreement, valid for the period from 2012-2015, was concluded between the appellant and X on 24 August 2012, prior to the promulgation of the ETI Act. As had historically been the practice, in terms of the agreement negotiated wage increases were paid effective from 1 May of each year. Under the heading "Backpay and General Provisions" it was agreed that:

> "Any amounts due to employees who qualify in terms of SD9 annual adjustments from 1 February will be paid with the lump sum payment or with the 1 May implementation, as the case may be."

[5] The appellant has at all relevant times treated all non-management employees, whether members of X or not, alike and paid annual increases agreed with the union with effect from 1 May, together with backpay in respect of the SD9 increase backdated to February. The appellant's witnesses testified that it did so for reasons of business and commercial necessity, so as to avoid labour relations chaos.

[6] The Commissioner of the South African Revenue Service (CSARS) disallowed the appellant's ETI claims for the months of February, March and April in 2014 and 2015 on the basis that the amount paid to qualifying employees with effect from 1 February was less than the stipulated minimum amount payable in terms of SD9. The appellant raised an objection to the decision and, in response, the CSARS allowed the ETI amount claimed only in relation to those of employees who were members of the trade union.

[7] In respect of unpaid leave, the appellant calculated the monthly remuneration of an employee who had taken unpaid leave so as to determine whether the appellant was entitled to the ETI benefit in respect of such employee, and if so, in what amount. The ETI was then claimed based on the pro-rated wages paid to the employee for the days worked. The CSARS disallowed the appellant's ETI claims in full for employees who had taken unpaid leave. The same occurred in respect of employees who had worked for less than a month on the basis that the ETI is available to "*a qualifying employee in respect of a month*" in terms of s 2(2) of the Act and that to qualify the minimum wage had to be paid to the employee for the month worked.

[8] The CSARS consequently determined that an assessed amount of R34 123 836,15 be imposed on the appellant, together with a penalty in the amount of R31 784 376,69.

Submissions

[9] The appellant sought that its appeal be upheld on the basis that the collective agreement, as a "*wage regulating measure",* applied to it in terms of the Act given that such wage regulating measure was "*applicable to that employer".* It contended that it was permitted to apply the agreement across the whole bargaining unit regardless of trade union

membership, as has been its past practice for reasons of commercially necessity, to treat all of the employees equally and avoid labour discord. As a result, all bargaining unit employees acquired a right to future backpay from 1 February, based on many years of conduct, with their salaries increased retrospectively on 1 May to conform with the requirements of the new SD9. The right to the backdated SD9 wage increase was one that accrued to the employees. Furthermore, the calculation of monthly remuneration to determine eligibility and allow remuneration to be pro-rated was an appropriate manner to calculate the ETI where employees had taken unpaid leave or worked for a portion of a month. There is in such circumstances no bar on an amount less than the minimum being paid or payable to the employee who has taken unpaid leave or worked a reduced number of days in a month. The appellant contended further that it had in good faith and on professional advice obtained, applied the Act using software believed to have been developed in conjunction with SARS.

[10] The appeal was opposed by the CSARS *inter alia* on the grounds that: the ETI entitlement is determined in respect of qualifying employees on a month-to-month basis and not retrospectively months later; the amount paid on 1 February to non-trade union members was less than the minimum prescribed by the wage regulating measure applicable to those employees, being SD9; the collective agreement with X had not been extended to non-union employees in terms of s 32 of the Labour Relations Act 66 of 1995 ("LRA") and the agreement did not, in terms of s 23 of the LRA, apply to such employees, who were not referred to in the agreement; and that since no bargaining unit existed which included non-trade union member employees, the collective agreement could not be applied to non-union members.

[11] Furthermore, it was argued that from the definition of *"monthly remuneration"* in section 1(1) of the ETI Act, considered with the definition of *"remuneration"* in the Fourth Schedule of the Income Tax Act 58 of 1962, as amended, where reference is made to *"paid"* in contradistinction to *"due"*, the word *"payable"* means that the employer has an unconditional liability to pay the relevant remuneration for services rendered to an employee. It was submitted that the determination of the wage paid to the employee is done on a monthly basis; and an employer is required to comply with the wage regulating measures for each month during which the ETI is claimed. It was submitted that the ETI Act does not make provision for a retrospective application of the payment of a minimum wage. Employees who took unpaid leave or did not work a full month were not paid the prescribed minimum wage in a month and, it followed that the appellant was not entitled to claim the ETI allowance in respect of such employees. For these reasons, the CSARS sought that the appeal be dismissed and that the additional assessments, penalties and interest imposed on the appellant be confirmed.

Discussion

[12] The ETI is a tax incentive provided to employers to encourage job creation for employees under 30 years of age.[2] It allows, in terms of s 2(2), an eligible employer to receive an ETI "*in respect of a qualifying employee in respect of a month*" in accordance with s 7(1) and (2)[3] by withholding a portion of the employee tax payable or being reimbursed an amount as set out in s 10(2).

[13] The stated purpose of the Act is *"to encourage employment creation"*[4] since "*government recognises the need to share the costs of expanding labour market opportunities with the private sector*" and *"wishes to support employment growth by focusing on labour market activation, especially in relation to young work seekers"*.[5]

Entitlement to claim ETI for employees not members of the trade union

[14] The ETI may be claimed in respect of a *"qualifying employee"*,[6] subject for current purposes to s 6(*f*) which provides that this does not include an employee *"in respect of whom an employer is ineligible to receive the incentive by virtue of section 4"*.[7] An employer is not eligible, in terms of s 4(1), to receive the ETI *"in respect of an employee in respect of a month if the wage paid to that employee in respect of that month is less than (a) the amount payable by virtue of a wage regulating measure applicable to that employer…".* A wage regulating measure is defined in s 4(3) to mean a collective agreement in terms of s 23 of the LRA; a sectoral determination as contemplated in s 51 of the Basic Conditions of Employment Act 75 of 1997; or a binding bargaining council agreement as contemplated in s 31 of the LRA. Both the collective agreement entered into between the appellant and X and SD9 are wage regulating measures applicable to the appellant as employer.

[15] The three-year collective agreement entered into between the appellant and X was not one concluded in a bargaining council and could not have been extended to non-parties to the bargaining council in terms of s 32 of the LRA. The legislative choice made in Chapter III of the LRA is one in favour of majoritarianism and against the proliferation of

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2 Section 6(*a*)(i).

3 As per this section, where monthly remuneration is R2000 or less, the ETI for the first 12 months of employment is 50% of monthly remuneration and for the following 12 months 25%. From R2000 – R4000, the ETI is R1000 for the first 12 months of employment and R500 for the following 12 months. From R4000-R6000 the first 12 months of employment is calculated at R1000 – (0.5 × monthly remuneration – R4000).

4 S 2(1) of the Act.

5 Preamble to the Act.

6 Section 6 provides *inter alia* that the employee must be not less than 18 years old and not more than 29 years old at the end of the month in which the ETI is claimed and must be employed in a designated industry on or after 1 October 2013, receiving remuneration in an amount less than R6000 per month. An employee may not be a domestic worker or a connected person as defined in s 1 of the Income Tax Act.

7 Section 6(*f*).

trade unions in the workplace, with the conclusion of collective agreements cardinal to the functioning an effective system of collective bargaining and aimed at ensuring workplace harmony. By its nature the collective bargaining system consists of the compulsory substantive right to bargain, with the corresponding duty to bargain, as well as a voluntary component which is concerned with the various procedural aspects related to it. Courts are generally unwilling to intervene in the collective bargaining process, which is considered better left to the parties through engagement and by the exercise of their respective levels of workplace power.

[16] While the collective agreement entered into with X, in terms of s 23(1)(*d*) of the LRA, was not binding on non-trade union employees, there was no bar on the extension of its terms to the benefit of all employees being undertaken voluntarily by the appellant. The historical election which had been made by the appellant to extend the application of the collective agreement concluded with X to all non-management employees, which appeared to have been accepted without objection by all employees, was aimed at avoiding workplace discord and achieving commercial efficiency. There is no legal bar on this voluntary extension of the terms of a collective agreement concluded with the trade union to all employees beyond those employees represented by it. As much accords with the provisions of Chapter III of the LRA and reflects the nature of the collective bargaining process. Seldom are trade union gains achieved for trade union members alone when, by their nature, trade unions act in the interests of all workers. This is so despite the fact that the collective agreement recorded for clear reason that it was entered into in respect of trade union members, given that the trade union was authorised only to represent its own members and not all employees.

[17] Had only non-trade union members received a wage increase on 1 February in line with SD9, the different treatment of non-trade union and trade union members would undoubtedly have created the risk of workplace conflict.[8] The appellant would plainly have wanted to avoid an accusation of having only increased non-trade union employee wages and that by doing so had sought to prejudice employees because of their trade union membership, in a manner prohibited by s 5(2) of the LRA. Furthermore, the administrative and commercial advantages of implementing wages on the same date to all employees at the same level are clear, when not to have done so would have resulted in different remuneration rates having been paid to different employees based only on their trade union membership. It would also, on the argument put up for the CSARS, have resulted in prejudice to non-trade union members in not receiving the increase granted on 1 May to trade union members in circumstances when non-trade union members were unrepresented

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[8] *Safcor Freight (Pty) Limited t/a Safcor Panalpina v South African Freight and Dock Workers Union* [2012] ZALAC 29; (2013) 34 ILJ 335 (LAC) at para 23.

and therefore unlikely to be in a position to negotiate wage increases as a collective with the appellant. The suggestion that the existence of a three-year collective agreement made it possible to pay the SD9 increase to non-union employees on 1 February is similarly, for all of the reasons advanced, without merit.

[18] Furthermore, there is no dispute that SD9 was applicable to the employer from 1 February in relation to all employees, including members of X. The CSARS accepted that the 1 February increase prescribed by SD9 could be paid retrospectively on 1 May to trade union members by virtue of the terms of the collective agreement entered into with the trade union. From this it is apparent that administratively it was accepted to be possible for the CSARS and the appellant to determine the ETI retrospectively and that the Act did not require, as an immutable rule, that the ETI be granted only to qualifying employees calculated on a monthly basis during or immediately following the actual month worked.

[19] The definition of *"monthly remuneration"* in s 1(1) of the Act as *"the amount paid or payable…in respect of that month"* clearly conceives of the fact that it may be an amount *"paid or payable"* to an employee. The meaning of *"payable"* was considered in *Singh v Commissioner, South African Revenue Service*[9] in the context of the Value-Added Tax Act 89 of 1991 ("VAT Act"), with it noted that the word can mean *"(a) that which is due or must be paid, or (b) that which may be paid or may have to be paid... The sense of (a) is a present liability – due and payable – ... (b) ... a future or contingent liability"*. In the context of the VAT Act it was held that *"payable"* in order to distinguish it from *"due"* must be given the meaning of a *"future or contingent liability".*[10]

[20] It was contended for the CSARS however that from the definition of *"monthly remuneration"* in section 1(1) of the ETI Act, considered with the definition of *"remuneration"* in the Fourth Schedule of the Income Tax Act, where reference is made to *"paid"* in contradistinction to *"due"*, the word *"payable"* means that the employer has an unconditional liability to pay the applicable remuneration for services rendered by the employee. It was submitted that since the determination of the wage paid to the employee is done on a monthly basis, the employer is required to comply with the wage regulating measures for each month during which the ETI is claimed. The ETI Act does not make provision for a retrospective application of the payment of a minimum wage. Since an accrued right to remuneration is a right to remuneration which is not paid but is payable, it is apparent that retrospective payment of wages was expressly contemplated by the Act and there is consequently no merit in the contrary contention made on behalf of the CSARS.

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9 2003 (4) SA 520 (SCA) at para 52 quoting Trollip JA in *Marine & Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A) at 975D – F.

10 *Ibid* at para 53.

[21] There is also no evidence that the Department of Labour has taken any issue with the backpay of the SD9 increase as an accrued remuneration entitlement, in circumstances in which the appellant had remained bound by and applied the terms of such determination.

[22] For these reasons, given that the collective agreement was *"applicable to the employer",* that it was voluntarily extended by the appellant to non-trade union members and despite the fact that the agreement was entered into by the trade union on behalf of its members, the appellant was entitled to apply its terms and to extend the application of the agreement to all employees regardless of trade union membership. There was no legal requirement that the agreement had to be formally extended in terms of s 32 of the LRA to non-parties when it had not been concluded in a bargaining council and there remained remedies available under the LRA to non-trade union members who may have been dissatisfied by the decision taken in this regard by the appellant. It follows that the appellant was entitled to apply the collective agreement which was applicable to it to all employees alike, whether trade union members or not. As a result, the refusal by the CSARS of the objection raised by the appellant in relation to the payment of the ETI to non-trade union employees is without merit and the appeal in this respect must succeed.

Unpaid leave and employment less than a month

[23] Turning to whether the appellant was entitled to claim the ETI in respect of employees who had taken unpaid leave or who had not been employed for a full calendar month, the relevant starting point is the definition of *"monthly remuneration"*[11] in s 1(1) of the Act which applied at the time that the assessments were made:

> "(*a*) where an employer employs a qualifying employee for a month, means the amount paid or payable in respect of that month; or
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> (*b*) where an employer employs a qualifying employee for part of a month, means the amount that would have been payable in respect of that month had that employer employed that employee for the entire month"

[11] The definition of monthly remuneration was amended with effect from 1 March 2017 and now reads follows:

(a) where an employer employs **and pays remuneration to** a qualifying employee for **at least 160 hours in** a month, means the amount paid or payable **to the qualifying employee by the employer** in respect of a month; or [Para. (a) substituted by s. 93 (1) of Act 15 of 2016 (wef 1 March 2017).]

(b) where an employer employs a qualifying employee **and pays remuneration to that employee for less than 160 hours in a month, means an amount calculated in terms of section 7 (5)**; [Para. (b) substituted by s. 93 (1) of Act 15 of 2016 (wef 1 March 2017).]

[24] From this definition, and from the provisions of s 7(5),[12] it is apparent that the Act expressly contemplates that an employer may employ a qualifying employee for part of a month and that the calculation of an employee's notional monthly remuneration, had he or she worked a full month, is necessary to determine whether the employee is a *"qualifying employee in respect of a month"* in terms of s 2(2). The reference to *"in respect of a month"* is a factor which, with others, allows a determination as to whether the employee is a *"qualifying employee"* given the earnings threshold imposed on the employer in order to qualify for the ETI in respect of an employee. This requires a calculation of remuneration which would notionally have been earned by the employee if a full month had been worked. From this it is plainly apparent that the ETI is applicable to employees who have not worked a full calendar month where their remuneration, had they notionally have done so, fell within the prescribed ETI threshold. In such case, it would then have been permissible for the ETI claimed to have be pro-rated on the basis of the days actually worked.

[25] This interpretation is bolstered by s 1(2) which provides that for the definition of *"monthly remuneration"* in s 1(1), *"remuneration"* has the meaning ascribed to it in paragraph (1) of the Fourth Schedule to the Income Tax Act. The definition of *"remuneration"* in paragraph 1 of the Fourth Schedule to the Income Tax Act states that it includes:

> "any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered, including …".

[26] The reference to *"any amount"* allows an interpretation of *"monthly remuneration"* in the ETI Act as one of any amount paid or payable to an employee in respect of a month. The fact that this may have the result that an amount less than the minimum wage is paid to the employee does not in these circumstances negate the employer's entitlement to receive the ETI.

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[12] Subsection 7(5) of the ETI Act stipulates:

> "If an employer employs a qualifying employee only for a part of a month, the amount of employment tax incentive to be received in respect of that month in respect of that qualifying employee must be an amount that bears to the total amount calculated in terms of subsection (2) or (3) the same ratio as the amount of remuneration paid by the employer in respect of that month bears to the amount of remuneration that would have been payable in respect of that month had the employer employed that employee for the entire month."

S (5) was amended with effect from 1 March 2017 to read:

> (5) If an employer employs a qualifying employee for less than 160 hours in a month, the employment tax incentive to be received in respect of that month in respect of that qualifying employee must be an amount that bears to the total amount calculated in terms of subsection (2) or (3) the same ratio as the number of hours that the qualifying employee was employed and is paid remuneration in respect of those hours by that employer in that month bears to the number 160. [Sub-s. (5) substituted by s. 116 (1) of Act 43 of 2014 (wef 1 March 2015) and by s. 95 (1) (j) of Act 15 of 2016 (wef 1 March 2017).]

[27] The contentions made for the CSARS to the contrary are without merit. To find so would have the effect that an employer may be disentitled to receive the ETI where an employee who is paid the monthly minimum wage takes unpaid leave for one day. Such a finding would not be to give a sensible and business-like interpretation to the statute or have appropriate regard to its purpose.[13]

[28] For these reasons, the additional assessments raised by the CSARS against the appellant in respect of employees who took unpaid leave or who did not work a full month fall to be set aside.

Conclusion

[29] It follows for all of these reasons that the appeal must be upheld, with the additional assessments raised by the CSARS set aside, together with the penalties and interest imposed on the appellant. Neither party sought an order of costs in the matter and no order of costs is made.

[30] In the result, an order is made as follows:

Order

1. The appeal is upheld.
2. The additional assessments raised by the CSARS against the appellant for the 01/2014 to 02/2015 tax periods are set aside, together with the penalties and interest imposed.

K M SAVAGE

Judge of the High Court

[13] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 18 and 26.