A juristic person has "no body to kick and no soul to damn"

By JJ van der Walt

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The Supreme Court of Appeal in South Africa recently had to consider whether a company subleasing accommodation premises to a university could enjoy the tax benefits that are available to suppliers of commercial accommodation. In the reported judgment, *The Commissioner for the South African Revenue Service v Respublica* (12 September 2018), the Supreme Court of Appeal (SCA) deliberated on whether a company could provide "lodging" to a university.

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In this case, Respublica entered into a lease agreement, as the lessor, with Tshwane University of Technology (TUT), as lessee. The lease agreement expressly provided that the premises were let to TUT for the sole purpose of allowing it to offer student accommodation to its students. Respublica contended that its supply to TUT qualified as "commercial accommodation", as defined in section 1(1) of the Value-Added Tax Act, No. 89 of 1991, as amended (Act). Respublica argued that the accommodation supplied by it to TUT was used by the students who were, veritably, the 'lodgers'.

Respublica pursued its argument all the way to the SCA in order to benefit from concessionary value-added tax (VAT) treatment that the Act offers to suppliers of commercial accommodation; more specifically, Respublica sought to have only 60% of the value of its supply to TUT to be subject to VAT.

The Act provides that if Respublica was an enterprise supplying commercial accommodation for an unbroken period exceeding 28 days, the consideration in money for the supply of the commercial accommodation is deemed to be 60% of the all-inclusive charge. In other words, in this case, if the SCA held that the supply by Respublica to TUT constituted supply of commercial accommodation, only 60% of the value of its supply to TUT would be subject to VAT.

The Act defines "commercial accommodation" as "lodging or board and lodging" and the consequence was that the SCA was called upon to decide whether Respublica can be said to have provided lodging to TUT. The SCA kept its judgment quite simple and relied on the dictionary meaning of "lodging", which is defined as "a temporary place of residence" or "a temporary residence; sleeping accommodation". It also relied on the dictionary meaning of "lodger", which is defined as "a person who pays rent in return for accommodation in someone's house".

The SCA then concluded that on the ordinary meaning of the word, a 'lodger' is a natural person who actually takes up temporary accommodation. Consequently, lodging cannot be provided to a juristic person, i.e. a university, that has "no body to kick and no soul to damn". The Court also held that, in addition to a juristic person only having a legal and fictional persona, there existed two distinct sets of agreements, the first between Respublica and TUT and, the second, between TUT and each respective student. The Court was emphatic that each set must be distinguished since each constituted a distinct "supply of goods" in terms of the Act.

In conclusion, lessors must be careful not to structure their lease agreements on the incorrect assumption that if a lease agreement provides for obligatory subleasing of immovable property for a specific purpose, which subleasing constitutes supply of commercial accommodation, that, by reason thereof, such supply in terms of such lease agreement would also qualify as supply of commercial accommodation for the purposes of the Act. An alternative must be sought and is available to lessors.

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