

SOUTH AFRICA / JUDGMENT

Bullion Star (Pty) Ltd v Commissioner for the South African Revenue Service (18176/2022)

[2024] ZAGPPHC 184 (2 February 2024)

[2024] ZAGPPHC 184**COURT**

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

18176/2022

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FLYNOTES:

TAX – Search and seizure – Warrant –
Reconsideration
and setting aside of warrant – Issued warrant is problematic
– Warrant authorises SARS unfettered
access to private
residences to embark on search for all items listed in warrant –
Issuing of warrant does not in law
or fact comply with provisions
– SARS failed to explain on what basis warrant was prepared
– Warrant issued is
set aside – Return of seized items
ordered – SARS ordered to pay costs of application –
Tax Administration Act 28 of 2011, s 60(1).
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
Case
Number: 18176/2022
In

the matter between: BULLION
 STAR (PTY) LTD
 Applicant
 and
 THE
 COMMISSIONER FOR THE SOUTH AFRICAN
 REVENUE
 SERVICE
Respondent
In

the ex parte application: REVENUE
 SERVICE
 Applicant
In

re: THE
 TAXPAYER: BULLION STAR (PTY) LTD

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Introduction

- [1] This is an application for the reconsideration and the setting aside of a warrant obtained ex parte by the South African Revenue Services (SARS) on 28 March 2022 for the search and seizure of certain premises connected to Bullion Star (Pty) Ltd (Bullion).
- [2] At the inception of the hearing Bullion applied for an amendment of its notice of motion, which application was dismissed. At the time, the court indicated that reasons for the dismissal will follow, and I propose to deal with the reasons prior to considering the merits of the application.

Amendment

- [3] Bullion initially claimed for the setting aside of the warrant, return of the goods that were seized and an interdict prohibiting SARS from utilising any of the information gathered during the search.
- [4] The proposed amendment was aimed at introducing further relief, to wit a declaration that the search and seizure was unlawful and unconstitutional.
- [5] Mr Swart SC, counsel for SARS, objected to the amendment on the basis that the further relief is unnecessary.

[6] In support of the contention that Bullion should be allowed to introduce further relief, Mr Bhana SC, counsel for Bullion referred the court to Pretoria Portland Cement Company Limited v Competition Commission. The matter involved a search and seizure warrant that was issued in terms of section 46 of the Competition Act. The principles pertaining to a search and seizure warrant in the terms of the Competition Act, apply equally to the issuing of a warrant in terms of the Act.

[7] The court in Pretoria Portland Cement Company Limited v Competition Commission dealt with the fact that the Commission's conduct offended not only the law, but also involved a gross violation to the appellant's right to privacy under the Constitution. In considering an effective remedy for these violations, the court stated the following at par:

"...The effective way in of achieving these ends is, in my view, to set aside the whole of the proceedings commenced by the Commission when applying for a warrant."

[8] In the result, I agree with Mr Swart that the further relief Bullion endeavours to introduce through the amendment is unnecessary.

Basis for relief

[9] The warrant was obtained in terms of section 60 of the Tax Administration Act, 28 of 2011 ("the Act") and may be set aside on two bases, to wit; due to defects in the ex parte application and the warrant that was issued in terms thereof or due to the manner in which the warrant was executed. I propose to

deal first with the ex parte application for the warrant and the contents of the warrant.

Ex parte application and warrant

Background and events preceding the issuing of the warrant

[10] Bullion operates as a licensed gold refinery with beneficiation facilities. Its operation involves the purchasing of second hand gold, the smelting and refining of the gold into either coins or bars, which coins and bars are sold to customers. The purchase of second hand gold and the selling of gold coins and bars in the local market attracts Value Added Tax ("VAT").

[11] From September 2020 until December 2021, Bullion only sold gold bars and coins in the Republic of South Africa, however, in February 2022, it also began exporting refined and unrefined gold bars. Export sales attract a zero VAT rate.

[12] During June 2021, Bullion was identified for a VAT audit for the tax periods 09/2020 to 03/2021. On 21 June 2021, SARS requested certain documentation from Bullion, which documentation was duly submitted by Ms Faber ("Faber"), Bullion's attorney at the time, on 19 July 2021.

[13] On 20 October 2021, SARS addressed a letter to Faber in which the following was stated:

13.1 SARS was in possession of reputable third-party evidence that all goods that was purchased from three of its suppliers was in fact Kruger coins and not second hand jewellery; and

13.2 queried, inter alia, why Bullion rendered tax invoices indicating that second hand jewellery was purchased when in fact Kruger coins were purchased.

[14] On the same day, Faber requested access to the alleged “reputable third-party evidence”. Faber, furthermore:

14.1 denied that Bullion had purchased Kruger coins from the three suppliers;

14.2 stated that Bullion had photographs of all the goods that were supplied to it by the three suppliers but due to the volumes involved, it was not possible to upload same;

14.3 tendered to make all documentation relating to each and every purchase made by Bullion together with photographs available to SARS; and

14.4 requested SARS to indicate a date and time for an inspection in loco to be carried out at the premises of Bullion.

[15] On 22 October 2021, VLZR, made a counter proposal and requested that samples of the documentation be provided. The documentation was duly submitted by Faber on 25 October 2021.

[16] On 2 November 2021, SARS issued a notice in terms of section 47(1) of the Act, calling on Ms Nyatsi, the director of Bullion, to attend and interview and to provide information relating to an extended VAT period, to wit; 11/20 to 05/2021.

[17] The interview was scheduled for 11 November 2021 and was attended by Nyatsi, Faber, a counsel and Bhagoo (office manager). Certain further documentation was tendered by Faber during the interview and delivered on 15 November 2021.

[18] On 1 March 2022, Bullion’s office manager, Bhagoo, submitted Bullion’s VAT201 declaration for the tax period 02/2022 on the SARS E-filing platform. According to the declaration. The declaration was not timeously captured by SARS and on 22 March 2022, Faber addressed a letter to SARS in respect of the aforesaid delay.

[19] VZLR only responded to the letter on 5 April 2022 and informed Faber that SARS’s system flagged the return on the “consistency check” stage since the return did not conform to the returns previously submitted by Bullion. VZLR, furthermore, informed Faber that the return “has now been allocated and reflects on the taxpayer’s statement of account.”

[20] In the meantime and on 24 March 2022 SARS issued a verification of the VAT declaration and requested certain documentation from Bullion in respect of the 02/2022 tax period.

[21] The ex parte application for the warrant was brought on 28 March 2022 and the warrant was issued on the same day.

Ex parte application

[22] Bullion relies broadly on the following grounds for the reconsideration and setting aside of the warrant:

22.1 SARS in its ex parte application:

22.1.1 failed to disclose material facts, and misrepresented other facts;

22.1.2 failed to establish that there are reasonable grounds to believe that Bullion failed to comply with an obligation under the tax act or has committed a tax offence;

22.1.3 failed to establish that there were less drastic and invasive means to elicit the information SARS sought.

1. Non-disclosure and misrepresentation

[23] It is trite that an applicant must observe the utmost good faith in an ex parte application. The principle is based on the audi alterem partem and forms the cornerstone of our judicial system. The party against whom relief is requested is not before court and the court is only privy to the version presented by the applicant.

[24] In respect of the failure to disclose material facts, Bullion firstly, alleges that Mr Klingenberg, the deponent to the affidavit in support of the application, “records glibly the communications between SARS and the Applicant.” The complaint centres around the failure by Klingenberg to refer to the timeous and detailed responses provided by Bullion to all the requests and queries by SARS, the extent of the documentation already provided to SARS and the fact that Bullion had tendered inspection of all the relevant invoices and photographs.

[25] Klingenberg’s affidavit consists of 66 pages to which 47 annexures are attached, resulting in the application running into some 447 pages.

[26] Insofar as this complaint of Bullion is concerned, Klingenberg dealt with the exchange between parties under the heading “THE MATERIAL FACTS”.

[27] Klingenberg sets out the events that transpired from 21 June 2021 when SARS advised Bullion that it has been identified for a VAT audit for the tax periods 09/2020 to 03/2021. Klingenberg states that SARS requested some documentation, which request was responded to by Faber in a letter dated 19 July 2021. Certain of the relevant material was attached to the letter.

[28] Klingenberg attached some of invoices received from Bullion to his affidavit and stated that “The annexures to the letter are voluminous of nature and include financial information. If required and necessary, copies of the annexures will be made available to the court.”

[29] Klingenberg also refers to the request for specified documentation in a letter dated 20 October 2021 and records that Faber responded on the same day. The relevant portion of the affidavit reads as follows:

“73. In Ms Faber’s letter, she advised, inter alia, as follows:

73.1 Bullion Star denies that it purchased Krugers from the three suppliers identified by SARS;

73.2 The invoices correctly set out the description of the supplies;

73.3 Bullion Star is requesting information in terms of section 73(1)(b) of the Tax Administration Act, being full particulars of the evidence held by SARS in respect of “reputable third party evidence to the effect that all the goods purchased from the aforesaid suppliers were Kruger Rand gold coins; and

73.4 Bullion confirmed that it had photographs of all the goods supplied to them by the suppliers and is willing to make such documentation available.”(own emphasis)

[30] Thereafter, Klingenberg refers to SARS’s counter-proposal and states that the requested information was provided by Faber on 25 October 2021. Klingenberg explains the nature of the documents that were received and once again states that the documents are not attached because it is voluminous in nature. Klingenberg then proceeds to deal with a few samples of the documentation that was provided and attaches these documents as annexures to his affidavit.

[31] In having regard to Klingenberg’s evidence supra, it is clear that Bullion responded timeously to the queries and requests of SARS, that it submitted voluminous documents and that it was willing to make the photographs and other documentation available for inspection.

[32] In the result, I am of the view that Bullion’s first complaint has no merit.

[33] The second complaint is directed at paragraph 21 of Klingenberg’s affidavit in which he states that “Bullion Star recently successfully registered as an exporter” and paragraph 28 in which he states, “Prior to the end of January 2022, Bullion Star rarely exported goods.” According to Bullion, Klingenberg should have informed the court that SARS is in possession of all the documents pertaining to the goods exported by it.

[34] It is clear from Klingenberg’s affidavit that the purpose of the warrant was to obtain material in respect of the suspicion that Bullion bought and sold Kruger coins locally. Exported goods are zero VAT rated and are totally irrelevant for the investigation conducted by SARS. The second complaint similarly has no merit.

[35] The third complaint is aimed at Klingenberg’s alleged failure to inform the court of the existence of third-party evidence. In paragraph 71 of his affidavit, Klingenberg states the following:

“71. On 20 October 2021, Bullion Star submitted a request in terms of the Promotion of Access to information Act, 2 of 2002 (“PAJA”), a copy of which is annexed hereto, marked “JK 16”. In this request for access to records, Bullion Star requested specifically “all reputable third party evidence that relates to Bullion Star (Pty) Ltd as advised is held by SARS in attached letter from SARS dated 20/10/2021 attached.”

- [36] I have dealt supra with Klingenberg’s referral to an extract from Faber’s letter dated 20 October 2021 in which specific reference is made to her request for the third-party evidence relied upon by SARS.
- [37] Klingenberg, furthermore, referred to a letter dated 4 November 2021, in which VZLR refused Bullion’s request to provide information in respect of the third party evidence. The reason for the refusal contained in the letter is set out verbatim in the affidavit.
- [38] In the result, the court was made aware of the existence of third party evidence and this complaint falls to be dismissed.
- [39] The fourth complaint pertains to Klingenberg’s failure to disclose to the court the glitch which was relied upon by SARS to interrupt the running of the 21 days within which to refund Bullion for the tax period 02/2022. It is correct that Klingenberg only referred the court to the fact that Bullion for the first time in its 02/2022 VAT declaration, claimed a refund and that the amount of the refund was R 13 942 127, 24.
- [40] The fact that the refund was not paid and the reason for SARS’s failure to pay the refund within 21 days from the date of the submission of the VAT declaration was not disclosed by Klingenberg in his affidavit.
- [41] The question then arises whether, this failure compared to the vast amount of information Klingenberg did disclose in support of the issuing of the warrant, was material to enable the court to exercise its discretion. Having had regard to the totality of the evidence contained in Klingenberg’s affidavit and the purpose for which the warrant was sought, I am of the view that the facts pertaining to SARS’s failure to capture the VAT declaration timeously is not material and is irrelevant to the case made out for the issuing of the warrant.
- [42] Mr Bhana referred in his address to further alleged non-disclosures that were not mentioned in Bullion’s founding affidavit. Mr Swart objected thereto and submitted that Bullion is confined to the case made out in its founding affidavit.
- [43] In turn, Mr Bhana contended that an applicant in a reconsideration application is entitled to point out any non-disclosures in the affidavit in support of an ex parte application. It should be noted that SARS dealt fully in its answering affidavit with the allegations of non-disclosure contained in the founding affidavit.
- [44] It would be most unfair to deprive SARS of an opportunity to deal with the further alleged non-disclosures and will be in conflict with the trite principle that an applicant must make out a case for the relief it claims in its founding affidavit.

[45] In the result, I am of the view that the instances of alleged non-disclosure relied upon by Bullion in its founding affidavit, is without merit and I am satisfied that Klingenberg disclosed all material facts in his affidavit in support of the ex parte application for the issuing of a warrant.

2. Reasonable grounds

[46] Bullion also refers to this ground as “the failure by SARS to establish the jurisdictional prerequisites for the issuing of a warrant in terms of section 60 of the Act.”

[47] Prior to having regard to the allegations by Bullion in this regard, the provisions of the Act pertaining to a warrant for search and seizure, need to be examined.

[48] Section 59 of the Act makes provision for an application for a warrant and section 59(2) reads as follows:

“SARS must apply ex parte to a judge for the warrant, which application must be supported by information supplied under oath or solemn declaration, establishing

the facts the application is based.”

[49] This stage of the procedure entails, no doubt, that SARS must observe the utmost good faith in preparing the application. The requirement has been dealt with supra.

[50] The next stage is the issuing of the warrant and is regulated by section 60 of the Act.

[51] Section 60(1) reads as follows:

“60. Issuance of warrant

- (1) A judge or magistrate may issue the warrant referred to in section 59(1) if satisfied that there are reasonable grounds to believe that—
 - (a) a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and
 - (b) relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.”

[52] It is clear that the discretion to issue a warrant rests with the judge considering the application. It is the judge who must be satisfied that the facts set out in support of the requirements contained in section 60(1)(a) and (b) constitutes reasonable grounds for the issuing of the warrant.

[53] This much was confirmed by the Constitutional Court in *Thint (Pty) Ltd v Director of Public Prosecutions and Others*; *Zuma v National Director of Public Prosecutions and Others*:

“How then should a court faced with a challenge to the issue of a search warrant approach the question? The answer is to be found in this court's judgment in Hyundai. The court made plain that there were two jurisdictional facts for the issue of a search warrant: the existence of a

reasonable suspicion that a crime has been committed, and the existence of reasonable grounds to believe that objects connected

with an investigation into that suspected offence may be found on the relevant premises. The Court went on to state that once the jurisdictional facts are present, the judicial officer issuing the search warrant then exercises a discretion to issue the warrant. That discretion must be exercised judicially.

When considering whether a warrant should be set aside, therefore, a court will determine, first, whether on the record the objective jurisdictional facts were present. If they were not, then a court will set aside the search warrant. If the jurisdictional facts were present, then a court will consider the exercise of the discretion by the judicial officer to issue the warrant. In order to determine the approach that a court will take to the exercise of that discretion, it is necessary to classify the type of discretion under consideration.”

[54] Whether a judge was satisfied that the objective jurisdictional factors were present to justify the judge, in his/her discretion, to issue a warrant, is, to my mind, a question that should be considered when one has regard to the contents of the warrant. I will refer to the question *infra* when considering the contents of the warrant.

3. Failure to establish that there were less drastic and invasive means to elicit the information SARS sought.

[55] The main thrust of this ground relied upon by Bullion, is the failure by Klingenberg to refer in his affidavit to certain excerpts of the transcript of Baghoo's interview conducted on 11 November 2021 at the offices of VZLR.

[56] A copy of the transcript is attached to Klingenberg's affidavit as annexure “JK29”.

[57] An exchange between Faber and Steyn, who conducted the interview on behalf of SARS appears in the transcript. In respect of the exchange between Faber and Steyn, Klingenberg states the following in his affidavit:

“I point out that on the day of the interview, Ms Faber delivered five lever arch files with copies of photographs and invoices. The original photos were not provided and no access to the digital photos was granted to SARS.”

[58] Bullion is of the view that the exact response of Faber should have been contained in the affidavit, to wit:

“MS FABER: And then you’d asked for the original photos that we had made reference to in our previous response to SARS. It was just easier instead of just taking out all these photos that have been taken, it was just easier for us to send the invoice that related to the purchase of, you know with that photograph, so that is all we did send to you because that was really what we were requested so we didn’t include sales because we weren’t requested to do so.

PRESIDING OFFICER: Sure noted than you.”

[59] The statement by Klingenberg is, therefore, factually correct. Original photos were, for whatever reason, not provided.

[60] The last portion of the statement to wit; that “no access to the digital photos were granted to SARS” refers to the following exchange between Steyn and Baghoo:

“MS BAGU (sic!): Then when we melt the bar, I gave you a picture of it because I take the pictures of this.

PRESIDING OFFICER: So you personally take the pictures?

MS BAGU: Yes.

PRESIDING OFFICER: Do you perhaps have the colour photographs of these pictures.

MS BAGU: I use my personal phone for this.

PRESIDING OFFICER: Okay.

MS BAGU: This is just for my reference.

PRESIDING OFFICER: Alright.”

[61] It is correct that Klingenberg did not refer to the fact that Baghoo mentioned that she had the photographs on her personal cell phone. The fact of the matter is, that Bullion did not grant access to the digital photos to SARS. In this respect, Klingenberg’s statement reflects the correct state of affairs.

[62] The reason for applying for the warrant was, furthermore, explained by Klingenberg under the heading: “THE RELEVANT MATERIAL REQUIRED”, as follows

“157. It is respectfully contended that, based on the interviews held, as detailed above, the business transactions are mainly conducted via electronic communications, such as WhatsApp messages, email and photos.

159. As indicated above, Bullion Star provided copies of photos pertaining to the second-hand gold allegedly melted by it and Skomboys provided copies of WhatsApp messages and photos exchanged with Ms Baghoo of Bullion Star regarding the supplies.

160. In order for SARS to ascertain the veracity of these photos and other electronic messages, SARS would require the original raw data relating to these messages, WhatsApps, emails and photos....”
- [63] According to Bullion, a less drastic and invasive manner to obtain the aforesaid information, would have been to merely request access to the electronic devices. In view of Bullion’s persisted cooperation throughout, there existed no reason to believe that Bullion would not have granted access.
- [64] I do not deem it a failure by SARS to not address the “less drastic and invasive manner” in which the information could be obtained. It is rather a factor that the court, in view of all the evidence contained in the affidavit, could have considered in exercising its discretion to issue the warrant.
- [65] In the result, this ground of complaint also fails.

Warrant

- [66] The warrant that was issued is problematic. In paragraph 160 of his affidavit, a portion of which was referred to supra Klingenberg stated the following:

“160. In order for SARS to ascertain the veracity of these photos and other electronic messages, SARS would require the original raw data relating to these messages, WhatsApps, emails and photos. It is for this limited purpose only that SARS is requesting this Honourable Court to issue the warrant for search and seizure.” (own emphasis)

- [67] The warrant, however, authorises SARS to search for and seize a host of documents that were not dealt with in the affidavit in any manner whatsoever.
- [68] I only mention a few: documentation relating to bank accounts, documentation evidencing the holding of assets, the import and export of goods, income and expenditure, etc. Furthermore, SARS was allowed to search for and seize annual financial statements, income statements, balance sheets, VAT schedules, etc.
- [69] In fact, only the search and seizure of 2 of the 13 items listed in the warrant is supported by the facts set out in Klingenberg’s affidavit.
- [70] In respect of the private residences of Niyazi and Bhagoo, Klingenberg stated the following in his affidavit:

“161.2 Only in the event of Ms Niyazi not being present at the business address of Bullion Star and only to be executed within reasonable hours at the residential address of the director of Bullion Star, being Unit 5, Stella Estates, 52 Stigling Road, Rivonia, Johannesburg, Gauteng; and

161.3 Only if Ms Baghoo, the employee of Bullion Star is not present at the business address of Bullion Star, or in the event of her electronic equipment, such as camera or phone, are not present at the business address of Bullion Star, then the warrant of search and seizure will also, within reasonable hours, be executed at the residential address of Ms Baghoo, being 132, 19th Avenue, Laudium, Johannesburg.”

- [71] The warrant does not reflect the aforesaid condition, but rather authorise SARS to unfettered access to the private residences to embark on a search for all the items listed in the warrant.
- [72] In the result, the issuing of the warrant does not in law or fact comply with the provisions of section 60(1) of the Act and stands to be set aside.
- [73] It is noteworthy that the warrant was prepared by SARS and presented to the court for authorisation. SARS has failed dismally to explain on what basis the warrant, in view of the facts presented by it, was prepared. Although it remains in the discretion of the court to issue a warrant, the legal practitioner presenting the matter has a duty to draw the court’s attention to anything that might be contentious. Courts rely on the unscrupulous and ethical conduct of officers of the court when adjudicating matters, more so ex parte applications that is voluminous and brought on an urgent basis.
- [74] In view of the finding above, it is not necessary to consider the further basis for the setting aside of the warrant, to wit; the execution of the warrant.

ORDER

The following order is granted:

1. The warrant issued on 28 March 2022 is set aside.
2. The respondent is ordered to forthwith return each and every item seized and removed, during the search and seizure operation at No 5 S[...] Estates, S[...] Road, Rivonia; 1[...], 19th A[...], L[...], Johannesburg and 62 W[...] Road Rivonia, Johannesburg to the premises from which they were seized.
3. The respondent is ordered to destroy every recording, copy, mirror image, computer file, notes, scans, emails or whatsoever record made, utilising the information and/or items seized as a result of the warrant mentioned in (1) above.
4. The respondent, its employees and/or agents are interdicted from utilising any information secured as a result of the search and seizure carried out on the strength of the warrant.
5. The respondent is ordered to pay the costs of the application, which costs include the costs of two counsel.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT

DIVISION, PRETORIA

DATES HEARD:

22 & 23 January 2024

DATE DELIVERED:

2 February 2024

APPEARANCES

For the Applicant: Advocate AR Bhana SC

Advocate C Dreyer

Advocate AB Omar

Advocate S Mohammed

Instructed by: ZEHIR OMAR ATTORNEYS

For the Respondents: Advocate BH Swart SC

Advocate S Maritz

Instructed by: VZLR INC

2003

(2) SA 385 (SCA).

Act 89 of 1998.

Ibid fn. 1 at para 71.

See: Schlesinger v Schlesinger 1974

(4) SA 342 (W).

2009

(1) SA 1 (CC) at para 90-91.

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