

SOUTH AFRICA / JUDGMENT

Jordi v Commissioner for the South African Revenue Service (A2023-008433) [2023]

ZAGPJHC 1392; 84 SATC 337 (29 November 2023)

[2023] ZAGPJHC 1392

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strydom, Mudau, Noko

CASE / FILE NUMBER

A2023-008433

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG

Case Number: A2023-008433
In

the matter between: JORDI
ADRIAN WALTER
Appellant
And
COMMISSIONER
FOR THE SOUTH AFRICAN REVENUE SERVICE

JUDGMENT

STRYDOM, J (Mudau J and Noko J concurring):

Introduction

- [1] This is an appeal against the whole judgment and order of the Tax Court, Gauteng delivered on 17 August 2022, per Molahlehi J, upholding the additional assessments raised against the income tax liability of Adrian Walter Jordi (Appellant) for the 2016 year of assessment. The appeal is brought in terms of Section 133(2)(a) of the Tax Administration Act[1] (the TAA).

[2] Before the Tax Court, the issue for determination was whether sub-section 1(cB) of the definition of gross income contained in section 1 of the Income Tax Act[2] (the ITA) finds application to the restraint of trade agreement concluded between the appellant and his former company Rappa Holdings

(Pty) Ltd (Rappa Holdings), and its affiliated companies. This issue was whether an amount of R60 000 000 received by the appellant pursuant to the restraint of trade should be classified as income or capital received.

[3] The court a quo found that the payment received in terms of the restraint agreement constituted income as defined in section 1(cB) of the ITA and dismissed the appeal with costs. The appellant afterward noted an appeal against the decision to this Full Court in terms of Part E of the TAA.

The salient facts

[4] The genesis of this matter is reflected in the pleadings of the tax appeal before the Tax Court, and the merits are comprehensively set out in the judgment of Molahlehi J, so it is not necessary to repeat same here in any detail, except insofar as these facts are relevant to cogently address the issues raised by the appellant in this appeal. The relevant facts are as follows.

[5] The appellant is a trustee and beneficiary of the Janad Trust. The latter held shares in Rappa Holdings. The appellant was also employed by Rappa Holdings and served on its board as a technical director during the period of 1988 to 2010. During his employment, the Janad Trust acquired its shares in Rappa Holdings. The appellant had a fall-out with Mr Moss who also held shares in Rappa Holdings through the Rynic Trust. The appellant ceased to be employed by Rappa Holdings in October 2010. He was bound by a restraint of trade for a period of 12 months. He ceased being a director of Rappa Holdings in June 2011. Following his resignation, Rappa Holdings, the appellant, and the Janad Trust were involved in protracted litigation, which resulted in a settlement agreement being

concluded on 23 April 2015 between the trustees of the Janad and Rynic Trusts and Rappa Holdings. On the same date, a share repurchase

agreement was concluded between the trustees of the Janad Trust and Rappa Holdings. This agreement was subject to the following

suspensive conditions:

“4.1.7. [W]ithin twenty (20) business days after the signature date, the company delivers a written guarantee in favour of the seller issued by the company’s banker on terms and conditions acceptable to the seller, in terms of which the bank guarantees payment of:

4.1.7.1 R160,000,000 (one hundred and sixty million Rand) by the company to the seller in settlement of the amount payable in terms of clause 6.5.

4.1.7.2. R60,000,000 (sixty million Rand) in settlement of the consideration payable in respect of a restraint of trade agreement.

on the closing date, against due performance by the seller with its delivery obligations under clause 7.1”

[6] The restraint of trade agreement, mentioned in clause 4.1.7.2 above, between the appellant and Rappa Holdings was also concluded on 23 April 2015, the clauses below are relevant for purposes of this dispute:

“2.3. Jordi is a trustee and beneficiary of the Janad Trust and is an erstwhile director and key employee of the Company, Nama, Rappa

Resources, and various other subsidiaries of the company. It is recorded that Jordi (i) ceased to be an employee of such companies on or about October 2010 and (ii) ceased to be a director of such companies on or about June 2011.

2.4. The company and the Janad Trust wish to enter into the Share Repurchase Agreement.”

...

“3.1 Jordi acknowledges that during the course of the Janad Trust’s shareholding in the Company, Jordi was directo (sic) and a key employee of the Company, Nama, Rappa Resources and various other subsidiaries of the Company, and has been exposed and has had access to, and has learned of certain Confidential Information.”

And

“1.1.8 Confidential Information

1.1.8.1 the know-how and techniques of the Subject Companies;

1.1.8.2 the method and mode by which:

1.1.8.2.1 Nama conducts the Nama Business; and

1.1.8.2.2 Rappa Resources conducts the Rappa Resources Business;

1.1.8.3 client lists and the client connections of each Subject Company; and

1.1.8.4 names of business connections of each Subject Company”

[7] Following receipt of the R60 million consideration for the restraint of trade, paid in terms of the restraint of trade agreement, the appellant declared to the respondent and paid an amount of R8 million as capital gains tax in his first provisional tax return. The appellant declared the amount of R60 million as a capital receipt in his Income Tax Return (ITR12) at the end of the year of assessment. According to the appellant, he declared the amount of R60 million as a capital gain, since he received a directive issued on behalf of the Commissioner for the South African Revenue Service’s (Respondent) by an employee, Mr Gerhard Jansen Van Vuuren (Mr Van Vuuren). According to the appellant, the consideration for the restraint

of trade constituted a capital receipt and is subject to capital gains tax rather than normal income tax.

- [8] On 21 June 2018, the respondent issued a notice of assessment and finalisation of the audit letter to the appellant in terms of which it adjusted his taxable income. The respondent included the consideration for the restraint of trade agreement as part of the appellant's gross income in terms of sub-section (cB) of the definition of gross income in section 1 of the ITA. The appellant objected to the assessment, on the grounds contained in his letter of objection. The respondent disallowed the objection because it was not persuaded that the receipt constituted a capital gain. Dissatisfied with the disallowance of the objection, the appellant appealed same to the Tax Court.

Proceedings before the Tax Court

- [9] In the proceedings before the Tax Court, it was not in dispute that the consideration of R60 million received by the appellant was for the restraint of trade. The bone of contention turned on whether there was a causal link between the consideration received for the restraint of trade and the appellant's past employment or holding of an office with Rappa Holdings to serve as a sufficient qualifier to regard the consideration received in terms of the restraint of trade agreement as gross income and thus taxable in his hands as a receipt of a revenue nature.
- [10] In his evidence-in-chief, the appellant testified that he was one of the founding members and the brains behind Rappa Resources. He explained in his oral evidence that he was employed by Rappa Holdings and that the employment contract was subject to the restraint of trade agreement which expired in or around October 2011. Since he ceased to be a director of Rappa Holdings, the latter wanted to acquire the shares of Janad Trust. The parties could not agree on the value of the shares, and this led to protracted litigation which culminated in an eventual settlement. The sale of shares and the restraint of trade agreements were concluded.
- [11] In terms of the restraint of trade agreement with Rappa Holdings appellant was restrained from, among other things, competing with Rappa Holdings for a period of five years.[3]
- [12] Apart from himself testifying, the appellant called two witnesses on his behalf. The first witness was Mr Shaun Nurick (Mr Nurick), who is the applicant's accountant. Mr Nurick testified that he had cumulative experience of approximately 27 years as a tax practitioner. He also testified that he does not know whether the R60 million was a receipt of capital gain or revenue nature.

- [13] Mr Van Vuuren testified on behalf of Mr Jordi. During his evidence in chief, he among other things testified that he started working at SARS in 1997. He then moved to the debt collection department at Megawatt Park. His duties did not include issuing an assessment or tax directive, but he knew what they looked like. He does not know how capital gains tax works and has never received training in same, nor did he know how to calculate a capital gain tax liability.
- [14] When questioned about the tax directive that the appellant relied on, Mr van Vuuren confirmed that the email address and the signature appearing on the tax directive were his. That said, he had no access to the system to issue a tax directive and could not have issued a tax directive. He also testified that he does not remember issuing the tax directive. But if he did, perhaps he did so on instructions of his senior (a person high up, as he said).
- [15] Having heard the evidence and argument presented by both parties, the Tax Court dismissed the appellant's appeal and confirmed the assessment. It further imposed the imposition of understatement penalties in terms of sections 222 to 223 of the TAA and section 89quat interest on the underpayment.

Condonation and reinstatement of the appeal

- [16] The appellant brought an application for an order that his late or deficient compliance with the provisions of rule 49(5) and (6) be condoned and for an order that the appeal be reinstated to the extent that the appeal might have lapsed. The respondent opposed the application and argued that condonation should not be granted.
- [17] The court a quo's judgment was delivered on 17 August 2022. The notice of appeal was delivered timeously on 10 November 2022. In terms of rule 49(6)(a) of the Uniform Rules of Court, within 60 days after the noting of appeal, the appellant had to make a written application to the Registrar for allocation of a date of hearing of the appeal, failing which a respondent may do so. If no such application is made by either party, the appeal would be deemed to have lapsed in terms of the rule. Thus, an application for a date of hearing in this instance, ought therefore to have been made on or before 9 February 2022. According to the respondent the appellant only did so on 24 May 2023 – more than 3 months after the expiry of the 60-day period. By then, the appeal had lapsed in terms of the deeming provisions of rule 49(6)(a).
- [18] The appellant appreciates that he might have been out of time and non-compliant with Rule 49(6)(a) read with Rule 49(7)(a) which required him to, at the same time as the application for a date for the hearing of an appeal, serve and file copies of the record on the Registrar and simultaneously, serve two copies of the record on the respondent; and accepts that he did not timeously file and serve copies of the appeal record.

- [19] The basis of the respondent's grounds of opposition is that the appeal has lapsed because the appellant failed to apply for the date of the hearing within sixty days after the noting of the appeal; that he failed to explain the extent and cause of the delay and to provide a full and reasonable explanation for the entire period of the delay to excuse his non-compliance with the rules; he failed to demonstrate that he has good prospects of success on appeal and that he failed to demonstrate that it would be in the interest of justice to reinstate the appeal.
- [20] The court will decide the condonation application together with the merits of this appeal as the prospects of success on appeal is one of the considerations.

Legal principles on condonation

- [21] The approach a Court adopts in determining an application for condonation, in the context of reinstatement of an appeal is well-established.[4] Tritely, an acceptable explanation must be given in all cases, not only for the delay in noting the appeal but also, where applicable, for any delay in seeking condonation.[5] The party seeking condonation must therefore make out a case for a good cause, and a full, detailed, and accurate account of the causes of delay and their effects must be furnished to enable the Court to understand clearly the reasons and then, in the exercise of the court's discretion, to assess the reasons for failure to comply with the rules.

- [22] Factors relevant to this enquiry were stated by Ngcobo CJ, in *Bernert v Absa Bank*[6] to include, but are not limited to:

"[T]he interest of justice ... the extent and the cause of delay, the prejudice to other litigants, the reasonableness of the explanation for the delay, the importance of the issues to be decided in the intended appeal and the prospects of success."

- [23] When the facts are considered and the dates when events took place from the date of the notice of appeal, on 10 November 2022, leading up to the due date when the application for a date for the appeal should have been requested from the registrar, it becomes clear that the appellant, through his attorney, seriously and consistently pursued the intention to prosecute the appeal. On 29 August 2022, a transcript of the record was requested. In terms of section 140(2) of the TAA, documents submitted in the tax court which

do not relate to the matters in dispute in the appeal may be excluded from the record of appeal.

- [24] In this matter, parts of the record related to a further appeal, the merits of which were conceded by the respondent, needed to be excluded. The transcript was received on 18 November 2022. This was followed by correspondence between the appellant and the respondent which portions should be deleted. At first security for costs was sought by respondent. On 1 February 2023, this request was abandoned by the respondent. On 18 January 2023, the respondent accepted the transcripts and its reduction. These issues all contributed to the delays whilst the lapse of the 60-day period was getting closer.

- [25] On 2 February 2023, according to appellant all documents, including the court record was filed on Court Online and an appeal number, to wit, A008433/2023 was provided. According to the appellant, a power of attorney was already filed in the appeal. This was disputed by the respondent. On 7 February 2023, the appellant received a letter from Mr JR Coetzee from the registrar's office. In this letter, addressed to Ms Moleme from the civil appeal section, it was stated that she had to audit the appeal application on court online and communicate with the attorney/s regarding any omissions in the case, if any, before it could be considered for a date allocation.
- [26] On 8 February 2023, the last day before the expiry of the 60-day period, the appellant caused an email to be send to Ms Moleme requesting an allocation for a date of the appeal. On behalf of the respondent, it was argued that this did not constitute an application for a date of appeal. The appeal record was not complete. In fact, this only happened on 18 May 2023 when the final reduced record was uploaded. Only on 24 May 2023 did the appellant made a written application for a hearing date.
- [27] In my view, the appellant at all relevant times was acting with purpose to get everything in place for an appeal date to be allocated. There were delays which could not solely be attributed to the appellant. This relates to the reduction of the record, problems with Case Lines and requests for security of cost. The argument on behalf of respondent that the letter of 8 February 2023 did not constitute an application for an appeal date has merit but Mr Coetzee on 7 February 2023 already referred to the "appeal application" of the appellant. This would explain why the appellant ask for condonation "to the extent that the appeal may have lapsed."
- [28] It was argued that the appellant failed to show that the interest of justice requires the reinstatement of the appeal. This appeal is without a doubt of great importance to the appellant. The respondent failed to indicate any prejudice it suffered as a result of the delay in obtaining a date of appeal.
- [29] In my view, save for the issue of prospects on appeal, I am satisfied that the appellant has demonstrated good cause for the grant of condonation for various non-compliances, and for the reinstatement of the appeal which had technically lapsed. I will deal with the merits of the appeal hereinbelow and depending on the outcome will then finally pronounce on the condonation application and whether the appeal has lapsed or not.

The issues on appeal

- [30] Crisply put, the issue for determination in this appeal is whether the Tax Court erred in holding that there is a causal link between the restraint of trade payment and Mr Jordi's past employment or the holding of office with Rappa Holdings and its affiliated companies.
- [31] The determination of the appeal hinges on the interpretation of paragraph (cB) of the definition of 'gross income' contained in Section 1 of the ITA, which includes:

“[A]ny amount received by or accrued to any natural person as consideration for any restraint of trade imposed on that person in respect or by virtue of

- (i) employment or holding of any office; or
- (ii) any past or future employment or the holding of an office”

[32] If this main issue is decided in the appellant's favour, i.e., that the Tax Court erred in its finding that the amount received by the appellant as consideration for the restraint of trade was in respect of or by virtue of his past employment or holding of office with Rappa Holdings, then the appellant will succeed in its appeal and will be entitled to the relief prayed for in its notice of appeal. If, however, the main issue is decided against the appellant, the judgment of the court a quo must stand. The questions then arise as to whether the Tax Court was correct in holding that the appellant is liable for understatement penalties and whether the Tax Court was correct in finding that there is no basis to remit the interest in terms of section 89quat. Lastly, whether the Tax Court was correct in ordering the appellant to pay costs.

The Merits

- [33] On behalf of the appellant, it was argued that the issue whether or not the amount of R60 million paid by Rappa Holdings to the appellant was an amount contemplated in sub-section (cB) of the definition of ‘gross income’ in section 1 of the ITA could be refined to whether or not this restraint of trade was imposed on the appellant in respect or by virtue of his past employment or holding of office at Rappa Holdings.
- [34] Sub-section 1(cB) has three elements that must be satisfied: the first element, is that the amount received or accrued should be as consideration for a restraint of trade. The second element is that the restraint of trade should have been imposed on a person, lastly the imposition should be in respect of or by virtue of employment or holding of any office, past present or future.
- [35] “In respect of” or “by virtue of” connotes a causal relationship should be present between the imposition of the restraint of trade and the employment or holding of an office.[7]
- [36] It was argued that what this court really has to determine is the causally relevant factor which resulted in the imposition of the restraint of trade imposed on the appellant. The inquiry is thus whether the causally relevant factor is the past employment or holding of office on the one hand or the sale transaction of the Rappa Holdings shares on the other.
- [37] It was argued that the court a quo erred by finding that there was a causal link between the restraint of trade and past employment and/or the holding of office of the appellant instead of finding that the restraint was imposed by virtue of the sale of shares transaction. It was argued that the dominant cause and true reason for the restraint of trade was the sale of the Rappa Holdings shares.

- [38] It was argued that considering the following facts, the court a quo should have concluded that the restraint of trade and payment in terms thereof was predominately causally linked to the sale of shares and not the past employment and the holding of office of the appellant:
- a. The restraint of trade agreement was entered during or about April 2015 and the payment was received during or about June 2015.
 - b. Until October 2010, the appellant was employed by Rappa Holdings, whereafter he ceased to be so employed.
 - c. During or about June 2011 the appellant ceased to be a director of Rappa Holdings and any of its subsidiaries.
 - d. The commercial ratio behind the restraint of trade was to protect the value of the Rappa Holdings shares by preventing the appellant from using his innovative invention and technology which he brought into Rappa Holdings when the business was started, by competing with Rappa Holdings. As long as appellant owned his shares this would not have happened as he would not have competed against Rappa Holdings as this would have diluted the value of his own shares which he was in the process of selling to Rappa Holdings.
 - e. After the appellant ceased to be employed by Rappa Holdings during 2010, a 12-month restraint of trade period was imposed on him which thereafter lapsed.
- [39] The respondent's version as alluded in its Rule 33 statement contends that the appellant was a key employee of Rappa Holdings and also held office as a director and that the restraint was imposed upon him in respect of his employment or holding of office.
- [40] What a decision in this matter really boils down to is what the reason or reasons for imposing the restraint of trade on the appellant was or were some four years after he no longer was employed by or held a directorship with Rappa Holdings.
- [41] For purposes of a decision in this matter section 1 (cB) requires a causal link between the restraint of trade which was imposed and the past employment or holding of office of the appellant. In my view, this section does not limit the causal link only to employment or the holding of office of the person receiving a consideration in terms of the restraint of trade. Nothing in the section can be interpreted to limit the causal link to a dominant reason. What is required is a nexus between the consideration
- received in terms of the restraint and the employment or holding of office. Has this been shown in this matter?
- [42] It cannot be doubted that the Settlement Agreement, Sale of Share Agreement, and the Restraint of Trade Agreement are interlinked and were concluded at the same time. This, however, in my mind, does not mean that the Restraint of Trade Agreement was only entered into because of a suspensive condition in the Sale of Share Agreement.

- [43] The sale of shares agreement might have been the triggering event for concluding the Restraint of Trade Agreement at that time, as, upon the sale of the shares the appellant had no longer a reason to protect the value of his previously held shares. The question remains, however, why was the restraint of trade necessary? Because the appellant had the know-how which he acquired many years before being brought into the business or whether through his employment and directorship, which stretches over many years, he obtained confidential information which he could use as a springboard to compete with Rappa Holdings and its subsidiaries?
- [44] In my view, the answer to these questions is to be found in the wording of the terms of the Restraint of Trade Agreement itself. It stipulates in some detail what Rappa Holdings wanted to protect. A protectable interest can be discerned from this.
- [45] The relevant portions of the Restraint of Trade Agreement have been quoted hereinbefore, but “confidential information” was defined to mean the know-how and techniques of the subject companies; the method and mode by which Rappa Resources and Nama conduct their respective businesses; client lists and client connections of these companies and the names of business connections of them.
- [46] In clause 3.1 of the Restraint of Trade Agreement the appellants specifically acknowledged that during the course of the Janad Trust’s shareholding in the company he was a director and key employee of the company, Nama, and Rappa Resources, and various other subsidiaries of the company. It is noted that he has been exposed and has had access to and has learned of certain confidential information.
- [47] The Restraint of Trade Agreement is an agreement that was signed by the appellant himself, whereby he agreed with the terms thereof. To argue that the dominant reason why he entered into the Restraint of Trade Agreement was by virtue of the Sale of Share Agreement is not sustainable.
- [48] It was argued that the Restraint of Trade Agreement contains terms and that these terms are not evidence. The undisputed evidence is that the Restraint of Trade Agreement contained these terms. A court can determine the intention of parties to an agreement if the terms are unambiguous and clear and can infer from the language used what the intention of the parties were when they entered into the agreement. In this case it can be done. It was noted that the appellant has been exposed and has had access to and has learned of certain confidential information during his employment and holding of office.
- [49] What should not be conflated is the reason why the Restraint of Trade was concluded at a specific time, i.e. when the shares were sold, and why it was necessary to impose such a restraint on the appellant. The reason for a restraint of trade is to protect the value of a business. The value of a business is protected by avoiding that a person with confidential information uses such information to compete against a business. A proprietary interest is sought to be protected through a restraint of trade. This proprietary interest may be vested in confidential information such as trade secrets, methods of conducting the business,

customer lists and

contacts. This was why it became necessary for Rappa Holdings to protect itself against the appellant, as was stated in the Restraint

of Trade Agreement. He obtained such confidential information and was in a position to effectively compete against the Rappa businesses if he was free to do so. This confidential information was obtained by the appellant as a result of his employment and/or directorship. The fact that the appellant, even before he became part of Rappa Holdings, developed the technology and know-how which he later

brought into Rappa Holdings is not decisive. During many years of employment and as a director he would have obtained a far deeper

know-how of the business of Rappa Holdings and its subsidiaries. That is what he acknowledged in the Restraint of Trade Agreement.

[50] In my view, the finding of the Court a quo was correct that the money paid under the Restraint of Trade fell within the definition of “gross income” with reference to section 1 (cB) of the ITA. The Restraint of Trade was imposed in respect or by virtue of his past employment and holding of office. The causal nexus has been established. The payment was thus income and not of capital nature.

[51] The appeal as far as this finding is concerned should be dismissed.

Penalty imposed

[52] The court a quo found that the appellant was liable for an understatement penalty. Section 221 of the TAA defines “understatement”, inter alia, to mean an incorrect statement in a return. If such a return is rendered a penalty can be imposed in terms of section 222 of the TAA “...unless the understatement resulted from a bona fide inadvertent error.”

[53] The court a quo found that it was not the case of the appellant that the understatement occurred consequent to a bona fide inadvertent error but rather that he acted on the directive issued by the respondent. The court found this explanation unsustainable.

[54] The court found that the appellant misrepresented to respondent the true state of affairs concerning the restraint of trade and its relation to the amount received. The document that the appellant allegedly received (“the directive”) from the respondent on of which he relied upon to declare the amount of R60 million as capital is “suspicious”. It was found that despite the directive being on a letterhead of the respondent its validity was placed in serious doubt by the evidence of Mr Van Vuuren, an employee of the respondent who was called as a witness on behalf of the appellant.

[55] Section 102(2) of the TAA places the burden of the respondent of proving the facts upon which it relies for the imposition of an understatement penalty.

- [56] The respondent initially disputed the authenticity of the directive, suggesting it was a forgery on the part of the appellant. It later transpired through discovery of a contemporary file note, in possession of the respondent, that recorded that the appellant had been directed to make payment on the basis that the amount received was a capital gain and that the appellant had in fact paid the first tranche of R4 million and that the officials of respondent had to keep a look out for the second tranche of R4 million. Mr Van Vuuren the employee of respondent confirmed the authenticity of the letter and the electronic file note having been the author of both. I agree with the appellant that this confirmed the authenticity of the letter.
- [57] Once it has been accepted that the directive was in fact given, albeit, that it now appears that it could not have been given by Mr Van Vuuren, as he did not have the knowledge or authority to issue such a directive then an explanation is required from respondent and not the appellant. Mr Van Vuuren testified that it was possible that he acted on the instruction of a senior.
- [58] There is no evidence to support a finding of fraud or any impropriety. The same apply to the court a quo's finding that the facts presented to respondent at Megawatt Park amounted to a misrepresentation. What was provided to respondent was a covering letter and the restraint of trade agreement. Reference was made to the previous 12 months restraint agreement but also what appears to be the 5 years restraint of trade agreement. The main aim of this letter appears rather to be a request to consider whether legal expenses incurred by the appellant could be deducted from income. There is no evidence of any form of misrepresentation.
- [59] Considering that the onus was on respondent to have proven its entitlement to impose an understatement penalty the court a quo in my view misdirected itself to have found that the appellant made a misrepresentation when the request for a directive was made. Further, to have based the court's finding on a suspicion of some impropriety. Evidence was lacking to have made such finding.
- [60] The version of the appellant that he in fact received the directive should have been accepted. This being the case the understatement of gross income came about for an acceptable reason, i.e., reliance being placed on a document which at least purported to be a tax directive, whilst in truth it was not. In my view, if a taxpayer received such directive, he or she, or even a tax practitioner, will be acting bona fide to declare income on the basis of the directive, unless such a finding was clearly unsustainable. In this matter the legal argument advanced that the dominant causa for the restraint of trade agreement was the sale of shares and not the appellant's previous employment and holding of office was not altogether meritless, despite the finding of the court a quo, and this court, that the argument cannot be upheld.
- [61] In my view, the 10% understatement penalty should be remitted, and the appellants relevant assessment be altered.

- [62] The appellant did not appeal to the court a quo's finding that there was no basis for imposing interest in terms of s 89quat of the ITA. Despite the appeal being upheld the appellant remains responsible for interest. This interest should be recalculated by the respondent in terms of the ITA and TAA.
- [63] Returning to the issue whether the appeal has lapsed as contemplated in Rule 49(6)(a) of the Rules of this court the court finds that there existed a reasonable prospect of success in the appeal. For this reason, coupled with what has been found hereinbefore, the appellant has shown good cause for the appeal to be reinstated.

Costs

- [64] This court has partially allowed the appeal. For this reason, the cost order made by the court a quo should be set aside. The appellant's grounds of appeal cannot be held to be unreasonable but the same can be said as far as the respondent's grounds of assessment, more particularly the inclusion of an understatement penalty. Unreasonableness in this sense does not mean that the grounds of appeal should have been upheld or the assessment was unassailable, respectively. Having found that the court a quo should have remitted the understatement penalty, the court a quo should have ordered each party to pay its own cost. The same applies to the cost on appeal to this court. The appellant was only partially successful whilst the respondent successfully opposed the appeal as far as the main finding of the court a quo, was concerned.
- [65] The order which this court intends making has no bearing on the cost order made by the court a quo pertaining to the second appeal. This order was not part of the appeal before this court.

- [66] The following order is made:

Order

1. The appeal is reinstated.
2. The appeal is partially upheld to the extent that the understatement penalty is remitted, and the costs order made against the appellant is set aside.
3. The additional assessments dated 21 June 2018 is hereby ordered to be altered in the following manner:
 - a. By the exclusion of the understatement penalty imposed
 - b. By the recalculation of any interest in terms of the Income Tax Act and Tax Administration Act to the extent that the exclusion of the penalty may alter the interest applicable.
4. Each party to pay their own costs in the court a quo and on appeal.

R STRYDOM

JUDGE OF THE HIGH COURT

JOHANNESBURG

I agree

TP MUDAU

M.V. NOKO

For the appellant:

Adv. J. Peter SC

with Adv. C. Dreyer

Instructed by:

Salant Attorneys

For the Respondent:

Adv. H.G.A. Snyman SC

with Adv. K.D. Mogano

Ramushu Mashile Twala Inc

Heard on: 23 August 2023

Delivered on: 29 November 2023

[1] 28 of 2011.

[2] 58 of 1962.

[3] Clause 3.3 of the restraint agreement states that: “Subject to the Janad Trust receiving payment on the Closing Date from the Company of the price payable for the Repurchase Shares in terms clause 4.1.7 of the Share Repurchase Agreement, and payment by the Company to Jordi on the Closing Date of the cash amount of R60,000,000.00 (sixty million rand) in consideration for the restraint undertakings set out in this Agreement, Jordi hereby confirms and undertakes to the Company and each Subject Company respectively that he will not, during the Restraint Period, either alone or jointly or together with any other person: 3.3.1. be interested or engaged, directly or indirectly, including but not limited to being a proprietor, partner, director, shareholder, financier, member of a syndicate or close corporation, employee, agent or other representative, consultant or adviser (in any way) in or with any firm, business, company, close corporation or other undertaking which is directly or indirectly engaged, interested or concerned in a Competitive Activity within the Territory; 3 3 2. directly or indirectly, encourage, or entice, or incite, or persuade, or induce any employee of a Subject Company to terminate his employment with such Subject Company, or cause, or assist in causing any of the foregoing to take place; 3.3.3. allow any

employee of a Subject Company to work for, any firm, business, company, close corporation or other undertaking of which he is a proprietor, partner, director, financier, shareholder or member within the Territory; 3.3.4. directly or indirectly encourage or entice or incite or persuade or induce any client of a Subject Company to take its/his custom away from such Subject Company, or cause or assist in causing any of the foregoing to take place.”

[3] Clause 3.3 of the restraint agreement states that:

“Subject to the Janad Trust receiving payment on the Closing Date from the Company of the price payable for the Repurchase Shares in terms clause 4.1.7 of the Share Repurchase Agreement, and payment by the Company to Jordi on the Closing Date of the cash amount of R60,000,000.00 (sixty million rand) in consideration for the restraint undertakings set out in this Agreement, Jordi hereby confirms and undertakes to the Company and each Subject Company respectively that he will not, during the Restraint Period, either alone or jointly or together with any other person:

3.3.1. be interested or engaged, directly or indirectly, including but not limited to being a proprietor, partner, director, shareholder, financier, member of a syndicate or close corporation, employee, agent or other representative, consultant or adviser (in any way) in or with any firm, business, company, close corporation or other undertaking which is directly or indirectly engaged, interested or concerned in a Competitive Activity within the Territory;

3 3 2. directly or indirectly, encourage, or entice, or incite, or persuade, or induce any employee of a Subject Company to terminate his employment with such Subject Company, or cause, or assist in causing any of the foregoing to take place;

3.3.3. allow any employee of a Subject Company to work for, any firm, business, company, close corporation or other undertaking of which he is a proprietor, partner, director, financier, shareholder or member within the Territory;

3.3.4. directly or indirectly encourage or entice or incite or persuade or induce any client of a Subject Company to take its/his custom away from such Subject Company, or cause or assist in causing any of the foregoing to take place.”

[4] See, in this regard, *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* [2017] ZASCA 88; and *Darries v Sheriff, Magistrate’s Court, Wynberg & another* [1998] ZASCA 18; 1998 (3) SA 34 (SCA).

[5] *Darries v Sheriff, Magistrate’s Court, Wynberg & another* 1998

(3) SA 34 (SCA).

[6] *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC).

[7] *Stevens v Commissioner, South African Revenue Service* 2007

(2) SA 554 (SCA) at 559 para [20].

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