

SOUTH AFRICA / JUDGMENT

## Portion 292, Waterval Developments (Pty) Ltd v Commissioner for the South African Revenue Service and Another (26092/2016) [2017] ZAGPPHC 629 (2 October 2017)

[2017] ZAGPPHC 629

COURT

North Gauteng High Court, Pretoria

BEFORE

G Rautenbach

CASE / FILE NUMBER

26092/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 26092/2016

Not reportable

Not of interest to other judges

Revised.

2/10/2017

PORTION 292, WATERVAL DEVELOPMENTS

(PTY) LIMITED Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE First Respondent

THE REGISTRAR OF THE TAX COURT Second Respondent

JUDGMENT

Rautenbach AJ

1. This matter refer to a matter that was adjudicated upon in the Tax Court. The main issue between the parties at this stage is whether the successful party, the Applicant , is entitled to an order declaring that the First Respondent has abandoned the right to appeal against the decision of the Tax Court in the appeal to this Court (in Case Number 13512), which was delivered on 30 March 2015. The issue is apparently about whether peremption took place. See: South African Revenue Services v. The Commission for Conciliation, Mediation and Arbitration and Others 2017 (1) SA 549 (CC).
2. It is however not the issue before me. The issue before me is whether the Applicant, for purposes of his main application, is entitled to certain documents which was requested in a Notice which was served on the First Respondent in terms of Rule 35(12). The requested documents comprised the following:
  - 2.1 A Memorandum prepared by an Employee of the First Respondent (paragraph 13 of the main Answering Affidavit) ("the Memorandum");
  - 2.2 Representations from relevant stakeholders, (paragraph 13 of the main Answering Affidavit) ("the representations");
  - 2.3 The Minutes of a Committee made up of representatives of all relevant stakeholders (paragraph 13 of the main Answering Affidavit) ("the Minutes");
  - 2.4 An Opinion obtained from Senior Counsel (paragraph 13 of the main Answering Affidavit) ("the Opinion");
  - 2.5 The "documents recording the unanimous decision to appeal" (paragraph 15 of the main Answering Affidavit); and
  - 2.6 The proof of postage evidencing that the First Respondent's Notice of Intention to Appeal was posted on 2nd June (paragraph 30 of the main Answering Affidavit).
3. The facts that have to be established is whether these were documents or recordings referred to as meant in Rule 35(12).
4. In its answer to the interlocutory application (Rule 35(12)) it is stated in paragraph 14 of the Applicant's Founding Affidavit that the Memorandum requested was prepared by a SARS' employee who conducted the litigation. It is further stated that SARS refuses to make this available and that this Memorandum is privileged. In my view the Respondent has not made out a proper case as far as privilege is concerned for me to exclude this document and the Applicant is therefore entitled to the document for purposes of the main application.
5. As far as paragraph 2 of the Notice is concerned, I am not convinced that representations and/or other inputs necessarily refer to document or recordings and I am therefore not going to make an order that the First Respondent should hand over the documents referred to in the second paragraph of the Notice. This ruling also apply in respect of paragraph 3.

6. As far as paragraph 4 is concerned which relates to the opinion of Senior Counsel practicing in the tax field, this is clearly a document that is privileged and I further do not see how an opinion of Senior Counsel in litigation could have a bearing on the

outcome of the case. At the end of the day it is actually irrelevant what opinion was given by Senior Counsel to SARS. I am fully aware that some Judgments do not consider relevancy a factor to be taken into account, as I was not persuaded on the fact that this document should be disclosed despite the fact that it is privileged I do not have to make a finding as to relevancy as a factor or not.

7. It is similarly not clear to me that reference was made at all to a document in respect of the decision to appeal as contained in paragraph 5 of the Notice.
8. As far as paragraph 6 of the Notice is concerned, it is stated under oath on behalf of the First Respondent that this document cannot be located. This is something that the First Respondent will have to live with at the hearing and adjudication of the main application.
9. I was referred to various Judgments specifically insofar as privilege was claimed. In this case the documents that I excluded from being disclosed to the Applicant are the documents in paragraphs 2 to 5 of the Rule 35(12) Notice.
10. I was referred to various authorities and without discussing them in depth and specifically taking into account *Competition Commission v. Arcelor Mittal South Africa Limited and Others* 2013 (5) SA 538 (SCA) the reference to the Opinion of Senior Counsel in my view does not contain waiver whether express, implied or imputed. Apart from this there was basically a bare reference to such document in the First Respondent's papers and nothing at all concerning the contents of the Opinion was disclosed.
11. I considered the relief obtained by the Applicant as well as to what extent the First Respondent was successful in opposing the relief sought and I am of the view that no cost order should be made in the matter.
12. In the circumstances I make the following order:
1. The Applicant is ordered to comply with the First Respondent's Notice in terms of Rule 35(12) dated 21 June 2016 in respect of paragraph 1.
  2. The First Respondent is not obliged to make available the items requested in paragraphs 2 to 5 of the Notice.

-----

J G Rautenbach

Acting Judge of the High Court

Gauteng Division

Pretoria

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZAGPPHC/2017/629.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/portion-292-waterval-developments-pty-ltd-v-commissioner-for-the-south-african-revenue-service-and-others-unknown-topic-agpphc-2017>

Prepared on 11 October 2026 · Esheria