

SOUTH AFRICA / JUDGMENT

SMI Pty Ltd and Another v Commissioner for the South African Revenue Services - Appeal (CA25/2023) [2023] ZAECMKHC 129 (21 November 2023)

[2023] ZAECMKHC 129

COURT

Eastern Cape High Court, Makhanda

BEFORE

J W Eksteen, M Makaula, H Zilwa

CASE / FILE NUMBER

CA25/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, MAKHANDA

Case

No.: CA25/2023

In

the matter between:

SMI
PTY LTD
First
Appellant
JPDP
Second
Appellant
And
COMMISSIONER
FOR THE SOUTH AFRICAN
REVENUE
SERVICES
Respondent

JUDGMENT

EKSTEEN J:

- [1] This appeal relates to the protection of taxpayer information.[1] The appellants had sought an order in the High Court, Makhanda, that an application (the main application) instituted by the South African Revenue Services (SARS) in that court should be heard in camera and that the court file should be sealed to the public (the secrecy application). The secrecy application was dismissed and the appeal to the Full Court is with leave of the judge a quo.

Background

- [2] SARS is currently gathering information to ascertain whether the first appellant's (SMI's), tax liability was correctly assessed in a previous tax period and, if not, whether the incorrect assessment was as a result of a tax offence or non-disclosure of material facts.
- [3] It is instructive at the outset, before I deal with the facts of the matter, to have regard briefly to the statutory structure regulating

SARS' authority to gather information and to issue additional assessments for previous periods. SARS was established in terms of the South African Revenue Service Act[2] in order to provide for the efficient and effective administration of the revenue collecting system in South Africa. The Tax Administration Act[3] (the TAA) was later promulgated in order to ensure the effective and efficient collection of tax by, amongst others, prescribing the rights and obligations of taxpayers and the powers and duties of persons engaged in the administration of a tax Act.[4] The responsibility for the administration of the TAA is entrusted to SARS[5]. The TAA defines the concept of 'administration of a tax Act', in s 3(2) of the TAA and it includes:

- (a) obtaining full information in relation to-

- [1] anything that may affect the liability of a person for tax in respect of a previous, current or future tax period; or

- [2] the obligation of a person to comply with a tax Act.[6]

- (b) ascertaining whether a person has filed correct returns, information or documents in compliance with the provisions of a tax Act;[7]

- (c) determining the liability of a person for tax;[8]

- (d) investigating whether a tax offence has been committed;[9] and

- (e) enforcing SARS' powers and duties under a tax Act to ensure that an obligation that has been imposed by or under a tax Act is complied with.[10]

In order to fulfil its obligation to administer the TAA it is afforded certain powers and duties in respect of the gathering of information as set out in Chapter 5 of the TAA. Section 46, which is contained in Chapter 5, empowers SARS, for purposes of the administration of the TAA, to require a taxpayer to submit relevant material to it. 'Relevant material' is defined in s 1 of the TAA to be any information, document or thing that, in the opinion of SARS, is foreseeably relevant for the administration of a tax Act, as referred to in s 3 of the TAA. Where a taxpayer receives a request under s 46 of the TAA it is obliged to submit the relevant material to SARS.[11]

- [4] All information submitted by a taxpayer is classified as taxpayer information and is subject to the confidentiality regime authorised in Chapter 6 of the TAA.[12] If, after receipt of the information and the completion of its investigation, SARS is satisfied that an earlier assessment does not reflect the correct application of a tax Act, to the prejudice of SARS or the fiscus, it is obliged to make an additional assessment to correct the prejudice.[13] However, its power to issue an additional assessment is subject to certain time limitations, in this case three years after the original assessment, unless the incorrect original assessment was due to fraud, misrepresentation or non-disclosure on the part of the taxpayer.[14]
- [5] In the event that SARS does issue an additional assessment the taxpayer is entitled to challenge the assessment in terms of the dispute resolution dispensation created in Chapter 9 of the TAA. All proceedings under this dispensation are confidential and a hearing before the tax court[15] is closed to the public, unless otherwise ordered.[16] However, any judgment of the tax court must be published, but without revealing the identity of the taxpayer.[17] Thereafter either party may appeal, either to the full court of a division of the high court or to the supreme court of appeal, and there is no provision for confidentiality in such an appeal.[18]
- [6] I revert to the facts of this matter. In pursuit of its investigation adumbrated earlier SARS had issued a request in terms of s 46 of the TAA requiring SMI to submit information to SARS which it considered to be relevant material. SMI resisted the request and declined to provide the information.
- [7] As a result of the position adopted by SMI, and in June 2021, SARS launched the main application, to compel compliance with its s 46 request.[19] In August 2021 SMI filed its answering affidavit in the main application. It contended that it was entitled to resist the s 46 request for it argued that the request was made pursuant to an unlawful criminal investigation and for an ulterior purpose. In addition, SMI argued that the request did not comply with the jurisdictional requirements in s 46 of the TAA. The contentions relate to the proper interpretation and application of s 46 and s 99 of the TAA. These are matters to be determined in the main application and I express no view on these issues. The second appellant was joined in the main application as an interested party and no relief was sought against him.

- [8] Simultaneously with the answering affidavit in the main application the appellants brought the secrecy application for an order that the main application be heard in camera and that the court file be sealed to the public.[20] In preparing the founding affidavit in the secrecy application the appellants chose to incorporate the papers in the main application by reference, and various passages in the founding affidavits and annexures to the answering affidavit were cross-referenced in footnotes in the secrecy application.
- [9] In October 2021 SARS delivered a reply in the main application and an opposing affidavit in the interlocutory application and the appellants responded with a replying affidavit in the interlocutory application.
- [10] Thus, a full set of three affidavits had been filed in the main application and the secrecy application. They all formed part of the papers in the secrecy application and are all included in the present appeal record. Accordingly, when the secrecy application was dismissed, more than eighteen months ago, all the papers filed in the main application and in the secrecy application were in the public domain and they have been in the public domain ever since. The secrecy application itself was heard in open court and no attempt was made for it to be heard in camera. Such a step, it seems to me, would in appropriate circumstances have been possible.[21]
- [11] That brings me to the appeal. Section 16(2)(a)(i) of the Superior Courts Act[22] provides:
- ‘(2)
- (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.’

Accordingly, at the commencement of the argument I enquired from Mr Botha, on behalf of the appellants, what practical effect the decision sought in this appeal could have in the present matter. Mr Botha acknowledged, fairly in my view, that the papers filed thus far already fall within the public domain. However, he contended that the prejudice to the appellants could be contained. Firstly, it was argued that the information currently published on the SARS website could be either deleted or amended so as to remove the reference as to the identity of the appellants. Secondly, he submitted that further procedures in the litigation could disclose taxpayer’s information.

- [12] In respect of the first argument the obvious difficulty is that information that has already been published is in the public domain and there is no application for an interdict to compel SARS to remove information from its website. The issue is simply not before us and the first argument must accordingly fail.
- [13] In respect of the second argument the appellants set out in the heads of argument three further phases of litigation in which they contended that confidential taxpayer information may emerge. The first, it was submitted, relates to any prehearing procedures which may arise. It was suggested that it was possible that one of the parties may choose to file a supplementary affidavit and, if, for instance, SARS were to make a request in terms of rule

35(11), (12) or (14) in respect of taxpayer information, that would constitute a disclosure of taxpayer information inconsistent with the relevant sections of the TAA.

- [14] As I have said, the papers in the main application are complete and neither party have expressed an intention to file further affidavits. A party to application proceedings is, in any event, not entitled to file any further affidavits of its own accord and the registrar is not empowered to permit the filing thereof.[23] The filing of any supplementary affidavit is therefore subject to judicial oversight and the disclosure, if any, of confidential

taxpayer information in such an affidavit would be a matter for the discretion of the court. Any further disclosure will be considered, if it arises, by a judge, who may make an appropriate direction in respect of how the information must be treated. Of significance, for present purposes, is that neither party has expressed an intention to seek leave to file further affidavits and the argument is presented on a purely speculative basis.

- [15] Rule 35 of the Uniform Rules of Court relates to discovery and the provisions of the rule do not generally apply to application

proceedings.[24] They may only be invoked insofar as the court may direct. Rule 35(14) provides for a defendant in action proceedings to require the other party to make available for inspection documents or tape recordings for purposes of pleading. By analogy, if the rule were to be applied to application proceedings, it would entitle a respondent to seek discovery of documents for purposes of the preparation of an answering affidavit. As adumbrated earlier, the proceedings in this matter have advanced far beyond that stage and no reason emerged from the papers in the secrecy application to believe that further affidavits may be filed. As I have said, the suggestion is purely speculative and would, in any event, be subject to the oversight of a judge.

- [16] Rule 35(11) is similarly subject to the discretion of a judge, who may not only order the production of further material, but may direct how such documents are to be dealt with when produced. In the event that an application in terms of rule 35(11) were to arise it would be subject to the directions of a judge in respect of the treatment of the documents which may preserve the confidentiality thereof. Again, as in the case of rule 35(14), the argument does not relate to any identifiable document, but merely to the theoretical possibility that such an application may be made and that it may reveal taxpayer information.

- [17] Rule 35(12) does apply automatically in application proceedings and it entitles a party to proceedings to require the other party to produce any documents or tape recording to which another party has referred in their affidavit. As I have explained, all the affidavits required for purposes of the application have been filed and neither party has thus far requested the inspection of any document referred therein. Mr Botha did not, during argument, identify any document referred to in the papers that contains taxpayer information that is not yet in the public domain and that may be called for. On a consideration of the conspectus of the evidence and the argument presented I do not consider that any case has been made that a reasonable prospect of the disclosure of further confidential information exists if the appeal were not upheld.

[18] That brings me to the second and third remaining phases of the litigation raised. The appellants argue that not only is the publication of the judgment and order in the main application a disclosure of taxpayer information, but the disclosure of the information compelled therein, should an order be granted in favour of SARS, will become part of the record which will constitute disclosure. Thereafter, so the argument went, either party may appeal the judgment with the resultant publication of taxpayer information contrary to the confidentiality provisions in the TAA.

[19] These arguments cannot be sustained. The high-water mark of the appellants' argument is founded upon the confidentiality

provisions in the TAA. As adumbrated earlier, even under the TAA, judgments of the tax court are published, subject to the

protection of the identity of the taxpayer.[25] The TAA does not provide for a similar confidentiality in respect of an appeal either to the full court of a division or to the supreme court of appeal and these courts are subject to the principle of open justice set out in s 32 of the Superior Courts Act.[26] Moreover, the appellants do not require a hearing in camera nor that the file be sealed from the public in order to protect disclosure of the appellants' identity. That may be

achieved by simply not reflecting the identity in the judgment of the court.

[20] In the event that the main application is successful the information compelled will be provided to SARS in terms of the s 46 request. It will not be part of the record and it will be subject to the Chapter 6 confidentiality regime of the TAA. Accordingly, the order that may be granted in the main application presents no threat of public disclosure of taxpayer information.

[21] I have concluded, accordingly, that the appellant has not demonstrated any reasonable prospect of further taxpayer information, which is not already in the public domain, emerging unless the appeal were upheld. That being so, the decision sought will have no practical effect or result. To the extent that taxpayer information has already emerged and is reflected herein, I have, in this judgment, referred to the appellants in an abbreviated form so as not to disclose their identity.

[22] In the result, the appeal is dismissed with costs, such costs to include the costs of two counsel.

J W EKSTEEN

JUDGE OF THE HIGH COURT

MAKAULA J:

I agree.

M MAKAULA

ZILWA AJ:

H ZILWA

ACTING JUDGE OF THE HIGH COURT

Appearances: For Appellants: Adv A C Botha SC and Adv J F Pretorius Instructed by: Pieterse Sellner Erasmus TRM Tax Attorneys, Gqeberha c/o De Jager & Lordan, Makhandha For Respondents: Adv A R Sholto-Douglas SC and Adv K Reynolds Instructed by: Joubert Galpin Searle, Gqeberha c/o Huxtable Attorneys, Makhandha Date Heard: 13 November 2023 Date Delivered: 21 November 2023

- [1] Taxpayer information is defined in the Tax Administration Act, 28 of 2011 (the TAA) as any information provided by a taxpayer or obtained by SARS in respect of a taxpayer. The confidentiality of such information is protected under Chapter 6 of the Act.
- [2] 34 of 1997.
- [3] 28 of 2011.
- [4] Section 2 of the TAA.
- [5] Section 3 (1) of the TAA.
- [6] Section 3(a) of the TAA.
- [7] Section 3(2)(b) of the TAA.
- [8] Section 3(2)(d) of the TAA.
- [9] Section 3(2)(f) of the TAA.
- [10] Section 3(2)(g) of the TAA.
- [11] Section 46(4) of the TAA.
- [12] See fn 1.
- [13] Section 92 of the TAA.
- [14] Section 99(1)(a), read with s 99(2)(a) of the TAA.
- [15] Created in terms of s 116, and exercising jurisdiction in terms of s 117 of the TAA.
- [16] Section 124 of the TAA.
- [17] Section 132 of the TAA.
- [18] Section 133 of the TAA.

[19] The TAA has no provision to compel compliance with s 46 and the appellants do not dispute the jurisdiction of the high court to

grant and order compelling compliance. See Commissioner for the South African Revenue Services v Brown 2016 JDR 0826 (ECP).

[20] The interlocutory application further sought condonation for the late filing of the answering affidavit in the main application and the striking out of certain passages in SARS' founding affidavit. Only the secrecy application was argued and the appeal concerns the secrecy application.

[21] Cerebos Food Corporation Ltd v Diverse Foods SA Pty Ltd and Another 1984

(4) SA 149 (T) at 159G-H; and Botha v Die Minister van Wet en Orde en Andere 1990 (3) SA 937 (W) at 944D-E.

[22] Superior Courts Act 10 of 2013.

[23] Standard Bank of South Africa Limited v Sewpersadh 2005

(4) SA 148 (C) at 153H; Sealed Africa Pty Limited v Kelly and Another 2006

(3) SA 65 (W) at 67B-E; Hano Trading CC v J R 209 Investments Pty Limited and Another 2013

(1) SA 161 (SCA) at 165A-C.

[24] Rule 35(13) provides: '(13) The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications.'

[25] Section 132 of the TAA.

[26] Section 32 of the Superior Courts Act provides: 'Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.'

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