IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
DATE SIGNATURE

Case No: 76878/10
Date heard: 28 and 29 March 2011
Date of judgment: 1 April 2011.

In the matter between:

EDREES AHMED HATHURANI Applicant

and

COMMISSIONAR FOR THE SOUTH AFRICAN REVENUE SERVICE First Respondent

THE MINISTER OF FINANCE Second Respondent.

JUDGMENT

DU PLESSIS J:

On 11 February 2010 the first respondent to whom I shall refer as the Commissioner or as the respondent[1], issued in respect of the applicant a tax

[1] The second respondent, the Minister of Finance, did not participate in these proceedings, no relief is sought against him, and further reference to him is unnecessary.

assessment in terms whereof the applicant is to pay R580 247 789,15 in respect of income tax, penalties and interest. The applicant has lodged an appeal to the Tax Court against the assessment. In terms of section 88(1) of the **Income Tax Act, 58 of 1962** (the Act), the noting of the appeal did not suspend the applicant's obligation to pay the tax in accordance with the assessment. (This is sometimes called "the pay-now-argue-later principle".) On 20 October 2010 the applicant, in terms of section 88(1) of the Act, applied to the Commissioner for the obligation to pay the assessed tax to be suspended pending the appeal. That application was refused. Thereafter on 15 December 2010 the Commissioner filed a statement in terms of section 91(1)(b) of the Act and this, without notice to the applicant, obtained the equivalent of a judgment in the Magistrates' Court for payment of the full amount of R580 247 789,15. The applicant has launched an application to rescind this judgment. The magistrate concerned has reserved judgment and the rescission application is still pending in the Magistrates' Court.

Before this court now is an urgent application for interim relief aimed at restraining the Commissioner from executing the default judgment and from enforcing or recovering the tax assessment until this court has decided on certain final relief that the applicant intends seeking here. The final relief that the applicant proposes to seek in due course comprises, firstly, the review and setting aside of the Commissioner's refusal of his (applicant's) application to suspend in terms of section 88(1). In the second place, the intended final relief

seeks to enforce an alleged agreement that, according to the applicant, settled his relevant tax liability and precluded the Commissioner from issuing the assessment referred to above. The interim relief that the applicant seeks is also sought pending the finalisation of the rescission application pending in the Magistrates' Court.

The interim relief pending the rescission application may be dealt with summarily. As long as the Commissioner's decision not to suspend the obligation to pay (the section 88(1) decision) stands, the applicant is in law obliged to pay the assessed amount. That is so whether the default judgment is rescinded or not. To grant a restraining interdict pending the outcome of the rescission application would ignore the Commissioner's underlying right to enforce the obligation.

From the above summary of the final relief that the applicant proposes to seek, it is apparent that the settlement agreement that he allegedly reached with the Commissioner is pivotal to his entire case. It is pivotal even to his intended application to review and set aside the Commissioner's refusal to suspend the applicant's obligation to pay. I say that for the following reasons. The applicant's appeal to the Tax Court is also premised on the enforceability of the alleged settlement agreement. When considering the application under section 88(1), the committee delegated to deal therewith concluded, *inter alia*, that the applicant had no prospects of success on appeal. It is that finding that the applicant seeks

to attack on review. If the applicant fails to prove an enforceable settlement agreement, he has indeed a poor prospect of success on appeal to the Tax Court. There are no other grounds of substance on which the committee's decision could be reviewed. Thus, if the applicant has in these proceedings failed to prove the settlement agreement, he has by the same token failed to show that he has a *prima facie* right to have the decision under section 88(1) reviewed and set aside.

In the applicant's founding affidavit, the following is stated to be the factual context in which the alleged settlement agreement was entered into.

The applicant failed to disclose for tax purposes funds that, in the period 1983 to 1998, accrued to him from Surus Cash and Carry CC, a close corporation that traded under the name Jumbo Cash and Carry ("Jumbo Cash and Carry"). By 2006 the tax affairs of the applicant and those of Africa Cash and Carry (Pty) Ltd had for some time been the subject of investigation by the South African Revenue Service (SARS). The applicant had an interest in Africa Cash and Carry. In the context of that investigation and of litigation in respect thereof, the applicant conveyed to SARS representatives that he wished to settle his tax affairs. He also offered to disclose irregularities relating to the members of Jumbo Cash and Carry. It is the applicant's case that he made the offer on condition that he be given the same benefit as those who had applied for and had received exchange control and tax amnesty in terms of the **Exchange**

Control Amnesty and Amendment and Tax Laws Act, 12 of 2003 ("the Amnesty Act"). (It is common cause that at the time the applicant made his offer, the amnesty period under the Amnesty Act had expired. It is also not the applicant's case that he at any time followed the application procedure under the Amnesty Act or that amnesty under that act had been granted to him.) Evidently to motivate why SARS would have settled with him, the applicant states that SARS stood to benefit from his offer as his disclosures would have enabled SARS to recover taxes from other members of Jumbo Cash and Carry who also did not disclose income to SARS.

In the circumstances, the settlement agreement that the applicant relies upon was allegedly entered into in writing on 12 April 2007. It is the applicant's case that in terms thereof, he was to make full and proper disclosure to the best of his "knowledge and memory" of the tax irregularities of members of Jumbo Cash and Carry with particular reference to those funds, including his own, that were undeclared and expatriated. The applicant further contends that the agreement provides that, in return for his disclosure, his tax affairs were to be settled on the same terms as those who benefited from the Amnesty Act. In addition, the applicant contends, the settlement agreement provides that he would not be the subject of criminal prosecution on account of undisclosed income for the relevant period. Finally, the applicant contends, he would in terms of the agreement be obliged to pay in settlement of his tax obligations for the relevant period an agreed 2%. The applicant does not unequivocally say so, but

from his papers as a whole it seems that the 2% was to be calculated on the previously undisclosed income that he was to disclose under the agreement.

The applicant annexed to his founding affidavit the written agreement of 12 April 2007. The document primarily records an agreement between Africa Cash and Carry and the Commissioner. The applicant is not recorded as a party thereto. The agreement ("the April agreement") records that it was entered into so as to settle a dispute between the parties thereto and in order to achieve "a mutually facilitative and transparent relationship" and to "achieve a significantly positive shift in that direction". Against that backdrop, the parties then agreed on practical steps in order to resolve outstanding tax matters regarding "the taxpayers", including Africa Cash and Carry. The taxpayers are then defined, and the applicant is recorded as one of them. Jumbo (Surus) Cash and Carry is another. One of the steps agreed to was that taxpayers who are natural persons, such as the applicant, were to submit outstanding tax return. Final returns were to be submitted for assessment. It is apparent from clauses 3.2 and 4 of the April agreement that the parties envisaged a process whereby they would, presumably in terms of section 78 of the Act, endeavour to settle the returns and, if they were unable to do so, the normal return, assessment and dispute resolution procedures would be followed.

It is the applicant's case that the settlement agreement described above is contained in clauses 5[2] and 6 of the April agreement. Those clauses read:

"5 SARS hereby agrees to the withdrawal of the section 76C inquiry against ... (a number of persons, including the applicant) who may have been subpoenaed ... to attend such inquiry, subject to the taxpayers making full and proper disclosure as required by law. SARS shall not be precluded from instituting such inquiries in the future should the collaborative approach not prove to be successful. ..."

"6 SARS agrees that the taxpayers ... who were prevented from accessing the Tax and Exchange Control Amnesty, shall enjoy:

6.1 These taxpayers have indicated their willingness to make disclosure in the without prejudice communication of 17 August 2006 addressed to SARS, that they otherwise would have made had they permitted to access the amnesty procedure.

6.2 These taxpayers wish to have the matter resolved and request that they be treated in respect of the tax aspect of the amnesty on no more an onerous basis than was permitted those taxpayers that accessed the amnesty while it was available, as a matter of equity."

[2] There are two clauses 5 in the agreement. The applicant relies on the second one.

What is apparent from these clauses 5 and 6 is that they deal with two distinct aspects. From clause 5 it is apparent that taxpayers have been subpoenaed to attend an inquiry under section 74C of the Act. SARS agreed to withdraw the subpoenas on condition that the taxpayers make full and proper disclosure as required by law. Apart from the undertaking to make disclosure, this clause does not remotely resemble the agreement that the applicant seeks to prove in this case. The disclosure was to be made in exchange for the withdrawal of the subpoenas.

It is apparent from clause 6 that some taxpayers (including the applicant) have by way of a letter dated 17 August 2006 indicated their willingness to make disclosures. They were, however, too late to make use of the amnesty under the Amnesty Act. Although the introductory part of clause 6 is indicative thereof that SARS was amenable to support a similar amnesty for those taxpayers, the clause does not record consensus as to whether the taxpayers would be entitled to treatment akin to amnesty. It (6.2 in particular) records no more than a desire on the part of the taxpayers to enjoy some sort of amnesty. The clause simply does not record a firm agreement in this regard.

Not only is no agreement apparent from clause 6 of the document. Read as a whole, the document definitely does not record an agreement as contended for by the applicant: The document does not record that, in return for his disclosure, the applicant's tax affairs were to be settled on the same terms as

those who benefited from the Amnesty Act. Moreover, there is no mention in the document of a percentage, be it 2% or otherwise that the applicant was to pay once he had made disclosure.

On this basis alone, it must be concluded that the applicant did not, on his own showing, adduce *prima facie* evidence of the agreement he contends for. Insofar as it relates to the applicant, the tenure of the April agreement is rather that contended for by the respondent: The parties reached an agreement as to a process that, if adhered to, may have resulted in a settlement agreement.

The applicant contends, almost in passing, that the April agreement falls to be rectified. He does not, however, put forward any facts that show that the requirements for rectification are present. Moreover, the applicant does not clearly state how the rectified document is to read.

My conclusion that the April agreement does not evince the agreement contended for, is fortified by the applicant's own evidence as to events that followed after the date of the April agreement.

Following the April agreement, so the applicant says, there were discussions about "the putting in place of a more detailed written framework for the disclosure" that was to be made under the agreement. From correspondence that the applicant annexes to his founding papers, it appears that his tax

consultant, Mr Jooma, put forward a "disclosure framework" on about 2 October 2007. The very heading of Mr Jooma's proposal belies the applicant's contention that a settlement of his tax liability had been reached. The heading reads: "A proposed framework for the assessment by SARS of liabilities to tax flowing from disclosures to be made by various taxpayers identified in the agreement concluded between SARS and representatives of the parties dated 12 April 2007". I find it unnecessary to summarise the proposal. It is apparent from the document that Mr Jooma may well have thought that agreement had been reached that taxpayers who made disclosure would "not be treated in a manner more onerous than would otherwise have been the case had they applied for the amnesty ...". What that entails does not appear from the proposal. There is no indication in the proposal that Mr Jooma thought that agreement had been reached that a percentage of 2% would be applied. I find it unnecessary to summarise the entire document. Its tenure is not that an agreement had been reached as to how the applicant was to be assessed for tax purposes once he had made disclosure. On the contrary, the document explores possible ways in which agreement could be reached on the assessment after disclosure had been made.

The applicant annexed to his replying affidavit a minute of a without prejudice meeting between him, his advisors and representatives of SARS. The meeting was held on 2 October 2007. During this meeting the SARS representatives explained that the 2% that was available during the amnesty

period under the Amnesty Act "would not satisfy the internal government of SARS and would not withstand third party scrutiny". Again, it is clear from the document that proposals were made, but that no final and binding agreement was reached. I should point out that the percentage mooted during these discussions was 10% "of the amount involved"" and 10% of "what was recovered" (whatever these terms may mean). What is clear is that the 2% that the applicant contends had been agreed to in April was not even a possibility in October.

On 24 October 2007 the applicant and representatives of SARS attended a comprehensive disclosure session. The parties agreed that the applicant's advisor was to prepare a draft disclosure affidavit and that he would forward it to the SARS officials. The draft was prepared and several meetings were held at which the draft was discussed.

The applicant alleges that on 28 March 2008 he paid R1,92 million to the Commissioner, thereby performing in terms of the settlement agreement of 12 April. I mention this allegation now only for the sake of its chronological position. I shall return to the allegation that this payment constituted proof that the applicant had performed in terms of the alleged settlement agreement.

Late in March 2008, the applicant does not state the precise date, a SARS official and the applicant had a "comprehensive drafting session" during which

the official, Mr Van Loggenberg, went through the applicant's draft affidavit and made manuscript changes thereto. Thereafter, the disclosure affidavit was finalised and the applicant signed it on 26 April 2008. Although the affidavit pertinently refers to the April agreement and makes reference to assurances given to the applicant, there is no mention in the affidavit of an agreed rate at which the applicant was to be taxed on amounts disclosed.

I return to the amount of R1,92 that the applicant allegedly paid in terms of the April agreement. The applicant avers that the R1,92 million is 2% of the income, R96 million, that he later disclosed in the disclosure affidavit. In the affidavit he, however, does not disclose R96 million as to income. What he discloses is R200 million income from Jumbo Cash and Carry that had been expatriated and of which 40% (R80 million) accrued to him personally. In addition the applicant discloses that R16 million, being portion of the proceeds of the sale of his share in the Jumbo Group, was expatriated. Why the latter amount would be taxable, the applicant does not explain. In any event, the payment of R1,92 million was sent under cover of a letter by the applicant's advisor, Mr Jooma. In the letter Mr Jooma wrote that the applicant is paying the amount "on behalf of Jumbo Cash and Carry". At the time that entity owed taxes in excess of R1,92 million. Apart from the clear wording of the letter, the applicant cannot be believed when he states that he made the payment (2% of the disclosed amount) in terms of the April agreement. As I have pointed out, on the applicant's own version no agreement as to the percentage had been

reached and to the extent that officials of SARS were agreeable to settle the applicant's tax liability, the figure mentioned was 10%. Even as to the latter figure, no agreement had been reached.

In a nutshell, the applicant has failed to adduce evidence that proves even on a *prima facie* basis that he had reached a settlement agreement with the Commissioner.

Counsel for the Commissioner pointed out that, even if the agreement that the applicant sought to prove had been proved, it would have been void as neither the Commissioner nor his representatives were empowered to enter into such an agreement without complying with the relevant provisions of the Act and regulations promulgated under it. Counsel for the applicant did not seek to argue that the settlement agreement contended for complied with the relevant statutory requirements. In view of my finding that there was no agreement, it is unnecessary to say more about the lack of power on the part of the Commissioner to enter into the agreement that the applicant contended for.

Mr D'Oliviera, who appeared with Mr Van Nieuwenhuizen for the applicant, submitted that the Commissioner's conduct in this case constitutes a breach of the applicant's fundamental rights under section 33(1) of the **Constitution of the Republic of South Africa, 1996**. The subsection provides that "everyone has the right to administrative action that is lawful, reasonable and

procedurally fair." In view of my finding that the applicant did not prove to the requisite degree that a settlement agreement had been reached, the only other relevant administrative action is constituted by the assessment. (The refusal of the applicant's section 88(1) application is dealt with elsewhere in this judgment.) Apart from the applicant's contention that the assessment was made contrary to the settlement agreement, the lawfulness, reasonableness and procedural fairness of the assessment is not an issue before this court. Having found that there was no agreement that precluded the assessment from being made as it was made, the attack based on section 33(1) cannot succeed.

It follows that the applicant has failed to show that he has a *prima facie* right to the final relief that he intends seeking. The interim relief cannot be granted.

Both the parties were represented by two counsel. In view of the bulk of the papers, the importance of the case and legal principles that had to be addressed, the employment of two counsel was warranted.

The following order is made:

1. The application for an order under part A of the amended notice of motion is dismissed.

2. The applicant is ordered to pay the first respondent's costs, which costs shall include the costs of two counsel..

BR du Plessis

Judge of the High Court.

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No appearance for the second respondent.