IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 4062/2016

In the matter between:

VUYISILE ZAMINDLELA NONDABULA **Applicant**

and

THE COMMISSIONER: SARS & ANOTHER **Respondents**

JUDGMENT

JOLWANA AJ:

[1] The applicant brought an application interdicting the first respondent from invoking the provisions of section 179 of the Tax Administration Act No.28 of 2011, "the Act", pending the final determination of the applicant's objection to the additional assessment of his income tax. The applicant further sought an order withdrawing a Third Party Notice that had been issued in terms of the Act and other ancillary relief.

[2] The applicant is a business man and sole proprietor of a fuel service station called Umzimkhulu Shell Garage and it is in respect of this business that he is liable to pay taxes to the first respondent in these proceedings.

[3] The first respondent issued an income tax assessment against the applicant for the 2013/2014 financial year in terms of which the applicant owed tax to the first respondent in an amount of R17 807–84. The first respondent issued an Income Tax Notice of Assessment reflecting the said amount as the outstanding tax debt for which the applicant was liable to pay on or before the 31st July 2014. The applicant duly paid this amount. The first respondent issued another assessment dated 31st October 2015 for the financial year 2014/2015 in terms of which the applicant owed tax debt of R15 768 – 69. This amount was also paid timeously. Up to this point the relationship between the applicant and the first respondent appears to have been cordial with assessments being issued and the assessed taxed debt being paid on time.

[4] The problem which resulted in these proceedings started when the first respondent acting within its power and authority, issued another assessment in terms of which the applicant owed the first respondent R1 422 637-83. This was brought to applicant's attention by means of a letter dated 29 September 2016 which in part reads as follows:

> "According to the records of the South African Revenue Service (SARS) you have failed to pay the following amounts: Income Tax Debt Totalling R1 422 637-83 which is made up of the following amount(s) R1 422 637-83 for Assessed Tax".

This notification demanded that this amount be paid within 10 days failing which further action would be taken. This notification had, about two weeks

earlier, been preceded by a statement of account issued by the first respondent which reflected a balance brought forward in the sum of R1 404 517-97. This in turn was preceded by a letter dated 11 May 2016 which was a final demand by the first respondent, in terms of which applicant was required to pay R1 424 690-79 within 10 days.

[5] The only real attempt by the first respondent to explain how these amounts came about seems to have been the statement of account issued by the first respondent dated 4th April 2016 which reflects an additional assessment for 2014 in the sum of R1 240 455-94 as at 1 March 2016. How this figure or any of the other figures said to be owing are arrived at does not seem to have been explained to the applicant.

[6] Even in the affidavit filed on behalf of the first respondent there is no attempt to give a breakdown of how these amounts or any of them are arrived at. The applicant challenges the first respondent about his ignorance of how this amount is arrived at as follows:

> "I did not know how the first respondent reached this amount or what information informed it to reach that amount. I was certainly not consulted or confronted with any information that first respondent could have come across that would make it to reach that amount after the same first respondent sent me an ITA34 Form (Notice of Assessment) for the 2014 tax year, and on which I paid the outstanding tax then, as stated above in par 20, per Annexure "E"."

[7] The first respondent responded as follows to this challenge at paragraph 21 of its answering affidavit:

> "The allegations contained in paragraph 33 are bad in law. The basis for the first respondent's decision, in any case, to impose an additional assessments upon a tax payer is as described above. Same does not require consultation and/or agreement with the taxpayer. For this reason, I deny these allegations."

[8] Nowhere in the answering affidavit does the first respondent claim to have furnished a breakdown to the applicant. Even in the papers filed and during argument no contention was advanced on behalf of the first respondent that the applicant knew or ought to have known how the first respondent calculated this additional assessment.

[9] The applicant objected to the additional assessment through his accountants on the 4th of April 2016. The first respondent responded to this objection by objecting to the objection on the basis that the applicant's abjection does not comply with the rules in that "*a request for waiver of penalties and a dispute against income cannot be submitted on the same objection*". This response is dated 5 May 2016.

[10] On the 3 June 2016 applicant's accountants wrote another letter to the first respondent in which further documentation was submitted and a request was made for the first respondent to reconsider the assessment and note the objection. This objection was preceded by another objection filed through the first respondent's e-filing system. All these objections were not responded to and even where there was a response it was not a substantive response but an objection to the applicant's objection. Communication was exchanged between the parties but at no stage did the first respondent attempt to justify the amount

claimed through some form of a breakdown. The first respondent contented itself with raising its own technical objection to the applicant's objections.

[11] The first respondent is a creature of statute and as such it must operate within the four corners of the statutory provisions which empower it. The first respondent is governed by and operates in terms of the Act. It therefore cannot do anything not specifically provided for in the Act or some other legislation nor can it conduct itself contrary to the provisions of the Act.

[12] In the case of the Competition Commission of South Africa v Telkom SA Limited and Another[1] it was held that "*the principle of legality entails that no public power may be exercised and no function performed beyond that conferred by law*".

[13] The first respondent issued the Third Party Notice to the second respondent in terms of section 179 (1) of the Act which provides thus:

> "A senior SARS official may by notice to a person who holds or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer require the person to pay the money to SARS in satisfaction of the tax payer's debt".

[14] The first respondent did not disclose in the notice of an additional assessment to the applicant or in any communication with the applicant the legal basis on which the additional assessment was made. However it appears that the first respondent relied on section 92 of the Act. This section provides thus:

[1] (2010) ALLSA 433.

> "If at anytime SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice."

This is apparent from the first respondent's answering affidavit where in part it is said that:

> "from this information, it was concluded that the applicant had failed to make proper and lawfully due declarations and this accordingly triggered a situation where SARS was not satisfied that the applicant's assessment reflected the correct application of the Tax Act and that same was to the prejudice of SARS or the *fiscus*. On this basis SARS was under a legal obligation to make an additional assessment to correct the prejudice".

[15] However before the first respondent acts in terms of Section 92 it has to do an estimation of assessments in terms of section 95 which provides as follows:

> "(1) SARS may make an assigned, additional, or reduced or jeopardy assessment based in whole or part on an estimate if the taxpayer
>
> (a) fails to submit a return as required; or
>
> (b) submits a return or information that is incorrect or inadequate.
>
> (2) SARS must make the estimate based on information readily available to it."

[16] Indeed it appears that the first respondent based its decision to do an additional assessment in terms of section 95 on the information that was readily available to it. This appears at paragraph 14 & 15 of the first respondent's answering affidavit. At paragraph 14 the first respondent says:

> "The original assessment was issued on the 27 October 2015. The amount that was due by the applicant was a sum of R13 598-59 (Thirteen thousand, five hundred and ninety eight rand fifty-nine cents). This resulted in an additional amount of R2 196-86 (two thousand one hundred and ninety-six rand eighty six cents) owing by the applicant."

[17] Then at paragraph 15 the first respondent says:

> "What prompted the additional assessment was the fact that the applicant, in the tax return that he submitted for the period, had declared interest income to the value of R0.00 (nil) and same did not match the interest income amount of R 32 734.00 (thirty two thousand seven hundred and thirty four rand) for account number 000 000 919 946 9411 held by the applicant at ABSA"

[18] It is clear that faced with this incongruence the first respondent was authorised by section 95 to do an additional assessment. This is because it was faced with a situation where based on the formation at its disposal the applicant had "submitted a return or information that is incorrect or inadequate" and therefore made the estimate based on information readily available to it.

[19] When the first respondent reached this stage and acted in terms of section 92 it was required to comply with section 96 of the Act which provides as follows:

> "SARS must issue to the taxpayer assessed a notice of the assessment made by SARS stating -
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> 1. (a) the name of the taxpayer;
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> (b) the taxpayer's reference number, or if one has not been allocated, any other form of identification;

(c) the date of the assessment;

(d) the amount of the assessment;

(e) the tax period in relation to which the assessment is made;

(f) the date for paying the amount assessed; a

(g) summary of procedures for lodging an objection to the assessment.

2. In addition to the information provided in terms of subsection (1) SARS must give the person assessed

(a) in the case of an assessment described in section 95 of an assessment that is not fully based on a return submitted by the taxpayer, a statement of the grounds for the assessment, and

(b) in the case of a jeopardy assessment, the grounds for believing that the tax would otherwise be in jeopardy"

[20] When one looks at the Statement of Account: Accessed Tax dated 04 April 2016 in which the balance due is reflected as R 1 414 596-67 it is clear that section 96 was not complied with at least, in some respects. For instance the date of paying the amount assessed is not reflected and the summary of the procedures for lodging an objection to the assessment as required in terms of section 96 (1). The rest of the requirements prescribed in that section seem to have been complied with. Most importantly a statement of the grounds for the assessment as required in terms of section 96 (2) (a) was not given to the person assessed that is, the applicant. The statement of account: Assessed Tax dated 04 April 2016 was accompanied by a document with a heading "Statement of account-General Information. That document is indeed general information as it was not dealing with applicant's case and did not have the information required in terms of section 96 (1). Notably no ITA34 was issued to the

applicant reflecting the additional assessment. Previously the applicant had been issued with an income tax notice of assessment (ITA34) which contained crucial information as prescribed in terms of section 96 (1). The reason why section 96 was not complied with has not been explained by the first respondent nor has it claimed to have complied with it.

[21] Proper construction of the Act reveals that the trigger for the additional assessment is provided for in section 95 and this leads to the conclusion provided for in section 92. At both these instances there is no interaction with the person assessed. Once the stage provided for in section 92 is reached the first respondent is required to comply with the provisions of section 96 by issuing a notice of assessment with all the information required and provided for in section 96. I may mention that the whole of section 96 is couched in peremptory terms, meaning that the first respondent has no discretion when it comes to section 96. In any event it is not the first respondent's case that it did have a legal basis for not complying with section 96.

[22] Having failed to comply with section 96 the first respondent jumped to the provisions of section 179 (1) and issued the impugned Third Party Notice and thus effectively closing down applicant's business. This was not only unlawful but a complete disregard of the doctrine of legality which is a requirement of the rule of law in a constitutional democracy.

[23] The first respondent is an organ of state. Section 239 of the Constitution[2] defines an organ of state as:

[2] Constitution of the Republic of South Africa, 1996.

"(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution –

(i) exercising a public power or performing a function in terms of the Constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer."

[24] The first respondent is obviously exercising a public power or performing a public function in terms of the Act. In terms of section 195 (1) (f) public administration of which the first respondent is part must be accountable and the only way of ensuring its accountability is by ensuring that it complies with the Act. Section 195 (1) (g) provides that "transparency must be fostered by providing the public with timely, accessible and accurate information. Subsection (2) (b) provides that the basic values and principles governing public administration apply to organs of state".

[25] There is no doubt that the first respondent dealt with the applicant in an arbitrary manner contrary not only to the Act but most importantly the values enshrined in the Constitution were not observed by the first respondent. The applicant is a business man who employs quite a number of people in our country where unemployment rate is alarmingly high. The first respondent's actions had the potential to close down applicant's business with catastrophic results not only for the applicant and his family but also for all of his employees in a situation in which unemployment is rampant and reaching crisis proportions.

[26] The least that is expected of the first respondent is to comply with its own legislation and most importantly promote the values of our Constitution in the exercise of its public power. This the first respondent failed to do. In failing to provide the applicant with all the information prescribed in terms of section 96 which the first respondent was obliged to provide the applicant, it acted unlawfully and unconstitutionally.

[27] I therefore make the following order:

1. The Rule *Nisi* issued by this Court is confirmed in respect of paragraphs 3 and 4 of the Notice of Motion.

2. First Respondent is ordered to pay costs.

SM JOLWANA

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

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Matter heard on:	**01 June 2017**
Judgment delivered on:	**27 June 2017**