IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 2999/18

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	~~YES~~/NO
2.OF INTEREST TO OTHER JUDGES:	~~YES~~/NO
3.REVISED	
21/05/2018 DATE	SIGNATURE

In the matter between:

RED ANT SECURITY RELOCATION AND EVICTION SERVICES (PTY) LTD Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

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JUDGMENT

EF DIPPENAAR, AJ:

[1.] The applicant sought urgent interdictory relief aimed at reinstatement of its tax compliance status so that it can generate a tax clearance certificate pending the determination of review proceedings instituted by it.

[2.] The basis of the application is that the respondent failed to comply with the procedural requirements of section 256(6) of the Tax Administration Act 28 of 2011 ('the Act'), the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and the Constitution in revoking the applicant's tax compliance status without affording it notice.

[3.] The applicant contended that the only provision in terms of which its tax compliance status could be altered is under section 256(6) of the Act. Section 256 of the Act regulates tax compliance status. It is common cause between the parties that no notice was given of the intention to revoke the applicant's tax compliance status. The failure to provide any notice forms the subject matter of the review application.

[4.] The respondent contended that it was not necessary to provide notice or afford the applicant an opportunity to be heard as a payment deferral agreement concluded between the parties lapsed on 31 March 2018 and there was still an outstanding tax liability for which no payment arrangement had been made. It denied that it revoked the applicant's tax compliance status and contended that it lapsed by operation of law. The deferment payment agreement relied upon by the respondent was not attached to its answering papers but was handed up from the bar by consent between the parties.

[5.] As part of these documents, the respondent handed up an unsigned letter from the respondent dated 14 November 2017. This letter in content differed from the signed version of a letter from the respondent dated 10 November 2017, confirming confirmation of the approval of the applicant's deferred payment request in that it included reference to payment of an additional amount of some R37 million under the

agreement. This letter was not accompanied by any affidavit explaining the difference in the two letters.

[6.] The respondent further relied on sections 256(3) and 167(3) of the Act and contended that it had no duty in law to notify the applicant as the deferral agreement only remained in effect for the term of the agreement. It argued that once the agreement lapsed by operation of law, the applicant was no longer entitled to a tax clearance certificate because of its outstanding tax liability. This outstanding tax liability is in dispute between the parties.

[7.] The respondent disputed the urgency of the application on the basis that it was self-created. It further contended that there was no compliance with the practice directives and did not afford the respondent sufficient time to present its answering papers. These contentions lack merit.

[8.] I am of the view that the application is indeed urgent and that the applicant has illustrated that it will not be afforded substantial redress at a hearing in due course[1].

[9.] It is undisputed that some 96% of the applicant's income is generated from the provision of public services to public and municipal entities, including essential services such as emergency accommodation and temporary water supply. Absent a valid tax clearance certificate, the applicant cannot receive payment for its services, nor tender to provide new services, thus creating severe financial constraints. It was not disputed that the applicant's business was on the brink of closure and that some 11 000 employees' jobs are at risk and that some nine municipalities will be left without services if the applicant's business ceases to operate.

[10.] I turn to the requirements for the interim interdictory relief sought.

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[1] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others [2011] ZAGPJHC 196

[11.] The first requirement is that the applicant must illustrate a prima facie right, although open to some doubt[2].

[12.] The respondent disputed that the applicant has illustrated a prima facie right. It contended that the versions of the applicant in its founding and replying affidavits differed and that no proper case was made out in the founding papers. These versions pertain primarily to the disputes surrounding the alleged tax liability of the applicant.

[13.] The central dispute between the parties relevant to the present application is in my view one of law, rather than fact. The merits of the tax dispute between the parties is not an issue which this court can determine and will be dealt with in an appropriate forum in due course.

[14.] The approach adopted by the respondent is a narrow one, being that by operation of law, the applicant's entitlement to a tax clearance certificate lapsed when the deferment agreement came to an end and that the provisions of section 256(6) of the Act are not applicable.

[15.] The primary complaint of the applicant is the respondent's failure to afford it the right to be heard ('the audi principle'), a right integral to the Constitutional scheme and the procedural aspect of the rule of law.[3]

[16.] It is common cause that the audi principle was not adhered to. The respondent contended that it was not necessary to do so as the provisions of section 256(6) only apply in the limited circumstances referred to in that section.

[17.] It iappears that the respondent may not fully appreciate its obligations in relation to procedural fairness being that *'decision makers who are entrusted with the authority*

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[2] Webster v Mitchell 1948 (1) SA 1186 (W).
[3] Walele v City of Cape Town 2008 (6) SA 129 (CC0 para [27]; Masetlha v President of the Republic of South Africa and another 2008 (1) SA 566 (CC) para [183]

to make administrative decisions by any statute are... required to do so in a manner which is consistent with PAJA.[4] The respondent did not directly address this issue, either in its written or oral argument.

[18.] It was not contended by the respondent in argument that as a matter of statutory construction, the legislature has expressly or by necessary implication enacted that the audi rule should not apply or that there are exceptional circumstances which would justify a court not giving effect to it. [5]

[19.] I am mindful not to preempt determination of the issues which will ultimately be determined by the review court and do not attempt to interpret the various sections in the Act on which the respective parties rely or express any view regarding the ultimate success of the review application.

[20.] Irrespective of whichever statutory interpretation is ultimately determined to be correct, on the available facts the applicant has sufficiently illustrated on a prima facie basis that it has the right to administrative justice and procedural fairness consistent with the provisions of sections 3 of PAJA.

[21.] I turn to the issue of irreparable harm. Although disputed in argument, the respondent put up no facts to controvert the undisputed evidence put up by the applicant of the present and ongoing harm suffered by the applicant. I am satisfied that the applicant has illustrated a threat by an impending or imminent irreparable harm.[6]

[22.] In adjudicating the balance of convenience, a comparison is required of the prejudice suffered by the applicant if the interim relief is not granted, but its review is

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[4] Zondi v MEC for Tradiitonal and Local Government Affairs 2005 (3) SA 589 (CC) para [1011]; Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works 2008 (1) SA 438 (SCA) paras [8]-[10]
[5]National Director of Public Prosecutions and Another v Mohamed NO and Others 2003 (4) SA 1 (CC) para [37}
[6] Afrisake NPC and Others v The City of Tshwane and Others (74192/2013) [2014] ZAGPPHC 191 (14 March 2014)

upheld, and the prejudice which the respondent will suffer if the interim relief is upheld but the review dismissed. [7]

[23.] The prejudice to the applicant and its employees is self-evident. Considering the nature of the services performed by the applicant to its clients, being predominantly public enterprises and municipalities, the assessment of the wider general public must also be taken into account in assessing the balance of convenience.[8]

[24.] On the other hand, the respondent contended that if the interim relief is granted, it would be constrained to afford the applicant tax compliance status pending the determination of the review application, irrespective of whether the applicant is tax compliant or not. It was contended that if the interim relief is granted, it would restrain the respondent, a state functionary, from exercising its statutory or constitutionally authorised power[9]

[25.] There is merit in this contention if relief is granted in broad terms without any suitable qualification and the respondent is prevented from exercising its statutory powers against the applicant for any future tax transgressions pending the determination of the review application.

[26.] An appropriate qualification to the interdictory relief sought, will in my view ensure that there is no risk to the respondent being constrained from exercising its statutory rights in a lawful manner, pending the determination of the review application.

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[7] Caravan Cinemas (Pty) Ltd v London Film Productions Ltd 1949 (3) SA 200W; Steel& Engineering Industries federation v National Union of Mineworkers of SA 1998 (4) SA 196 T

[8] Verstappen v port Edward Town Board and Others 1994 (3) SA 569 (D) 576H-I; Cipla Medpro (Pty) Ltd v Aventis Pharma SA and Related Appeal 2013 (4) SA 579 (SCA) paras [46] and [52]

[9] National treasury and Others v Opposiiton to Urban tolling Alliance and Others 2012 (6) sa 223 (CC) para 70

If there are any grounds on which the applicant's tax clearance certificate should be revoked and due process is followed, the interim relief will not present a bar to any future lawful action on the part of the applicant.

[27.] In the circumstances, I am satisfied that the balance of convenience favours the granting of interim relief.

[28.] The last requirement which requires consideration is that no alternative remedy must be available to the applicant.

[29.] The respondent contended that the applicant has a suitable alternative remedy, being to approach it for the conclusion of a further deferral agreement, which would render the applicant tax compliant and result in it being able to obtain a tax clearance certificate.

[30.] This argument assumes that such an agreement would indeed be concluded and does not cover the eventuality that the parties are unable to conclude such an agreement on mutually acceptable terms. Moreover, such request is not a remedy for appealing the respondent's decision or its failure to apply the audi alteram partem principle.

[31.] The respondent further contends that the applicant could have requested an 'override' by challenging the non-compliant tax status and providing reasons for such challenge. This contention was not substantiated by any reference to the Act. In any event, the respondent declined to restore the applicant's tax compliance status when requested to do so.

[32.] I am satisfied that the applicant has no alternative remedy in the circumstances.

[33.] I am of the view that the applicant is entitled to the interdictory relief sought, subject to a proviso which ensures that the respondent's performance of its statutory duties is not hampered or infringed.

[34.] The last issue which requires consideration is that of costs. Both parties sought a punitive costs order against the other based on its conduct in relation to the matter.

[35.] The applicant contended that the conduct of the respondent justified the granting of a punitive costs order[10]. It contended that the respondent has adopted a high handed and arrogant approach to the matter. In addition, the very deferment agreement which was pivotal to its case was not attached to its answering papers, which were replete with irrelevant matter and documents.

[36.] The respondent on the other hand, contended that the applicant had abused the process by delivering a lengthy reply and contained facts which were within its knowledge at the time of drafting the funding affidavit. It was also contended that the applicant changed its version between its founding affidavit and reply and had not made out a case in its founding papers.

[37.] I am not convinced that the granting of a punitive costs order would serve the interests of justice.

[38.] The normal principle is that the costs follow the result[11]. There are no grounds to deviate from this principle in the circumstances of this matter.

[39.] In the result I make the following order:

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[10] Nel v Waterberg Landbouers Ko-operatiewe Vereniging 1948 AD 587 at 617; Ward v Sulzer 1973(3) SA 701 (A) at 706g-707A

[11] Treatent Action Campaign v Minister of Health 2005 (6) SA 363 (T) at 371C-E

[39.1] The respondent is directed to restore the applicant's tax compliance status forthwith and within 24 hours of the granting of this order to enable the Applicant to generate a tax clearance certificate on the day following the date of the granting of this order.

[39.2] The order in 39.1 above is subject to the proviso that the respondent is not prohibited thereby from exercising any of its statutory rights and duties in relation to the applicant's, de future tax compliance status, subject to compliance with the provisions of section 256(6) of the Tax Administration Act 28 of 2011, as amended.

[39.3] The respondent is directed to pay the costs relating to the urgent application.

EF DIPPENAAR
ACTING JUDGE OF THE HIGH COURT,
PRETORIA

APPEARANCES

DATE OF HEARING	:	15 and 16 May 2018
DATE OF JUDGMENT	:	21 May 2018
APPLICANT'S COUNSEL	:	Adv C Steinberg
APPLICANTS' ATTORNEYS	:	Werksmans Attorneys Ref: Ms Mabasa
RESPONDENT'S COUNSEL	:	Adv KD Magano
RESPONDENT'S ATTORNEYS		State Attorney Ref: Mr V Ramruch