IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 22820/2016

In the matter between:

Mark Roy Lifman	**First applicant**
The Close Corporations, Companies and Trusts listed in Schedule A hereto	**Second to Thirty Sixth Applicants**

And

The Commissioner for the South African Revenue Service	**First Respondent**
Keith Hendricks	**Second Respondent**
MacRobert Attorneys	**Third Respondent**

JUDGMENT DELIVERED ON 11 JUNE 2019

BAARTMAN,J

[1] This is an application to stay the execution process commenced pursuant to taxes raised following the late filing of VAT and tax returns, and a section 50 enquiry (**the enquiry**) under Part C, Chapter 5 of the Tax Administration Act, 28 of 2011 (**the Tax Administration Act**).

[2] The applicants have abandoned some of the relief initially sought; below, I deal only with the relief persisted with, namely the stay of the execution proceeding. In May 2014, the first respondent, the South African Revenue Services **(SARS),** launched the enquiry. The first applicant held an interest in each of the entities that make up the second to thirty-sixth applicants. On 5 May 2014, Veldhuizen J, pursuant to an *ex parte, in camera* application, authorised the enquiry to investigate suspected non-compliance and/or offences committed by the applicants in the assessment periods described in the order. In terms of the order, Marais SC **(Marais),** a member of the Pretoria Society of Advocates, was designated as the presiding officer in the enquiry. The offences relate to contraventions of the Tax Administration Act, I do not deem it necessary deal with the offences in any detail.

[3] The enquiry commenced on 26 May 2014. In October 2015, Marais imposed a fine of R180 000 on the first applicant for his alleged failure to, among others, supply relevant information[1]. Midway through the enquiry, some applicants submitted outstanding income tax and VAT returns in respect of certain years that were subject to the enquiry. SARS assessed those returns and on 27 November 2014 levied a tax liability totalling R13 215 062.21 against 6 applicants. The amount raised was immediately payable. Although no dispute was raised against the assessment, payment remained outstanding. In February 2015, the first applicant and SARS reached an agreement in terms whereof the tax debt would be settled by end of March 2015. However, payment was not forthcoming. Instead, the applicants proposed a deferred payment arrangement and unsuccessfully pursued litigation. SARS was unable to enter into a deferred payment arrangement as the applicants still had outstanding tax returns. SARS can only enter into deferred payment arrangements with a fully compliant tax payer. Despite SARS threatening to institute proceedings to recover the debt if it was not settled by the end of March, it remained outstanding.

[4] The enquiry continued in respect of the periods not covered by the assessment referred to above. In March 2015, pursuant to evidence gathered from the enquiry, SARS issued letters of finding to the applicants in which it indicated further tax liabilities and the facts on which it had relied for the conclusions. The applicants had 21 days from date of delivery of the findings to respond in writing to

[1] Section 127(1) read with sections 127(5) and 25 of the Tax Administration Act, 28 of 2011.

the alleged facts and conclusions. They did not.

[5] In October 2015, SARS issued income tax and VAT assessments against the applicants as well as letters of assessment explaining the basis and stating the grounds upon which the assessments had been raised. The applicants did not initiate any of the dispute resolution procedures provided for in the Tax Administration Act. Therefore, the assessments raised pursuant to the submitted returns and those raised pursuant the enquiry became final and conclusive.

[6] On 1 April 2015, SARS obtained civil judgments and warrants of execution against the moveable property of the affected applicants. On 2 April 2015, SARS executed the warrants. On 7 April 2015, under case number 5961/2015, the applicants launched an urgent application in which they sought the setting aside of the civil judgments alternatively their suspension and interdicting SARS from proceeding with the execution process embarked upon. On 17 June 2015, Mantame J dismissed the application. SARS proceeded with the execution process by arranging sales in execution. On 19 June 2015, the affected applicants served a notice of application for leave to appeal the dismissal. The applicants failed to prosecute the appeal. SARS intervened and the application for leave to appeal was set down for 9 November 2015. However, the applicants withdrew the application for leave to appeal 2 days before the hearing.

[7] SARS resumed execution steps which led to the second urgent application in which the applicants sought to stay the execution process pending an application for leave to appeal the judgment handed down in the first urgent application. In November 2015, that application was dismissed with a punitive costs order.

[8] In this application, the applicants alleged that exceptional circumstances exist in that SARS had undertaken to conduct an internal review and reconsider the assessments referred to above. It is common cause that the applicants did not avail themselves of any of the procedures provided for in the Tax Administration Act to dispute the assessments raised[2]. The assessments are thus final.

[9] The first applicant alleged that he had 'on more than one occasion complained that SARS officials are acting in an untoward and subjective manner.' Pursuant to the first applicant's allegations of unfair treatment during the investigation, Gavin Cairns **(Cairns),** a specialist forensic auditor at SARS, was 'tasked to attend to the

[2] SARS' Dispute Resolution Guide Issue 1, 28 October 2014 promulgated in terms of section 103 and

review of the... audit.' In correspondence dated 3 November 2016, Cairns said the following about the review:

'Please note, (and as clarified) the purpose of the review is to compile an internal report. Therefore, it is unlikely that the details of our review findings will be communicated to yourself. However, SARS *will communicate its decision to revise, or not, the current assessment for each taxpayer within the group structure.* '

[10] However, on 12 February 2018, Ms Makola, chief officer SARS enforcement, communicated the following decision in the respect of the Cairns review:

'1. I refer to the email communication from Mr Gavin Cairns... on 3 November 2016 ...

2. Mr Cairns communicated to Mr Lifman that he intended to conduct a *so called "review" of the audit that had been conducted by* SARS..

…

4. SARS *has considered its position. The notion of an internal "review" of an assessment with the express purpose of revising such assessments, is neither contemplated nor countenanced in terms of the provisions of the TAA [Tax Administration Act]. Accordingly, there exists no statutory basis for it. A "review" of this nature is neither* a *power conferred on the Commissioner nor* a *right to which* a *taxpayer is entitled in terms of the provisions of the TAA. Accordingly, the "decision" communicated by Mr Cairns to Mr Lifman was erroneous, was based on an error of Jaw was consequently* a *nullity.*

5. I, in my capacity as a *senior SARS official, have accordingly decided, in terms of the provisions of section 9(1)(b) of the TAA, to withdraw, to the extent necessary, the decision to conduct such "review". Accordingly, the assessment raised against Mr Lifman and the companies are final and conclusive. ...*

7. *In light of my withdrawal of the decision to conduct such "review", it appears that little purpose would be served by the parties pursuing the stay application ... You are accordingly invited to withdraw the application.'*

[11] The applicants did not challenge the Makola decision. Nevertheless, on 30 April 2019, Cairns informed the first applicant that:

'I have completed what was requested of myself and have submitted my findings to management. As indicated to you in my mail of 3 November 2016, I am not at liberty

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Section 93 of the Tax Administration Act.

to share such findings with you. Please liaise with Mr Keith Hendrickse regards all future queries as *I am no longer involved in this matter.* '

[12] In light of Cairn's communication, the relief sought is relevant:

'3. That case no 14889/2015 be stayed pending the finalisation of the internal review to be conducted by Gavin Cairns of SARS.

4. That case no 1391712016 be stayed pending the finalisation of the internal review to be conducted by Gavin Cairns of SARS;

5. That any execution steps and legal proceedings pursuant to any assessment... be stayed with immediate effect, pending the finalisation of the internal review to be conducted by Gavin Cairns of SARS.'

[13] The Cairns review is done. The applicants acknowledge that they are not entitled to a copy of the internal review findings and have not requested one. Ostensibly, the relief sought is moot. Not so, submitted Ms Bawa SC, counsel for the applicants. Instead, so the submission went, the review is only finalised once the applicants have received notice from SARS 'of its decision to revise the assessments or not'. I disagree. The first applicant complained about the treatment the applicants had received at the hands of SARS' officials. The applicants cannot elevate a complaint about 'treatment received' to a ground of review. It follows that the relief sought has become moot.

[14] Even if I am wrong, the Tax Administration Act makes no provision for the reconsideration of an assessment contended for in this application. The applicants have not indicated where they laid the complaint that would have initiated the complaint mechanism provided for in the Tax Administration Act. Each assessment was preceded by letters of finding issued to the relevant applicant in 2015-2016, indicating the tax debt SARS intended to raise and the facts relied upon for its conclusion. The amounts, totalling R352 235 074.28, were such that one would have expected the applicants to have availed themselves of any opportunity to dispute the proposed assessments[3]. Section 106 of the Tax Administration Act provides:

'(1) SARS *must consider* a *valid objection in the manner and within the period prescribed under this Act and the 'rules'.*

[3] Lodge a complaint at the office of the Tax Ombud; Applied for the suspension of the payment obligation in order to alleviate potential hardship resulting from the 'pay-now- argue-later' rule in section 164 of the Tax Administration Act; Disputed the assessments through the mechanisms in Chapter 9 of the TAA; Used the objection and appeal process provided in section 104(1) and (2) of the Tax Administration Act.

(2) SARS may disallow the objection or allow it either in whole or in part.

(3) If the objection is allowed either in whole or in part, the assessment or 'decision' must be altered accordingly.. .'

[15] The applicants did not lodge any objection to initiate any of the mechanisms referred to above[4]. Instead, it seems that the initial dissatisfaction was about treatment received which the applicants have belatedly and opportunistically sought to raise to an objection against the assessments. That is not permissible; it follows that on this ground, the application must also fail. The assessments are undisputed, final, due and payable.

[16] Even if I am wrong, SARS cannot exercise any power other than that conferred upon it by law[5]. The applicants have relied on section 93(1)(d) and 92 for the submission that SARS may reduce an assessment even in the absence of an objection or an appeal provided for in the Tax Administration Act. Section 92 does not assist the applicants; instead, it protects the fiscus. The section provides:

'Additional assessment - If at any time 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.'*

[17] SARS is not prejudiced by the assessment; quite the opposite is apparent from the amount due and payable. Similarly, section 93 does not find application in the circumstances of this matter. The section makes limited provision for an amendment to an assessment[6]. The circumstances of this matter do not justify invoking the provisions of sections 92 or 93.

[18] The applicants contend that there are exceptional circumstances present in this matter justifying a stay of the execution process[7]. SARS is a special body with extensive powers and can legitimately intrude on the rights of taxpayers. However, the power SARS exercised is circumscribed and the applicants have been unable to indicate any flouting or abuse of those powers. The applicants have had ample

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[4] Part B: section 104 and 105 of the Tax Administration Act.

[5] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) para 58-59.

[6] Section 93: 'Reduced assessments. - (1) SARS may make a reduced assessment if-

(a) the taxpayer successfully disputed the assessment under Chapter 9;...

(d) SARS is satisfied that there is a readily apparent undisputed error in the assessment by -

(i) SARS; or

(ii) the taxpayer in a return; or ...

(e) (ii) a processing error by SARS...'

[7] Van Ransburg and Another NNO v Naidoo and Others NNO; Naidoo and others NNO v Van

opportunity to engage the dispute or appeal mechanisms available and have chosen not to.

[19] In the exercise of my wide discretion, I have considered the particular facts of this matter and am persuaded that they do not establish grounds of justice and fairness to stay the execution proceedings. There is no indication that an injustice will result from a failure to suspend the execution. On the contrary, this application appears to be an abuse of the process. It follows that there are no exceptional circumstances justifying a stay of the execution proceedings[8].

[20] In respect of the costs of this application, I considered that the applicants were brought under the impression that a lawful review process was in progress until 12 February 2018 when they received Ms Makola's decision. I intend to direct that each party pay its own costs up to that date.

Conclusion

[21] The application is dismissed with costs incurred after 12 February 2018;

[22] Each party is to bear its own costs incurred prior to 12 February 2018.

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BAARTMAN J

Ransburg and Others 2011 (4) SA 149 (SCA) at paras 51 and 52.

[8] Bannister's Print (Ply) Ltd v D&A Calendars CC and Another2018 (6) SA 77 (GJ).