IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED.

Case Number: 30964/2018

10/9/2019

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**APPLICANT**

And

HARRY TREMORIO CHAKALA	**1ST RESPONDENT**
HR COMPUTEK (PTY) LTD	**2ND RESPONDENT**

JUDGMENT

Fabricius J,

[1] This is an application that an order granted by Mokose AJ dated 12 July 2018, be rescinded and set aside. The Respondents herein were the Applicants in the main application, and they were only Mr H. T. Chakhala and HR Computek (Pty) Ltd. For the sake of convenience, I will refer to the Applicant herein as being "SARS". According to the Founding Affidavit, the order was obtained on an unopposed basis and in the absence of a representative of the Applicant. It was said that the matter had always been opposed and Applicant had always intended to oppose it because it had no merits. Furthermore, the Applicant had filed a Notice of Intention to Oppose which was dated 28 May 2018, as well as a Rule 30 Notice which had not been brought to the attention of the Court. It was alleged that the Applicant had not been in wilful default of the Rules of this Court and it also had a *bona fide* defence to the various claims of the Respondents.

[2] The rescission of the order was sought on the following grounds:

1. The order should not have been granted as in terms of the provisions of Rule 31 (5) (a) of the Rules of this Court, whenever a Defendant is in default of delivery of a plea, the Plaintiff must give such Defendant not less than five days' notice of his or her intention to apply for default judgment. The deponent to the Founding Affidavit stated that it would be argued that the provisions of this Rule were applicable in this case, and that the Respondents were bound to give notice to the Applicant of the date of set- down. This they failed to do;
2. It was also submitted that the order should be rescinded in terms of the common law;
3. In the alternative it was submitted that the order was sought or granted erroneously on the basis that the main application was unopposed. The application was indeed opposed, and the Applicant had furthermore served a notice in terms of Rule 30 which required the Respondents to withdraw their application because it did not comply with the requirements of s. 11(4) of the ***Tax Administration Act No. 28 of 2011 as Amended,*** relating to the giving of notice before legal proceedings were instituted against SARS. It was submitted in the Founding Affidavit

that had this been brought to the attention of the Court the order would not have been granted;

4. The resultant submission was that the order ought to be rescinded, both in terms of Rules 31 (5) (b}, and 31 (2) (b). alternatively, 42 (1) (a} and the common law.

[3] A long version of certain background facts was given but the essential ones are the following:

1. On 3 May 2018, the Respondents issued an application seeking a number of orders, as will appear from the order actually made by Mokose AJ on 12 July 2018 which read as follows:

"1 All assessments, additional assessments, penalties and interest raised by SARS since 2000 to date, for HR Computek CC, registration number 2000 / 041123/ 23 and HR Computek (Pty) Ltd and Harry Rozalird and Associates CC, registration number 2000 / 054516/ 23 are irregular, unlawful, null and void and that SARS must forthwith repay the money to the said taxpayers it had taken in respect of those irregular, null and void assessments.

2 SARS must consolidate all the taxpayer's different accounts under the multiple tax numbers SARS had issued to HR Computek as a single taxpayer since 2000.

3 SARS must revert back to the original tax numbers issued to the taxpayer, HR Computek, for Income Tax, VAT, PAYE, UIF and SOL.

4 SARS must consolidate all payments made by and on behalf of the taxpayer, HR Computek, including all amounts seized by SARS and collected by agents.

5 SARS must give account of the whereabouts of RS7 000 000 .00 (fifty seven million rand) paid for **taxes** by or on behalf of the taxpayer, HR Computek since 2003, that it failed to credit to the said taxpayer.

6 SARS must issue correct statements of account under the single tax numbers for Income Tax, VAT, PAYE, SOL and UIF after

complying with the prayers 1 to 5 above within 30 {thirty) days of this order failing which the statement of account by the forensic chartered accountant and auditor, Dr W. A. A. Gouws, will substitute all SARS' statements of accounts.

7 Costs."

As I have said, the order was obtained as if it was unopposed and in the absence of a representative of SARS. The parties had agreed to postpone the matter on 20 June 2018 for three weeks to enable SARS to deliver an Opposing Affidavit on or before 11 July 2018. For this purpose, a draft order had been prepared which was granted by Janse van Nieuwenhuizen J on 20 June 2018. The relevant part of that order read as follows:

"1. The application is postponed sine die;

2. Respondent will file an Opposing Affidavit on or before 11 July 2018, failing which the application will be enrolled on the Unopposed Motion Roll."

On 9 July 2018, the Attorneys of SARS served a notice in terms of Rule 30 , the basis of which being that the Respondents had failed to comply with the provisions of s. 11 (4) of the ***Tax Administration Act*** relating to notice of legal proceedings to be instituted. It is not in dispute, nor was it so during argument before me, that the Respondents' Attorney had informed the Applicants' Attorney that this notice was irregular and would therefore simply be ignored. There was no attempt to set it aside. During argument before me, Ms A. van der Walt on behalf of the Respondents was not sure whether the Applicants' Notice of Intention to Oppose had been in the file before Mokose AJ but did inform me that the Applicants' Rule 30 Notice had not been in the Court file, and had thus obviously not been considered by her. Instead of dealing with this Rule 30 Notice, the Respondents set the matter down without notifying SARS, and obtained the order which is now the subject matter of the rescission application before me. The question is whether this was proper, just and justifiable on the facts. In essence, it was the Respondents' case that this had been agreed upon if the order by Janse van Nieuwenhuizen J was considered

properly.

[4] The Respondents obtained a warrant of execution as a result of the Court order of 12 July 2018 but, this was suspended by Fourie Jon 15 February 2019 pending the finalization of the application for rescission. A number of arguments were raised before me in the context of the above facts, and it is fortunately not necessary to deal with all of them. Some of them do not appear from the affidavits and annexures before me. As is apparent from the actual order made by Mokose AJ, the parties thereto had been at war since 2000, involving substantial issues, legal and factual, and millions of Rand, and the question could therefore justifiably be asked: why would SARS all of a sudden not oppose the application for those incisive orders, many of which are of doubtful competence as well. Applicants' Counsel, Mr Malindi SC, with him Mr Natani, argued that the application before Mokose AJ had been in the nature of a "default" judgment inasmuch as the order had been issued in the absence of SARS. Under those circumstances it was submitted that Counsel appearing before Mokose AJ had been under a duty to disclose that a Rule 30 Notice had been filed (albeit out of time), and if they had done so, the Court would most likely not have granted the order in the absence of SARS. Furthermore, if the Respondents herein and the Applicants before Mokose AJ had been of the view that the Rule 30 Notice was in itself irregular, they should have taken steps in terms of the Rules to have it set aside. The Rule 30 Notice raised a serious step relating to the absence of the required statutory notice of proceedings in terms of the provisions of s. 11(4) of the ***Tax Administration Act*** and as such attacked the very foundation of the proceedings against SAAS. It ought therefore to have been brought to the attention of the Court. I agree with that contention. I also agree with the submission that it has been the practice in this Court for time immemorial that in the absence of a party, and in proceedings by "default" for that reason, the Court should be informed of all relevant facts before it is asked to make an order. In the present instance, and having regard to the terms of the order sought, such duty by Counsel appearing ought to have been even more obvious and necessary. After all, the "draft order" handed to the Court was not the result of a joint effort by the parties, but was drafted by the Respondents' Attorney and

Counsel unilaterally. In that context Ms van der Walt's reliance on *Moriatis Investments {Ply} Ltd v Montie Oairy (Pty) Ltd 2017 (5)* ***SA 508 SCA,*** is in my view misplaced. The order of Janse van Nieuwenhuizen J did not mean, nor was it intended to mean, that the draft order handed to Mokose AJ had been agreed to by the parties in that same context.

[5] It is also clear from the provisions of par. 13.10 of the ***Practice Manual*** of this Court, as it read at the time, that where a Respondent has failed to deliver an Answering Affidavit after filing a Notice of Intention to Oppose, the relevant application must be enrolled on the Unopposed Motion Roll, and Notice of Set Down of such application must be served on the Respondents' Attorney of record. This was not done in the present instance. It has previously been held by Van Costen J (Cachalia J concurring), and in my view quite correctly, that a request for default judgment is in the nature of an *ex parte* application, where generally an Applicant is required to make full disclosure of all relevant facts. In the present instance, the filing of the Rule 30 Notice ought to have been disclosed to the Court, as I have said. Most likely therefore, she would not have granted the relevant order without further ado.

See: ***Santam and Others v Bamber 2005 (5) SA 209 Wat 213.***

[6] There is a further major difficulty for the Respondents herein if reference is made to the decision of Van Reenen J in ***Pro Media Drukkers en Uitgewers (Edms) Bpk v Kaimowitz and Others 1996 (4) SA 411 (C).*** The learned Judge dealt with the requirements for rescission with reference to a number of authorities appearing at p. 417, relating to rescission proceedings in terms of Rule 42 (1) (a), and re-emphasized that a Court has a discretion whether or not to grant an application for rescission under Rule 42 (1), and that relief will be granted if there was an irregularity in the proceedings, or if facts existed at the time the order was made, of which the Court was unaware of, and which, if known to it, would have precluded the granting of the order. Furthermore, relief would be granted if the Court lacked legal competence to have made the order. In that regard see: ***Athmaram v Singh 1989 (3) SA 953 (D) at 954£ to F.*** Also, it is not necessary for an Applicant to show "good cause" for the Rule

to apply. "Good cause" is only necessary when an application is made in terms of the common law, In which event the Court then has a discretion. In that instance also, a reasonable and acceptable explanation for default is required as well the disclosure of a *bona fide* defence which *prima 'facie* carried some prospect of success. These requirements are all well-known, but the aspect of the absence of legal competence requires emphasis on the present facts.

[7] Considering the common law requirements and the question of "wilful default" useful reference can be made to the judgment of the Full Court of this Division (Bertelsmann J, Moseneke J and Derksen AJ) in *Ha"is v ASSA Bank ltd t/a Volkskas 2006 (4) SA 527 (T).* It was said that before it can be held that a party was in "wilful default", such a party would obviously have to bear knowledge of the action brought against him or her, and of the steps required to avoid a default. Such an applicant must therefore deliberately, being free to do so, fail or omit to take steps which would avoid the default, and must appreciate the legal consequences of his or her actions. A mental element of this default must be one of several factors which the Court must weigh up in determining whether sufficient or good cause has been shown to exist. Furthermore, a Court should not look at the adequacy or otherwise, of any explanation of the default or failure in isolation. Indeed, the explanation, be It good, be it bad or indifferent, must be considered in the light or the nature of the defence which is an important consideration, and in the light of all facts and circumstances of the case as a whole. I deem the last mentioned consideration to be of particular importance.

[8] A perusal of the order made by Mokose AJ on 12 July 2018, raises a number of serious issues that in my view are, and were, of such a nature that it would almost amount to an absurdity to say that SARS, a vast organisation, that functions within statutory confines, would as such, and without any particular department or individual taking responsibility, consent to orders which would clearly conflict with a number of provisions of the said ***Tax Administration Act*** Order number 1, is of such a nature and is moreover, in direct conflict with not only various provisions of the said ***Tax Act*** but also, a judgment of the Tax Appeal Court, dated 3 May 2013, where the parties were HR Computek CC and SARS. Furthermore, the Supreme Court of Appeal had also adjudicated

on the matter involving assessments up to 200 6. It is not now for this Court to determine whether the assessments referred to therein were properly made. It is also clear from order number 1 that it refers to parties not even before the Court. The other orders made, similarly refer to parties not before the Court, they are vague and ambiguous, and in my view of such a nature that they could not be enforced by any reasonable reader thereof. The said judgment of the Supreme Court of Appeal was delivered on 29 November 2012, under the citation ***[2012] ZASCA*** *178.* The Appellant was HR Computek (Pty) Ltd. On behalf of the Commissioner further submissions were made, namely, that if regard is had to the prayers sought relating to assessments wrongly or unlawfully issued, this Court would have no jurisdiction to hear the matter as the provisions of s. 104 (1) of the *Tax* ***Administration Act*** would apply with reference to the jurisdiction of the Tax Court. Furthermore, there was the issue of non-joinder inasmuch as the parties referred to in order number 1, were not before the Court. I also raised with Counsel for Respondent the question in terms of which statute I would have the power to make an order relating to unlawful, irregular or otherwise wrongly issued assessments, additional assessments, penalties and interest raised by SARS from 2000 to date. The simple answer was that I could do so on the basis of "fraud". My simple answer is that there are no indications before me in the present application that would show by any standard of proof that SARS had committed fraud in that context.

[9] I also reject the argument tendered on behalf of the Respondents that although the Court order upon a mere reading thereof is couched in very general vague, uncertain and ambiguous terms, SARS knew very well what they referred to, and could discover all relevant facts merely by reference to its systems". Court orders cannot be enforced by anyone, including the Deputy Sheriff, if necessary, merely on the basis that someone in SARS, not identified, would be able to interpret and obey, the orders made, many of which are the nature of a mandamus which relate topics to which the ***Tax Administration Act*** applies, and the various dispute resolution mechanisms contained in that *Act,* such as in Chapter 9 for instance.

[10] Having regard to all of the above issues and considerations, I exercise my discretion in favour of the Applicant for rescission.

The following order is therefore made:

1. **The order of Mokose AJ dated 12 July 2018 is rescinded;**
2. **The Respondents in this application are ordered to pay the costs, including the costs of two Counsel, where so employed, and which costs would also include the costs reserved by Janse van Nieuwenhuizen J on 20 June 2018 and by Fourie Jon 15 February 2019**.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 30 964 / 20 18

Counsel for the Applicant: Adv A van der Walt
Instructed by: J. H. Van der Merwe Inc. Attorneys

Counsel for the Respondents: Adv Malindi SC
Adv Nalani
Instructed by: The State Attorney

Date of Hearing: 3 September 2019
Date of Judgment: 10 September 2019 at 10:00