REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

CASE NO: 17418/2016

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Applicant

In re: INQUIRY INTO THE TAX AFFAIRS OF:

A (PTY) LTD First Respondent

B Second Respondent

C (PTY) LTD Third Respondent

RESPONDENTS
(AS IDENTIFIED IN ANNXURE "MM1" TO THE FOUNDING AFFIDAVIT)

J U D G M E N T

KEIGHTLEY, J

INTRODUCTION

1. This is an application by the Commissioner of the South African Revenue Services ("SARS") for an inquiry in terms s50, read with the relevant provisions of s51 to s58, of the Tax Administration Act[1] ("the TAA" or "the Act"). SARS is entitled, under s50(1), to proceed *ex parte* in an application of this nature. However, in this case it elected to proceed on notice to the respondents. The corporate respondents (i.e. excluding Mr B, the second respondent), are the registered taxpayers into whose tax affairs SARS seeks to inquire.

2. It is common cause that Mr B is the public officer and/or director of the first respondent, A (Pty) Ltd ("A"), as well as of the remainder of the respondents. It is also common cause that SAVE for A and the third respondent, most of the remaining corporate respondents were established as special purpose vehicles ("SPV's"), in other words, as entities whose operations are limited to the acquisition and/or financing of specific assets. The SPV's are all connected to A, the principle entity. Over a number of years A rendered corporate services to clients which resulted in the implementation of various structures or schemes (conveniently, "the X structures"), involving the use of the SPV respondents.

3. In its application SARS uses the terms "X" or "the X group" as a loose descriptor to refer to the general body of corporate respondents. I do the same in this judgment. However, it is important to clarify that this description is adopted purely for the sake of convenience, in light of the links between the corporate respondents. As the respondents point out,

[1] Act 28 of 2011

there is no formal “X Group” of companies, as contemplated under the Companies Act, or under the TAA. SARS accepts this.

4. A further point of clarity is that most of the SPV respondents are in voluntary liquidation. At the hearing of the application I was advised by Mr Eloff SC, counsel for the respondents, that only 17 of them were not in liquidation, and that he and his legal team appeared only for those 17 entities.

5. The X structures, the role and participation of the various SPV’s in them, and their relationships with each other, with A’s clients and with A are the focus of SARS’ intended inquiry. SARS avers that its investigations to date have revealed that the X group has, since inception, been devoted almost exclusively to designing, marketing, selling and implementing tax avoidance schemes to its clients.

6. SARS uses the terms “tax avoidance scheme” to describe an arrangement whose sole or main purpose is the avoidance of tax on income from an underlying asset in an impermissible manner by virtue of an arrangement that is constructed so as to provide a client with a return higher than would have been obtained had the client invested directly in the income-producing asset, without the other aspects of the arrangement. According to SARS, its investigations to date show that the X group provided advisory and other services in return for fees to clients seeking to benefit from tax avoidance schemes. Further, the SPV respondents were utilised solely to facilitate the implementation of these schemes: they were used solely to house offsetting assets and liabilities, and/or to facilitate the flow of income, for purposes of these arrangements.

7. The respondents vehemently deny these averments. They assert that A’s business entailed providing corporate advisory services to clients in relation to corporate finance,

mining and property related transactions, mergers and acquisitions, BEE requirements and the like. While this on occasion led to the conclusion of structured finance or investment transactions for clients, i.e. "structures", A's prime objective was to assist clients to achieve their particular commercial objectives. The respondents say that none of the SPV respondents were used in impermissible tax avoidance structures, or for any other impermissible purpose. It was never their purpose to achieve tax avoidance in an impermissible manner. A gave no tax advice to clients. The purpose of their advice was to achieve commercially efficient solutions for clients. Although clients required their commercial transactions to be structured in tax-efficient ways, tax constituted only an ancillary part of any transaction: the primary focus was always on achieving a commercial goal.

8. In short, what SARS requests is that it be authorised to proceed with an inquiry into this state of affairs under s50 and the related provisions of the TAA. The respondents contend that SARS has failed to make out a case that entitles it to this relief, and asks for the application to be dismissed.

LEGISLATIVE FRAMEWORK

9. The purpose of the TAA is to ensure the effective and efficient collection of tax by SARS.[2] Among other things, SARS is responsible for obtaining full information in relation to anything that may affect the liability of a person for tax, or the obligation of a person to comply with tax provisions,[3] to determine the liability of a person for tax,[4] to collect tax,[5]

[2] Section 2
[3] Section 3(2)(a)
[4] Section 3(2)(d)
[5] Section 3(2)(e)

to investigate whether an offence has been committed under a tax provision,[6] and to enforce SARS' powers and duties to ensure compliance with tax obligations.[7]

10. A taxpayer has general obligations to provide SARS with relevant information. For example, the taxpayer must submit tax returns that contain information that is full and true.[8] Of relevance to this matter, under s35 read with s37 of the TAA, a "promoter" and a "participant" have obligations to disclose specified information to SARS concerning "reportable arrangements". A promoter is a person who is principally responsible for organising, designing, selling, financing or managing a reportable arrangement. A "participant" is either a promoter or a company or trust which directly or indirectly derives a 'tax benefit' of 'financial benefit' by virtue of a reportable arrangement.[9] Reportable arrangements are further provided for in ss35 to 39, and s212 of the TAA. It is not necessary for present purposes to go into the details of those provisions in this regard.

11. The TAA gives SARS a wide range of powers for purposes of obtaining and verifying information provided by a taxpayer. The relevant provisions are contained in Chapter 5 of the Act, under the heading "information gathering". The available mechanisms range from various types of inspections, audits, requests for material, production of material in person, criminal investigations, inquiries and warrants for search and seizure.

12. Of background relevance to this matter is section 46(1), in Part B of chapter 5, which provides that:

> "*SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires.*"

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[6] Section 3(2)(f)
[7] Section 3(2)(g)
[8] Section 25
[9] Section 34

It is common cause that SARS made extensive use of this provision in its dealings with the respondents prior to instituting its application for an inquiry.

13. The inquiry provisions fall under Part C of Chapter 5. Sections 50 and 51 provide as follows:

> "*50. Authorisation for inquiry*
> *(1) A judge may, on application made ex parte by a senior SARS official grant an order in terms of which a person described in section 51 (3) is designated to act as presiding officer at the inquiry referred to in this section.*
> *(2) An application under subsection (1) must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.*
> *(3) A senior SARS official may authorise a person to conduct an inquiry for the purposes of the administration of a tax Act.*
> *51. Inquiry order*
> *(1) A judge may grant the order referred to in section 50 (2) if satisfied that there are reasonable grounds to believe that—*
> *(a) a person has—*
> *(i) failed to comply with an obligation imposed under a tax Act; or*
> *(ii) committed a tax offence; and*
> *(b) relevant material is likely to be revealed during the inquiry which may provide proof of the failure to comply or of the commission of the offence.*
> *(2) The order referred to in subsection (1) must—*
> *(a) designate a presiding officer before whom the inquiry is to be held;*
> *(b) identify the person referred to in subsection (1) (a);*
> *(c) refer to the alleged non-compliance or offence to be inquired into;*
> *(d) be reasonably specific as to the ambit of the inquiry; and*
> *(e) be provided to the presiding officer.*" (emphasis added)

14. "Relevant material" is defined as meaning any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed.[10] It is common cause that relevant material includes the answer given to questions put to an examinee at an inquiry under s50.

15. The presiding officer of an inquiry has the power to subpoena a witness to be examined under oath, and to produce any relevant material in his or her custody. In addition, he

[10] Section 1

or she has the power to make orders regarding contempt of court.[11] A person subject to an inquiry may have a representative present when he or she appears as a witness. Proceedings are confidential.[12] Although a person may not refuse to answer a question on the grounds that it may incriminate him or her, incriminating evidence obtained is not admissible in criminal proceedings (save for limited exceptions) against that person.[13]

16. The jurisdictional requirements for granting an order for an inquiry appear from section 51(1), above. In summary, SARS bears the onus of establishing (to the satisfaction of the court) that there are reasonable grounds to believe:
    1. in the first place, either that a person has failed to comply with a tax obligation or has committed a tax offence; and
    2. in addition, that the inquiry is likely to reveal relevant material that may provide proof of that failure or commission.

17. The application must be supported by an affidavit that must include "information" to "establish" the facts on which the application is based. As I will discuss shortly, this introduces an element of uncertainty as regards the evidentiary and legal onus on SARS, and the appropriate procedural rules that the court must apply in determining issues of fact arising from the affidavits filed by the parties. A further aspect of the provisions that should be noted is that in terms of s51(2)(d), the order must be "reasonably specific" as to the ambit of the inquiry, and it must identify the person subject thereto, (in terms of sub paragraph (b)), and the alleged non-compliance or offence to be inquired into (in terms of sub paragraph (c)). These provisions also require further consideration, as will become clearer later.

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[11] Sections 53 & 54
[12] Section 56.
[13] Section 57

18. The fact that SARS's application is opposed by the respondents presents some difficulty. This is because there is a dearth of authority on how the provisions are to be interpreted and applied by the court. In fact, neither of the parties was able to find and refer the court to any judgments dealing directly with s50 of the TAA and its related provisions.[14] There is thus no guidance from existing authority on such issues as what the nature is of SARS' onus; what degree of proof is required to meet it; what facts and averments SARS is required to include in its application; and how the court is to exercise its discretion to grant the order or not. As will become apparent later, the parties have contrary views on these issues, and it is necessary to give consideration to them.

THE PROPOSED TERMS OF THE ORDER

19. The notice of motion describes the order SARS seeks. Originally, it read as follows:

1. Granting authority, in terms of section 51 (3) of the Tax Administration Act, to hold an inquiry into the tax affairs of the Respondents with specific reference to whether or not:
    1.1. They have failed to submit income tax returns and to pay income tax in respect of fees charged by them, thereby failing to comply with their obligations under ss 5 (1) and 66 (13) of the Income Tax Act;
    1.2. They have failed to pay secondary tax on companies ("STC") owing by them, thereby failing to comply with their obligations under s64B of the Income Tax Act;
    1.3. They have failed to submit VAT returns and to pay VAT owing on fees charged by them, thereby failing to comply with their obligations under ss7 and 28 of the Value Added Tax Act and s25(2) of the TA Act;

[14] I refer later to the *Ferucci* judgment (citation follows in a later footnote) which dealt with the search and seizure provisions under the Income Tax Act.

1.4. They have dishonestly evaded their obligations in relation to the declaration and payment of income tax, STC and VAT;

1.5. They have failed to disclose to SARS the requisite information (as set out in s38of the TA Act) in relation to “reportable arrangements’ (as defined in s35 of the TA Act), which the respondents have been responsible for organizing, designing, selling, financing or managing, thereby failing to comply with their obligations of disclosure under s37 of the TAA;

1.6. They have committed tax offences under ss234 d, h (i)&(ii), j, k, l and p of the TA Act;

1.7. The third parties, including clients of the First Respondent:

17.1. have made use of the First Respondent’s services I order to evade, alternatively impermissibly avoid, their obligations in relation to payment of income tax and STC;

17.2. have, as participants in reportable arrangements from which they have derived tax benefits or financial benefits, failed to comply with their disclosure obligations under s37 of the TA Act;

17.3. have committed tax offences under s234 d, h (i)&(ii), k, l and p of the TA Act.

2. Designating Advocate Renata Williams SC as the presiding officer before whom the inquiry shall be held.

3. Directing services of this order on the presiding officer so designated.

The respondents pointed out in their answering affidavit that paragraph 1.7 of the notice of motion, relating to the tax affairs of third parties, including clients of A, exceeded the authority granted by the senior tax official concerned under s50(3) of the TAA. In response to this, SARS indicated that it would delete paragraph 1.7 from its original proposed order, leaving the ambit of the inquiry restricted to the X group.

SARS' CASE

20. SARS accepts that it bears the onus of satisfying the court on the jurisdictional requirements set out in section 51(1). However, it submits that the requirement of "*reasonable grounds to believe*" places a much lighter burden on SARS than would be the case if SARS instead was required to actually "*satisfy*" the court on the respondents' non-compliance and the likelihood that relevant material may be revealed in the inquiry. SARS refers to *Vumba Intertrade CC v Geometrtic Intertrade CC*,[15] where this distinction was drawn in relation to the requirement that there be "*reason to believe*" that a respondent close corporation will be unable to pay its debts before a court may order a respondent to furnish security for costs. Thus, SARS submits, the bar it faces in satisfying the jurisdictional requirements in s51(1) is relatively low.

21. SARS points out that a s50 inquiry is not a hearing to determine tax liability. It is intended only to operate as an investigative tool. As such, says SARS, the inquiry itself is not determinative of an affected party's rights or obligations. In this respect, the s50 inquiry is akin to an inquiry under s417 of the Companies Act.

22. In the affidavits supporting its application SARS says that it has conducted investigations into the known structures established and operated by X on behalf of its clients as part of the corporate advisory services X offered in return for fees. Its investigations to date have revealed that the structures are extraordinarily complex, and involve a range of X entities used as SPV's to facilitate the arrangements. In some cases, foreign entities, in Namibia and Mauritius, linked to the X group, are involved.

[15] 2001 (2) SA 1068 (W) at para [8]

23. One of the first X structures investigated by SARS involved the J group of companies ("J") which was X's client. From its investigation into the J structure, SARS concluded that it was designed and implemented by the X group solely to create tax benefits for J, and not for the stated purpose of achieving Black Economic Empowerment. Further, SARS concluded that the involvement by the X SPV's and the transactions effected by them as part of the overall J scheme had no commercial value and did not make commercial sense to J beyond the tax benefits that were created and passed on via their operational involvement. This conclusion was accepted by J after the dispute between it and SARS was settled. J issued a SENS announcement on 23 January 2015 in this regard ("the J SENS announcement"), and paid an agreed amount of R312m to SARS. In that SENS announcement, J stated that it recognised that X had used SPV's "*with no apparent commercial role but to effectively convert interest into exempt preference dividends*", the implication being that the purpose of this was to shield taxable interest from tax.

24. Following the J investigation, SARS increased the scope of its investigation by:

    1. Conveying audit queries to X, including making extensive use of SARS' powers under s46 of the TAA;

    2. Obtaining documentation from the Namibian Revenue Authority in terms of an Exchange of Information process under South African and Namibian double tax agreement;

    3. Requesting audit files and working papers from the external auditors of X entities;

    4. Requesting material and correspondence from the issuers of the underlying instruments used in the transactions;

    5. Requesting bank account details from X's banks.

25. From the material so gathered, SARS says it was alerted to other complex structures that were similar to the J structure. To date SARS has investigated fifteen of sixteen known X structures. SARS states that its investigations show that the arrangements implemented through the X structures (and involving X SPV's) facilitated at least the impermissible avoidance of South African income tax and Secondary Tax on Companies ("STC") credits for the benefit of both the X group and its clients. In the case of the former, the arrangements involved the conversion of taxable interest income to tax-exempt dividends, by using debt instruments that were passed through a number of SPV entities in South Africa and other jurisdictions. In the case of the latter, the arrangements generated artificial STC credits, and hence a reduction in the taxable amount for STC purposes.

26. The mechanisms through which SARS asserts this was achieved are explained in more detail in the founding affidavit. It is not necessary to traverse them much further here, as they are patently complex. I simply record that SARS states that as a result of its investigations into the X structures, it has identified instances of round-tripping; simulated transactions; cross-border arrangements involving convertible capital loans; cross-border "loop structures" (involving the passing of capital in the form of interest income in a circular fashion from a South African entity through foreign entities and then back to the South African entity in the form of an exempt foreign dividend); "funnel schemes" (the offsetting of rights and obligations that simulates the flow of capital but is commercially meaningless); STC credit generator arrangements; and "accelerator" restructuring to realise planned tax benefits prior to a relevant 2012 amendment to tax legislation.

27. An important feature of the arrangements is that they involved a network of multiple X SPV's that were used to facilitate the flow of assets and liabilities. It is clear from the explanations provided by SARS in this regard that the structures, mechanisms used, and roles played by the X SPV's were highly complex. SARS annexes to the founding affidavit a list of known X SPV's, together with the X structure to which each is known to be linked, and the role that each is understood to have played in the relevant arrangements. The list includes all of the respondents The roles played by them vary, and include the roles of debt conduit, equity conduit, benefit entity, STC credit generator, and "holding/fees". SARS summarises the methods of operation common to the various structures it has investigated. They include transactions involving the use of corporate capital loans, interest-generating debt instruments, dividends, preference share investments, and X SPV's being used as "plug companies" in offshore transactions effectively to render taxable interest tax neutral. According to SARS, many SPV's were common to a number of the structures investigated.

28. SARS has concluded that each of the structures it has investigated to date constitutes a "reportable arrangement" for purposes of Part B of Chapter 4 of the TAA, or an arrangement in respect of which disclosure obligations flowed under s80O of the Income Tax Act (which governed reportable arrangements prior to the implementation of the TAA), and that the general anti-avoidance rules ("GAAR") apply to them. The reporting regime places reporting obligations on both "promotors" and "participants" in reportable arrangements, and imposes penalties for the failure to do so. Despite this, none of the X entities involved in the structures investigated thus far complied with their reporting obligations.

29. SARS points out in its replying affidavit that its conclusion that X was engaged in the design and operating of impermissible tax-avoidance structures is based partly on

SARS' own experience and conclusions drawn from its investigation and audits of the entities involved. In addition, SARS refers to what it refers to as objective documentary evidence in the form of working papers and other file documents obtained from X's auditors: PwC, and later KPMG. SARS refers to extracts from these documents and avers that they make it clear that X operated aggressive tax-avoidance structures.

30. A PwC minute noted X's "aggressive but legal structures", and that senior PwC tax personnel were involved and were "aware of the risk in (X)". Possible tax challenges by SARS are noted on a number of occasions. Similarly, KPMG noted the "high levels of risk" involved. In a closure note provided by KPMG in 2015, KPMG noted that it had been requested to give its considered view regarding the risks to X regarding various historic tax aggressive structures promoted by X. The note recorded that:

> "*Certain entities within the X group of companies previously set up tax structures for their clients in order to improvise the client's rate of return on their investments. <u>These structures ultimately has (sic) the effect to transform taxable income/return on investments to income tax exempt income/return for the client.</u>*" (emphasis added)

The note recorded further SARS would most likely consider, among others:

> "- *Substance over form risk of the structures and entities used*
> - *Round tripping transactions*
> - *Simulated transactions*
> - *Use of special purpose vehicles with no apparent commercial role by to effectively convert interest into exempt preference dividends and to provide cross-security*
> - *Tax general anti avoidance rules ("GAAR")*
> - *Reportable arrangements risk*
> - *Contamination risk whereby SARS may attack another entity within the X group should SARS not be able to successfully assess a tax risk entity.*"

In the final paragraph of the note, KPMG stated that:

> "*Whilst it remains a subjective matter, the commercial reasons [for the structures] appears somewhat 'thin' and our high level impression would be that if the matter were to proceed to a court of law, that the commerciality of the underlying transactions will require significant strengthening.*"

31. SARS has concluded further that it was not only X's clients that benefited from the impermissible tax avoidance nature of the schemes, but that the X group also benefits to a large extent from the same structures that benefit its client. SARS says that a portion of the interest shielded from tax via the offshore mechanisms employed and converted into dividends (through inter alia X SPV's), was not returned to X's clients. Instead, they were funneled through a series of companies and trusts and appear to have vested in certain X employees and shareholders. These include two trusts that appear to be related to Mr B and MsC, who are directors and co-founders of X. SARS believes that through this mechanism X extracted a "fee" portion from the structures in a tax exempt form as dividends, thus escaping tax in South Africa, including potentially VAT.

32. According to SARS there is reason to believe that the doctrine of simulation may apply. This means that X's own participation in the structures it established for its clients could be characterised as a sham and a contrived way of extracting a *quid pro quo* for services rendered without attracting income tax. Alternatively, at least the GAAR would be applicable, and remedies available under those rules. If this were established from the body of evidence and information SARS hopes to obtain from the inquiry, X would be liable for substantial amounts of income tax and VAT, and penalties for income tax and VAT evasion, or at least that the GAAR is applicable to the transactions, giving rise to the need for additional tax assessments for entities in the X group.

33. It should be noted that the respondents deny that they are involved in simulation or any similar impermissible conduct through their participation in the structures set up for their clients. They contend that they earned net margins in consequence of the commercial role they played in the implementation of the transactions. They state that these were not fees for remuneration for services rendered, and that they have made all necessary tax declarations in this regard.

34. Based on its investigations, SARS submits that there are reasonable grounds to believe that companies in the X group have:

    1. Failed to submit income tax returns and to pay income tax in respect of fees charged by them, thereby failing to comply with their obligations under s5(1) and s66(13) of the Income Tax Act and s25(2) of the TAA;

    2. Failed to pay STC owing by them, thereby failing to comply with their obligations under s64B of the Income Tax Act;

    3. Failed to submit VAT returns and to pay VAT owing on (what are in substance) fees charged by them, thereby failing to comply with their obligations under ss7 and 28 of the VAT Act and s25(2) of the TAA;

    4. Dishonestly evaded or at least impermissible avoided, as the case may be their obligations in relation to the declaration and payment of income tax, STC and VAT;

    5. Failed to disclose to SARS the requisite information (as set out in s38 of the TA Act) in relation to 'reportable arrangements' (as defunded in s35 of the TAA) which those companies have been responsible for organising, designing, selling, financing or managing, thereby failing to comply with their obligations of disclosure under s37 of the TAA;

    6. Committed tax offences under paragraphs (d), (h)(i) & (ii), (l), (j), (k) and (p) of s234 of the TAA.

35. As regards the first alleged violation, I should clarify that it is common cause that until 2010 the X entities were in default of filing their tax returns. The respondents state that this "unfortunate" situation was rectified subsequently as regards all but four of the

corporate respondents by the time the application was launched, and they have since been filed. SARS does not dispute this.

36. SARS asserts that the purpose of its proposed inquiry is to obtain an exhaustive and definitive list of all X structures, and to establish the tax consequences for X (as outlined earlier) for each structure.

37. In particular, SARS says that it is likely that the inquiry will produce information to enable it to establish the identities of the “promoters” and/or “participants” in each reportable arrangement, and whether any “participant” was excused from making disclosure under the TAA. Without that information, SARS will not be able to establish precisely where the liability for non-disclosure lies in each case, and thus to impose the relevant penalties. For ease of reference, I refer to this as the reportable arrangements aspect of the inquiry.

38. Further, SARS anticipates that the inquiry is likely to provide information to enable it to complete its investigation into the X’s potential liability for additional tax, VAT and penalties flowing from the manner in which it has benefited by participating in the structures it has established for its clients. For ease of reference, I refer to this as the X fees aspect of the inquiry.

39. In its replying affidavit, SARS clarifies that there are three categories of X structures in respect of which it says an inquiry is warranted.

40. The first category are the structures that SARS has already investigated, and in respect of which it has concluded that they were involved in impermissible avoidance arrangements. As regards these structures, SARS points out that its investigations and

thus the informati at its disposal is not yet complete. What remains to be investigated are both the reportable arrangements aspect, and the X fees aspect. As regards the reportable arrangement aspect, SARS indicates that it is not sufficient for it to have concluded that the arrangements entered into were impermissible avoidance arrangements. Liability and penalties for non-disclosure still have to be attributed to each relevant entity involved in each of the structures. Without the inquiry, SARS says that it will not have the information required to enable it to do this.

41. The second category of structures that SARS wishes to subject to inquiry are those in respect of which SARS only has a code name. SARS obtained a list of thirteen code names from X's 2011/2012 general ledger which PwC provided to SARS. SARS has very little meaningful information as to those structures because they are not identified with reference to any clients, but only by code names, such as ProjectMowgli, Project Mufasa or ProjectMulan. SARS submits that it is entirely likely that these structures will share the same non-compliance's exhibited by them.

42. The third category of structures are those not yet known to SARS but which, it submits, are likely to exist. SARS points out that it has not been able to obtain clarity that the list of clients it has obtained from third parties or from X is exhaustive. Further, the general ledger obtained from PwC is dated only up to 2012. SARS has information of projects that appear to have been resurrected later than this. In addition, SARS is aware that X registered a number of new SPV's, and of other SPV's used by X. SARS says it thus has reasonable grounds to believe that there may be further arrangements, as yet completely unknown to SARS, that share similar tax avoidance features as those about which SARS has knowledge. It says that it is likely that the inquiry will provide information relevant to them.

43. SARS makes it clear from the outset that the inquiry is necessary to enable it to conduct what it describes as a comprehensive and holistic structure-based approach to the investigation into the X group's tax affairs, rather than an entity-by-entity investigation. It points to the complexity of the structures and arrangements as a factor in this regard, with each structure involving multiple SPV's, as well as the common use of some of the SPV's in different structures. In addition, SARS highlights that both PwC and KPMG adopted a structure-based approach to their external audits of the X group. During the course of these audits, the auditors considered each structure on a holistic basis, rather than considering the entities involved on an individual basis. SARS says that this indicates, first that the X group has in its possession whole structure-based information (including financial models and the like) indicating that each structure consists of a pre-determined set of entities, transactions and arrangements, and should be considered as such. Second, it indicates that X has provided structure-based information to its auditors but has refused to provide it to SARS. Consequently, SARS submits that this state of affairs can only meaningfully be investigated by SARS on a holistic structure-by-structure basis, with access to the whole-structure information X has at its disposal.

44. SARS's case that the most efficient, effective and practical way to do this is by way of an inquiry. It points to the inadequacy (in its view) of the numerous requests it has made for information under s46. These requests were addressed to Mr B as the principal officer of the X entities. The parties differ on the adequacy of Mr B response to these requests. SARS says that Mr B evidenced a strategy of obstruction and obtuseness in response, and that the responses were limited in nature. In particular, Mr B adopted the stance that he was only prepared to provide information on an entity-by-entity request and response basis. SARS says that Mr B has abjectly refused to answer SARS's requests in respect of multiple taxpayers in one letter, despite the fact that he is the public officer of A and all the X entities. SARS allegations are strongly disputed by Mr

B. He annexes hundreds of pages of annexures to the answering affidavit to demonstrate what he says was full and detailed compliance with SARS' requests for information. This is an issue for later consideration. However, what SARS nonetheless avers is that while the X entities have furnished some information through the s46 channel, it remains an ineffective and insufficient mechanism to investigate the complex corporate structures involved.

45. On these bases, SARS submits that it has made out a case that meets the jurisdictional requirements of section 51(1) and that the court should authorise an inquiry on the terms proposed.

X'S CASE

46. In broad outline, X opposes the relief on the basis that:

1. SARS has failed to satisfy the jurisdictional requirements for the convening of an inquiry; and

2. Even if SARS is found to have satisfied those requirements, the court has a discretion whether or not to grant the relief and in this case, for various reasons, it should refuse to do so.

47. The respondents premise their case on what they say is the far-reaching, open-ended and invasive s50 inquiry procedure. They submit that the inquiry procedure is far more invasive than the other information gathering powers SARS has under Parts A and B of Chapter 5 of the TAA. They describe a s50 inquiry as being an extreme measure, involving a significant infringement of a taxpayer's right to freedom and security of the person, and the right to self-incrimination under the Constitution. The respondents liken the inquiry process to an interrogation involving coercion.

48. The respondents say that these characteristics shape the legal nature of a s50 application. They make certain submissions on what is required of SARS to meet the threshold requirements for a s50 inquiry, and how the court is to exercise its discretion if it is satisfied that SARS has met those requirements. More particularly, they submit that:

    1. A court faced with an application for an inquiry must adopt a rigorous approach to ensure that SARS complies with what the respondents say are the strict jurisdictional requirements of s50 and s51. A court is required to scrutinise closely the facts put up by SARS to ensure that it is "satisfied" that a proper case has been made out. According to the respondents, an order under s50 should not be easily granted by the court.

    2. Despite s51(1) requiring SARS to satisfy the court that there are "reasonable grounds to believe", the ordinary principles applicable in opposed motion proceedings apply. This means that SARS must prove its case on a balance of probabilities. Furthermore, as the application is for final relief, the principles laid down in *Plascon-Evans*[16] apply. This means that where the respondents dispute a factual averment by SARS, the respondents version must prevail.

    3. Similarly, SARS cannot make averments in reply that constitute a new case.

    4. SARS' case must be based on "sufficiently particularised facts" supporting the alleged reasonable grounds to believe. This means that SARS must provide evidence to support the belief that a specific offence was committed, or a specific violation occurred by a specific respondent. The precise conduct must be

[16] *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [26]

particularised, as must the precise information, or types of information, that SARS avers are likely to be revealed in the inquiry. If SARS fails to do this, its application will be defective.

5. SARS must satisfy the court that the other, less invasive, information-gathering mechanisms available under Parts A and B of the TAA (such as requests under s46) would be ineffective before it ought to be permitted to resort to the extreme measure of an inquiry. In other words, SARS must persuade the court that less invasive information gathering powers at its disposal will not serve its purpose.

49. These submissions give rise to what I refer to as the "preliminary issues". The respondents proceed to take issue with the case made out by SARS in this regard.

50. First, and pursuant to the respondents submission that the *Plascon-Evans* rule applies, the respondents contend that because they deny SARS' averment that the X group was engaged in the design and operating of impermissible tax-avoidance structures, their version (as respondents), and not SARS' version (as applicant) must prevail. Thus, the respondents say, the court must accept, as fact, that none of the SPV respondents were used in impermissible tax avoidance structures, or for any other impermissible purposes.

51. Similarly, the respondents point out that in their answering affidavit they denied SARS' allegation that the *modus operandi* in terms of which respondent SPV's participated in, and benefited from, the structures established and implemented for X's clients was a means of shielding what was in effect X fee income from tax in South Africa. The respondents stated in the answering affidavit that the profits so earned were commercial margins on their involvement in the transactions, and not fees. The respondents submit that the court must accept this statement, being the version of the respondent.

52. The respondents conclude in this regard that on an application of the principles applicable in opposed motion proceedings, SARS has failed to establish the respondents' non-compliance with tax laws or the commission of tax offences, as required under s51(1)(a). On this basis, and having failed to meet the threshold requirements for the a s50 inquiry, its application should be dismissed.

53. The respondents contend further that, in any event, SARS has failed to establish, "with any sufficient particularity" facts to support the belief that the respondents have committed the offences or violations referred to in the application. Instead, say the respondents, SARS deliberately relies on broad, vague, general and unsubstantiated allegations, and draws what the respondents describe as "factually bereft" conclusions in support of its case. The respondents point to s50(2) which requires SARS to support its application with "*information supplied under oath ... establishing the facts on which (it) is based.*" They submit that SARS' case is unsubstantiated, and that for this reason too, the case made out fails to satisfy the jurisdictional requirements of s51(1), read with s50(2).

54. The respondents say that SARS does not, as it is required to do, identify particular conduct relating to particular violations or offences, alleged to have been committed by particular respondents. Instead, SARS refers to vague and general alleged non-compliance and tax violations by a group of taxpayers. The Respondents contend that SARS ought to have made averments that link each corporate respondent individually with particular instances conduct. The averments should then have spelled out precisely what violation or non-compliance that conduct amounts to, and thus why that particular individual respondent is in contravention. As SARS fails to make out a case on this basis in its affidavits, it has not satisfied the threshold requirements for an inquiry, and its application should be dismissed.

55. In similar vein, the respondents contend that SARS was required to identify "with sufficient particularly" the relevant material that is likely to be revealed at the inquiry as possible proof of the alleged violations or non-compliance. The respondents assert that a generalised reference by SARS to likely relevant material is not sufficient. It is required to say what specific material it anticipates is likely to be revealed. Further, as indicated by the use of the word "reveal" in s51(1)(b), this must be new information, not information that SARS already in SARS' possession.

56. In this regard, SARS has obtained a significant volume of information from the respondents through its use of s46, as well as from third party sources. This has enabled SARS to build up a comprehensive understanding of the X group and its activities, including the X structures. There cannot possibly be any more information that SARS needs. The respondents say that they have provided SARS with every piece of information that it has requested of them. Further, they have tendered to provide SARS with all further information it might request under s46. The information already at hand has proved sufficient to allow SARS to draw the conclusion that the respondents have committed the violations and non-compliance's described in the application. As such, no new information is likely to arise, and thus an inquiry would not serve the purpose intended by s51(1)(b). For these reasons, the respondents submit that the application should be dismissed as it does not meet the threshold requirement of s51(1)(b).

57. A further contention raised by the respondents is that the information gathering powers of SARS do not permit it to seek information (or "relevant material" in the words of s51(1)) from the X structures as a whole. In other words, SARS may only exercise its information gathering powers on a taxpayer-by-taxpayer basis. This means it is impermissible for SARS to seek to conduct a holistic inquiry into the X structures, as it indicates in its

application it intends doing. For this reason too, the respondents submit that the application must be refused.

58. Respondents also take issue with what they say is SARS' failure to justify why it ought to be permitted to resort to the invasive process of a s50 inquiry, rather than simply continuing to use its less-invasive information gathering powers. They say that in response to the numerous requests by SARS for information under s46 the respondents have provided hundreds of pages of material. As I have already indicated, to underline this point, the respondents summarise in detail in their answering affidavit all the correspondence between SARS and each of the X entities in respect of which information was sought. In addition, they attach all copies of the relevant correspondence. This portion of the answering affidavit, with annexures, comprises over 1 500 pages. The respondents state that this reflects the voluminous and detailed information already in the hands of SARS. It also reflects that they have fully complied with all the s46 information requests to date. They have tendered to comply with any others SARS may wish to forward to them. In the circumstances, say the respondents, there is simply no need for SARS to resort to the more invasive form of information gathering constituted by a s50 inquiry. For this reason, the court should exercise its discretion and refuse the application (assuming the threshold requirements are met), as it is inappropriate and unjustified.

59. In fact, say the respondents, the insistence by SARS of pushing ahead with a s50 application despite the voluminous information it already has at its disposal constitutes an abuse. This is demonstrated by SARS having concealed from the court the volume of information it has gathered from the respondents thus far. According to the respondents, the inescapable inference to be drawn from this is that the application under s50 was launched *in terrorem* and for an ulterior purpose. It is intended as a

fishing expedition, or an attempt to gather information about X clients, even though SARS has not been authorised to do so. For this reason too, say the respondents, the court should dismiss the application in its discretion.

60. Not only do the respondents seek the dismissal of the application for the reasons described above, they also submit that the application is without any legitimate basis, and they ask the court to make a costs order against SARS on a punitive scale. This submission is made in a supplementary answering affidavit filed by the respondents after SARS had filed its replying affidavit.

61. In the supplementary answering affidavit the respondents record that SARS used its replying affidavit in an attempt to supplement the skeletal, vague, generalised, unsubstantiated and factually bereft assertions contained in the founding affidavit. While the respondents say they were aware of their entitlement to seek to strike out the new matter in reply, they opted instead to file a supplementary affidavit in order, as they put it, to address the new matter substantively. There were some pre-hearing skirmishes about how the supplementary affidavit should be dealt with and, in particular, whether it was properly before court. However, the parties saw good sense before the hearing of the matter, by which time I was advised that SARS had no opposition to permitting the respondents to file their supplementary affidavit.

62. I accordingly permitted the filing of the supplementary affidavit.

ISSUES FOR DETERMINATION

63. The following issues arise for determination before this court:

1. The preliminary issues. These must be considered first, as they provide the basis on which to determine the remaining issues.

2. The next issue is whether SARS has satisfied the court that there are reasonable grounds to believe that there has been a failure to comply with a tax obligation, or a commission of a tax offence as required under s51(1)(a)? If the answer to this is negative, that is the end of the application, as SARS must satisfy the requirements under both s51(1)(a) and s51(1)(b). For ease of reference, I call this the "non-compliance/offence issue".

3. If the answer to the non-compliance/offence issue is positive, the court must determine whether SARS has satisfied the court that there are reasonable grounds to believe that relevant material is likely to be revealed in the inquiry which may provide proof of the failure to comply with a tax obligation or the commission of the tax offence. If the answer to this is negative, that is the end of the application, as SARS would have failed to meet the jurisdictional requirements laid down in section 51(1). For ease of reference, I will call this the "relevant material issue".

4. If the answer to the relevant material issue is positive, it remains for the court to decide whether, in the exercise of its discretion, an order should be granted authorising the inquiry. For ease of reference, I will refer to this as "the discretion issue".

THE PRELIMINARY ISSUES

64. The parties plainly have diametrically opposed views on the preliminary issues. On the respondent's approach SARS has a high bar to meet if it is to succeed in its application. Not only must it satisfy what the respondents insist are the strict threshold requirements under s50 and s51 (with all the attendant strictures proposed by the respondents and discussed earlier), but it must, in addition, persuade the court that a s50 inquiry is the only feasible option left to SARS to gather the relevant material it requires. Furthermore,

the court is to scrutinise the application very carefully, and to proceed with caution in exercising its discretion.

65. The first question to consider is whether the respondents are correct in their assertion that a s50 inquiry involves a substantial infringement of constitutional rights.

66. In support of their submissions in this regard the respondents rely on *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others.*[17]

> *"The real question is whether it is necessary in the sense that no other method exists which achieves the desired objective, but which is less intrusive of the examinee' s s11(1) rights. Differently stated, is there an acceptable proportionality between the legitimate objective sought to be achieved and the means chosen? The answer must clearly be in the negative."*

67. The reference to s11(1) in this dictum is to the right to freedom and security of the person under the Interim Constitution. It followed a finding by Ackerman J that s417(2)(b) infringed that right, and the *dictum* formed part of the Court's s33 inquiry to determine whether the infringement was justifiable.

68. I am not persuaded that *Ferreira* supports the respondents contention that an inquiry under s50 of the TAA involves a substantial infringement of constitutional rights. *Ferreira* was concerned with the question of whether s417(2)(b), as it read at that time, unjustifiably impinged on the right to freedom and security of the person, or the right to protection against self-incrimination. Significantly, at that time, s417 compelled an examinee to answer self-incriminating questions, and it provided that "*any answer given to any such question can thereafter be used in evidence against (the examinee)*". This meant that self-incriminating evidence was admissible against the examinee in

[17] 1996 (1) SA 984 (CC) at para [127]

subsequent criminal proceedings against her. It was only in this narrow respect that the Court found s417 to be intrusive of the examinee's constitutional rights.[18]

69. In fact, the Court found that s417 in general serves a lawful and important public purpose. It goes hand-in-hand with the responsibility on companies to account to shareholders and to creditors in the event of the company going into liquidation.[19] The Court recognised that liquidators face difficulties in trying to piece together the affairs of a company, as they come in as strangers to its affairs.[20] Therefore, it is reasonable and necessary to make provision to compel examinees in s417 inquiries to answer questions, even if these were self-incriminatory in nature. Without this, there would be a reluctance by examinees to make full and frank disclosure.[21]

70. In *Ferreira* the remedy ordered by the court was to include a use immunity in s417(2)(b) so that in general (and save for very limited purposes) self-incriminating evidence given at a s417 inquiry is inadmissible in subsequent criminal proceedings against the examinee.

71. Of course, the same constitutional failing does not afflict a s50 inquiry. A use immunity along the lines of that prescribed by the Court in *Ferreira* is already written into s57(2). Thus, *Ferreira* does not support the respondent's view that a s50 inquiry involves a substantial intrusion of the basic right to protection against self-incrimination.

72. On the contrary, *Ferreira* holds that an inquiry along the lines of s417 serves a lawful and constitutional purpose. By analogy, the same must hold true for a s50 inquiry. The

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[18] At para [156]
[19] At paras [150] & [156]
[20] At para [124] citing *Re Rolls Razor Ltd (No 2)* [1969] 3 All ER 1368 (Ch) at 1396-7
[21] At para [126]

lawful and constitutional purpose of permitting SARS to conduct a s50 inquiry is manifest from its obligations under the TAA, referred to earlier in this judgment. Taxpayers have a statutory responsibility to provide SARS with full and frank information, and SARS has a duty to investigate that information. Like liquidators, when corporate taxpayers are under investigation, SARS must piece together their affairs after the fact, and as a stranger to the workings of the corporation. These considerations justify the same conclusion as regards s50 as the Constitutional Court concluded in respect of s417 in *Ferreira*: it is reasonable and necessary to compel examinees in s50 inquiries to answer questions, even if these are self-incriminatory.

73. Furthermore, the majority of the Court in *Ferreira* rejected Ackerman J's finding that s417(2)(b) infringed the right to freedom and security of the person. *Ferreira* does not provide support for the respondents' contention that a s50 inquiry infringes that right either.

74. In the circumstances, there is no need to approach this application on the basis that a s50 inquiry involves an infringement of the respondents' constitutional rights as contended by the respondents.

75. Must SARS make out its case on a balance of probabilities and in accordance with the principles laid down in *Plascon-Evans*? The respondents say that it must do so because s50(2) requires SARS to provide information that "establishes the facts" on which it bases its application. Even though SARS is required under s51(1) to satisfy the court that there are "reasonable grounds to believe" what follows in subparagraphs (a) and (b), the respondents submit that the facts supporting that belief must be established on the same basis as any other application in which final relief is sought.

76. There is ample authority against the respondents' view. In *National Director of Public Prosecutions v Rautenbach*[22] the SCA was concerned with the degree of proof required to satisfy the court that there were "*reasonable grounds for believing that a confiscation order may be made*" against a person under s25 of the Prevention of Organised Crime Act[23] (my emphasis). The court *a quo* had held that:

> "*The Act requires that it must be shown that "grounds" exist which grounds appear to a court to be of such a nature that they would support a future confiscation order. This means that, as a first requirement, the Applicant has to prove the existence of such "grounds". That is a factual question and according to section 13(5) of the Act, the onus of proving such facts must be discharged by the Applicant on a balance of probabilities.*"[24] (my emphasis)

77. Nugent JA rejected the court *a quo*'s approach, finding instead as folllows:

> "*In my view that is not correct. It is plain from the language of the Act that the court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the court on reasonable grounds that there might be a conviction and a confiscation order. While the court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion (National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) para 19) it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a court in such proceedings is required to determine whether the evidence is probably true. Moreover, once the criteria laid down in the Act have been met, and the court is properly seized of its discretion, it is not open to the court to then frustrate those criteria when it purports to exercise its discretion. The misdirection by the court a quo pervaded all its reasoning and was instrumental to the conclusion to which it came and I have approached the matter afresh.*"[25] (my emphasis)

78. In the earlier judgment of *National Director of Public Prosecutions v Kyriacou*,[26] which concerned the same provisions, Nugent JA found that:

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[22]

[23] Act 121 of 1998

[24] Cited in para [26]

[25] At para [27]

[26] XXXXXX

> "*Section 25(1)(a) confers a discretion upon a court to make a restraint order if, inter alia, 'there are reasonable grounds for believing that a confiscation order may be made…' While a mere assertion to that effect by the appellant will not suffice (National Director of Public Prosecutions v Basson 2002(1) SA 419 (SCA) at 428 B-C) on the other hand the (National Director of Public Prosecutions) is not required to prove as a fact that a confiscation order will be made, and in those circumstances there is no room in determining the existence of reasonable grounds for the application of the principles and onus that apply in ordinary motion proceedings. What is required is no more than evidence that satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order.*"[27] (my emphasis)

79. The requirement of "reason to believe" in the context of the Insolvency Act has been explained to mean that:

> " *... it is not necessary ... for the creditor to induce in the mind of the Court a positive view that the sequestration will be to the financial advantage of creditors. .... though the Court must be 'satisfied', it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so*.'[28]

80. These authorities demonstrate that the respondents' submissions regarding the degree of proof necessary to satisfy the threshold requirements under s51(1) are plainly incorrect. SARS does not have to satisfy the court that the respondents have conducted themselves as described under s51(1)(a), or that there is a likelihood of relevant material being revealed at the inquiry. All SARS must do is to satisfy the court that there are reasonable grounds for believing this to be so. That belief must be rational, and there must be sufficient facts to support it.[29] But, these facts do not have to be established on a balance of probabilities. The court does not have to verify whether the facts are true or not, and the *Plascon-Evans* principles do not apply.

81. This still leaves open the issue raised by the respondents regarding the specificity of detail that they say SARS is required to provide in its affidavits supporting the application. Is SARS required to specify precisely what conduct amounts to precisely what violation

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[27] At para [10]
[28] *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 558
[29] *Hillhouse v Scott; Fremantle Investments v Itzkin; Botha v Botha* 1990 (4) SA 580 (WLD) at 585D

or non-compliance alleged to have been committed by each particular respondent? Must it also specify the relevant material likely to be revealed at the inquiry?

82. The respondents rely on *Ferucci and Others v Commissioner, SARS, and Another*[30] to support their argument. That case dealt with the information-gathering mechanisms under the Income Tax Act prior to the promulgation of the TAA. These included a similar inquiry mechanism as provided for under s50 of the TAA. This was contained in s74C. It also included powers of search and seizure under a warrant in terms of s74D. Section 74D(4) provided, among other things that the warrant had to refer to the alleged non-compliance or offence in relation to which it is issued. This is similar to s51(2)(c) of the TAA.

83. The court in *Ferucci* was concerned with an application to set aside a warrant under s74D. It set aside the warrant in part because it did not specify which of the offences referred to in the relevant sections of the Income Tax and VAT Acts allegedly had been committed. There was furthermore, no particularity whatsoever as to what conduct on the part of the applicants constituted the offences. The warrant did no more than list, without elaboration, various sections of the two Acts. In the circumstances, the court found that there was a failure to comply with s74D(4) of the Income Tax Act.[31]

84. That decision was clearly based on the particular facts before the court. The court did not find that there had to be the kind of specificity of detail contended for the by respondents. On the contrary, the court held that:

> "*In order to meet the objective standards imposed by the Legislature, it is necessary for the warrant to set out the offence or non-compliance which led to the issue thereof in sufficient detail. The degree of particularity need not be that contained in a charge-sheet commencing criminal proceedings. On the other hand, the safeguards which the Legislature sought to achieve when promulgating s74D...*

[30] 2002 (6) SA 219 (CPD)
[31] At 230F

would not be met simply by referring to certain sections of the Act, without further elaboration. The applicable legislative provisions require not that the warrants must specify that they are issued in terms of, respectively, the Income Tax Act or the VAT Acts, but that they should refer to something more specific, namely the alleged non-compliance or offence in relation to which it is issued. That requires a setting out of the facts relating to the non-disclosure or offence, in sufficient detail to enable a party against whom the warrant is executed to be adequately informed as to the purpose and ambit of the search. To suggest that it is sufficient for the warrant to simply identify specific sections of the Income Tax Act or the VAT Act, without any further particularising of the alleged offence or non-compliance, would be to render s74D(4)(a) of the Income Tax Act and s57D($)(a) of the VAT Act largely meaningless, and would fall far short of providing the necessary constitutional balance and protection referred to in the Hyundai Motor Distributors case."[32] (my emphasis)

85. I agree with the views expressed by the court in this passage. The standard of specificity postulated by the respondents is akin to that required in a criminal charge sheet. A s50 inquiry is not a criminal trial. Like a warrant, it is an investigative and information gathering mechanism. The court does not have to determine whether any of the respondents actually have committed the alleged offences, or whether they actually are non-compliant with a tax obligation. That would be something left for determination in another forum.[33] If criminal proceedings were instituted, the charge sheet would have to provide the specificity demanded by the respondents, but this is not required of SARS in a s50 application.

86. SARS must set out the facts relating to the non-compliance or offence in sufficient detail to enable a party against whom the inquiry is sought to be adequately informed as to the purpose and ambit of the inquiry. Likewise, the affidavits supporting the application must also include sufficient detail to enable the court to understand what underpins the inquiry, and thus to determine whether it is satisfied that the threshold requirements have been met. In my view, that is the measure of sufficiency required under s50, read with s51. Whether this requirement is met will depend on the facts of each case. In *Ferucci*, there

[32] At p229B-C
[33] *Ferucci*, at 227G

was simply no attempt to provide any details whatsoever to inform the purpose and ambit of the warrant. It was patently insufficient to serve its intended purpose, and it is for that reason that the warrant was set aside.

87. The final preliminary issue is the respondents' contention that SARS must satisfy the court that the other, less invasive, information-gathering mechanisms available under Parts A and B of the TAA (such as requests under s46) would be ineffective before it ought to be permitted to resort to the "extreme" measure of an inquiry under s50.

88. It is common cause that there is nothing in the TAA that expressly makes it a requirement for SARS first to exhaust all its remedies under Parts A and B before it can apply for a s50 inquiry. This makes sense. Chapter 5 provides a range of different information gathering mechanisms. Some will be more appropriate in certain circumstances, and others will more appropriate in other circumstances. As SARS bears the duty to investigate and to obtain full and frank information from tax payers, it may obviously use its discretion to decide which mechanisms to use at which point in any investigation, provided, of course it meets any requirements laid down under Chapter 5.

89. The respondents rely on the *dictum* of Ackerman J in *Ferreira* that I discussed earlier to advance their case on this issue. I do not repeat my previous remarks in that regard, save to comment that it is important to bear in mind that that *dictum* formed part of the Court's proportionality inquiry, under the limitations clause, following its finding that there had been an infringement of the constitutional rights in question. For reasons I have already discussed, s50 and its associated provisions do not infringe those rights. Thus, *Ferreira* does not support the respondents' submission.

90. In *Ferucci*, the court expressed the view that a search and seizure should not be permitted where the objective sought to be achieved could be attained by less drastic means.[34] It went on to comment that it may perhaps be too stringent to require the warrant seeker to show that there is no other reasonable alternative method of investigation, and it expressed no view on this. However, it expressed the view that the judge issuing the warrant should consider whether one of the "less drastic mechanisms" could not be used to attain the objective, and that appropriate facts should be placed before the judge in this regard. The court found that this had not been done in the case before it.[35]

91. *Ferucci* dealt with search and seizure. The court's approach was guided by the findings of the Constitutional Court on the issue of search and seizure provisions in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others.*[36] In that case the Court held that:

> "*... State officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individuals and that of the State, a task that lies at the heart of the inquiry into the limitation of rights. On the proper interpretation of the sections concerned, the investigating directorate is required to place before a judicial officer an adequate and objective basis on which to justify the infringement of the important right to privacy.*"[37]

92. A s50 inquiry is fundamentally different from a warrant for search and seizure in that it does not involve an infringement of the right to privacy. Nor, as I have indicated, does it involve an infringement of the right to freedom and security of the person, or of the right to protection against self-incrimination. In fact, in *Ferucci*, the court expressed the

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[34] At 235B
[35] At 235F-H
[36] 2001 (1) SA 545 (CC)
[37] At para [

view that the equivalent inquiry provisions under the Income Tax Act were "less drastic and far-reaching" than the search and seizure provisions. This is understandable if regard is had to this fundamental difference between them. In my view, the *Ferucci* court's statement, that a judge is required to consider whether one of the less drastic mechanisms could not be utilised instead, should be seen in the context of the need to protect the right to privacy which is threatened by search and seizure. The same obligation, if it exists, does not arise in the context of a s50 inquiry where the right is not under threat.

93. Of course there may be particular circumstances that warrant consideration of this issue by a court when it determines a s50 application as part of the matrix of factors that feed into the exercise of the court's general discretion to grant the order. That would depend on the facts at hand. However, I do not accept the respondents' submission that as a matter of course a court is bound to give consideration to the issue of whether the other information-gathering mechanisms not involving an inquiry might achieve SARS' purpose instead. I will examine the question of whether or not this is one of those particular cases later in the judgment when I consider the discretion issue.

THE NON-COMPLIANCE/OFFENCE ISSUE

94. The question here is whether SARS has deposed to sufficient facts to satisfy me that there are reasonable grounds for believing that the respondents have failed to comply with a tax obligation or that they have committed a tax offence. This is the jurisdictional requirement SARS must meet in terms of s51(1)(a) of the TAA.

95. Unlike the situation in *Ferucci*, this is not a case where the applicant has made no real attempt to describe the conduct of the respondents that is alleged to constitute the non-compliance's or offences to which SARS refers. I have already set out in some detail a

summary of the facts relied on by SARS in support of its application. I do not wish to repeat those details here.

96. However, it is clear from my detailed summary that the application is not "factually bereft", and nor is it based on generalised, vague and unsubstantiated averments, as the respondents contend. The facts relied on by SARS are derived from the investigation that it has conducted to date into the tax affairs of the respondents. The respondents do not dispute this, nor do they dispute that the investigation has been thorough. In fact, the thoroughness of the investigation is one of the reasons that the respondents say that an inquiry is not warranted. The investigation involved a substantial volume of documentation from the respondents and third parties, as well as written answers that the respondents have provided to SARS in response to the s46 requests. Consequently, the nature and tenor of the evidence supporting the facts relied on by SARS are very well known and understood by the respondents.

97. Plainly the facts describe a highly complex scheme of arrangements devised and implemented by X on behalf of a number of corporate clients. Most of the SPV respondents were involved in some form or another in the various X structures that are under investigation by SARS. Neither of these two facts is in dispute. Nor is it in dispute that SARS has accurately described the X structures and the technicalities of their operations in its founding and replying affidavits.

98. Based on what it has gleaned from its investigation to date, SARS has concluded that the *modus operandi* through which X has conducted its business involves conduct on the part of the respondents that amounts to the commission of the offences and/or the non-compliances referred to in the notice of motion. It is this conclusion that the respondents dispute.

99. It is not the function of this court to decide whether SARS' conclusion is correct. This court need only decide whether there are reasonable grounds for believing that it is. Clearly, it is not an unfounded conclusion, based as it is on SARS' admittedly thorough investigation. SARS has concluded that, without exception, all of the structures investigated to date involve impermissible tax avoidance arrangements. The conclusion drawn by SARS is also not a subjective or speculative conclusion. It is supported by the following:

1. The outcome of the J investigation as a result of which SARS found that the X SPV's used in the arrangement played no commercial role but were used to convert interest into tax exempt dividends. SARS found that the J structure constituted an impermissible tax avoidance arrangement, and applied the GAAR to the arrangement. The J structure operated on the same lines as the *modus operandi* adopted in the other X structures. The outcome was a settlement in terms of which J paid additional taxes and penalties. The respondents submitted that the outcome of the J investigation does not advance SARS' case against the respondents because it was based on a settlement between the parties and not a finding of a court. The problem with this submission is that it does not take into account that to succeed in its application SARS does not have to prove the commission of an offence or non-compliance by the respondents. It only has to establish reasonable grounds for believing that they have done so. The J investigation quite clearly establishes reasonable grounds for SARS' belief that the other X structures working on the same *modus operandi* also involve the commission of tax offences or non-compliance with tax obligations on the part of the respondents.

2. The working papers obtained from the respondents' auditors add further objective support for SARS' belief. It is clear from these that both PwC and KPMG were aware of the tax aggressive nature of the X structures. They were also aware of the risks for X from a tax point of view, and of the risk that SARS might proceed to query the tax legality of arrangements. Although PwC (cryptically) described the structures as being "aggressive but legal", KPMG adopted a more concerned view about the tax legality of the structures. This appears from their memorandum discussed earlier. The respondents take issue with SARS' reliance on the working papers of its auditors. They say that these were only opinions held by the auditors, and that SARS selectively extracted from the working papers to present a skewed view. It does not matter that these may have been the opinions of their auditors. As I am only concerned about the reasonableness of SARS' conclusion, I do not have to make a finding on the veracity of the auditors' concerns. The fact is that the auditors expressed concerns. These concerns carry particular weight because they were expressed independently of SARS, its investigation, and the conclusions it has drawn. Furthermore, they were based on the auditors' intimate knowledge of the workings of the structures.

100. I have already found that it is not necessary for SARS to particularise which of the respondents carried out the particular conduct allegedly amounting to a specific offence or non-compliance. That level of particularity is not required of SARS in an application under s50. Indeed, in a case like the present, without the further investigation SARS intends to conduct through the inquiry, it would not be reasonably possible for SARS to draw these links with any degree of particularity. This is one of the reasons why it wants to conduct a structure-based, holistic s50 inquiry. It will only be apparent after that inquiry which offences or non-compliances can be linked to which respondents.

101. I should add here that there seems to me to be no bar against SARS seeking information, and conducting an inquiry into the tax affairs of multiple taxpayers on a holistic basis, as it intends doing in this matter. The respondents do not advance any cogent reasons for their submission that SARS is prohibited from doing so. SARS points out that under the relevant provisions of the Income Tax (prior to the adoption of the TAA), and under the TAA, SARS has a duty to determine whether the GAAR should be applied to an arrangement, or whether an arrangement constitutes a reportable arrangement. An arrangement may well involve more than one taxpayer. Therefore, it seems to be plain to me from these provisions that SARS must have the power, and indeed the duty, to conduct the type of structure-based inquiry it intends in respect of X.

102. I am satisfied that the facts set out by SARS provide sufficient particularity to enable the respondents to understand the ambit of the investigation, and the spectrum of non-compliances and/or offences in respect of which SARS intends to obtain proof through the inquiry. The application is not deficient in this respect.

103. The respondents raise a particular complaint regarding what I referred to earlier as the X fees aspect of SARS' case. They say that SARS has failed to establish reasonable grounds to believe that, through the insertion of dividend-earning X SPV's in the structures, X has engaged in simulated transactions (or at least in reportable arrangements) in order to shield what are effectively fees earned, from tax. The respondents contend that SARS' conclusions in this regard are tentative, and not based on any objective evidence, such as the auditors' working papers. Therefore, they say, SARS has failed to meet the reasonable grounds to believe standard as regards this aspect of its case.

104. There may have been more merit in the respondents' submissions in this regard if this aspect of SARS' case stood in isolation. However, it does not. The reasonableness of SARS' belief in respect of the X fees aspect must be gauged within the context of case as a whole. It is not in dispute that X SPV's participated in the X structures, or that they earned dividends. Once it is established that there are reasonable grounds to believe that the structures constituted impermissible tax avoidance arrangements, it stands to reason that the role of the X SPV's and their dividend earnings will be tarred with the same brush. In my view, this constitutes reasonable grounds to believe that tax offences and/or non-compliances have occurred in this respect as well.

105. For these reasons, I am satisfied that SARS has met the threshold requirement laid down in s51(1)(a).

THE RELEVANT MATERIAL ISSUE

106. This issue involves the jurisdictional requirement laid down in s51(1)(b) of the TAA. Relevant material is broadly defined. It includes material that is foreseeably relevant for purposes of showing non-compliance with a tax obligation, or the commission of a tax offence. In this case, SARS is particularly concerned with obtaining structure-related material. In other words, information about the workings and affairs of each of the X structures.

107. The respondents' view to date has been that SARS is not entitled to information of that nature. As I have already found, there is no merit in this submission. Of significance here is that because of its stance, the respondents have refused to supply any structure-based information to SARS in response to the s46 requests previously made to them. SARS has managed to obtain some working papers from the auditors which indicate that they were required to consider the X entities on a structure-by-structure basis. This

supports SARS' view that in order to obtain full information regarding the tax affairs of the individual X entities, it has to understand their role in each structure. To this end, structure-based material is essential to SARS' investigations.

108. In the circumstances, even though SARS has already investigated fifteen of the sixteen known X structures, and despite the respondents' protestations that they have already provided all relevant material to SARS, I am satisfied that SARS does not have full information about X's tax affairs. I am satisfied that it still requires outstanding structure-based information in order to enable it to determine what the role is of each X entity in each structure, and hence to assess the tax implications for each individual entity involved. It also needs to verify the tax information submitted by those respondents who belatedly filed their tax returns.

109. SARS states that it also needs relevant material in respect of X structures identified in the general ledger of A, and in respect of which it has no further details. In addition, it needs to determine whether the X structures in respect of which it has knowledge constitute the complete list of structures or not. The respondents have not confirmed to SARS that the list of structures known to SARS is a complete list of all X structures. SARS refers to these two categories of structures as the "unknown structures".

110. These seem to me to be reasonable objectives for SARS to pursue in a s50 inquiry. As I have already found, I am satisfied that there are reasonable grounds to believe that the known structures constitute impermissible tax avoidance arrangements. Therefore, there must be reasonable grounds to believe that relevant material is likely to be obtained in a s50 inquiry pertaining to similar impermissible tax avoidance arrangements involving other structures that SARS has not yet been able to investigate because it does not have the basic information at its disposal with which to commence an investigation.

111. As regards these two categories of unknown structures, SARS is not obliged to first use the mechanisms provided in other Parts A and B of Chapter 5 of the TAA. I have already rejected that argument by the respondents. In any event, in this particular case, it would be most inefficient to do so, and would probably be ineffective. It is reasonable to expect that SARS would be met with the same responses it has been met with to date, viz. that X is not obliged to provide structure-based information to SARS. The most efficient and effective manner of conducting as complete an investigation as possible into X's tax affairs is to permit a s50 inquiry that is wide enough to reveal relevant material relating to the two categories of unknown structures.

112. For these reasons I am satisfied that SARS has met the threshold requirement laid down in s51(1)(b).

THE DISCRETION ISSUE

113. A court does not have *carte blanche* when it comes to the exercise of its discretion in an application of this nature. Once a court is satisfied that the jurisdictional criteria for an order have been met and a court is properly seized with its discretion, it is not open to the court to frustrate those criteria in the exercise of the discretion.[38] In light of this direction, the discretion issue can be disposed of shortly.

114. The respondents raise the following points in relation to the discretion issue:

1. The inquiry cannot be justified because SARS has not proven the need to escalate its investigation to the level of an inquiry. I have already found that SARS is not under an obligation to satisfy the court that it has exhausted the other information

[38] NDPP v Rautenbach, above, at para [27]

gathering mechanisms before being permitted to hold an inquiry. The respondents contend that there is no reason why SARS cannot obtain all the information it needs by continuing to rely on s46, particularly as it has, and will continue to comply with its obligations under that section. This argument is indirectly covered in my consideration of the relevant material issue. It is not up to the taxpayers under investigation to dictate to SARS what avenue of information gathering it should use. In this case, a s50 inquiry will facilitate the effective and efficient gathering of relevant material. To refuse to grant the order in these circumstances would be an impermissible exercise of my discretion. There is no merit in this submission by the respondents.

2. The respondents submit that I should exercise my discretion and refuse the application on the basis that it constitutes an abuse by SARS. I have already found that there are reasonable grounds for believing that SARS' case is properly established. It is implicit in this finding that I am satisfied that the application was not an abuse. Similarly, it is also implicit that I am satisfied that the application is not a fishing expedition. In the circumstances, to refuse the application on this basis would undermine the jurisdictional criteria laid down in s51(1).

3. The respondents submit that the application is over-broad, and for this reason too, I should refuse to grant the order. None of the bases relied on by the respondents in this regard hold water. By satisfying the jurisdictional requirements, SARS has established that it ought to be permitted to inquire into the respondents' affairs with specific reference to what is set out in the order it seeks. In any event, the complexity of the X structures, their operations, and the number of entities involved justifies a broad inquiry. I see no reason to refuse the application for the reasons advanced by the respondents in this regard.

4. The respondents also say that the application was unbalanced and biased and was instituted with an improper motive. There is simply nothing to support this argument, and I find no merit in it.

115. For these reasons, I am unpersuaded that there is any good reason for me to decline to grant the order in the exercise of my discretion.

CONCLUSION

116. In summary, I find that SARS has satisfied the jurisdictional requirements for a s50 application, and that there is no justifiable basis on which to refuse to grant the order that is sought.

117. I make the following order:

1. The South African Revenue Services authorised, in terms of section 51 (3) of the Tax Administration Act, to hold an inquiry into the tax affairs of the Respondents with specific reference to whether or not:

1.1. They have failed to submit income tax returns and to pay income tax in respect of fees charged by them, thereby failing to comply with their obligations under ss 5 (1) and 66 (13) of the Income Tax Act;

1.2. They have failed to pay secondary tax on companies (“STC”) owing by them, thereby failing to comply with their obligations under s64B of the Income Tax Act;

1.3. They have failed to submit VAT returns and to pay VAT owing on fees charged by them, thereby failing to comply with their obligations under ss7 and 28 of the Value Added Tax Act and s25(2) of the TA Act;

1.4. They have dishonestly evaded their obligations in relation to the declaration and payment of income tax, STC and VAT;

1.5. They have failed to disclose to SARS the requisite information (as set out in s38 of the TA Act) in relation to “reportable arrangements’ (as defined in s35 of the TA Act), which the respondents have been responsible for organizing, designing, selling, financing or managing, thereby failing to comply with their obligations of disclosure under s37 of the TAA;

1.6. They have committed tax offences under ss234 d, h (i)&(ii), j, k, l and p of the TA Act.

2. Advocate Renata Williams SC is designated as the presiding officer before whom the inquiry shall be held.
3. This order must be served on the presiding officer so designated.
4. The respondents are directed, jointly and severally, to pay the costs of the application, including the costs of two counsel.

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R M KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard	: 05 March 2018
Date of Judgment	: 24 May 2018
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