

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**



Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 5492/2021

In the matter between: -

KETSISE MOTLOUNG 1st Applicant

REATLEHISE DEVELOPMENT CC 2nd Applicant

and

**THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICES** 1st Respondent

MINISTER OF FINANCE 2nd Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 3rd Respondent

**MINISTER OF JUSTICE AND
CONSITITUTIONAL DEVELOPMENT** 4th Respondent

CORAM: N. M. MBHELE, AJP

HEARD ON: 28 JULY 2022

DELIVERED ON: 21 NOVEMBER 2022

- [1] The applicants are seeking a declaratory order declaring Section 235 and 222 (read with section 223) of the Tax Administration Act 28 of 2011 (TAA) unconstitutional.
- [2] The relief sought by the applicants is on the following terms and grounds:
2.1 declaring section 235 and 222 of TAA (read with section 223); to the extent that it allows the first respondent [hereafter the “Commissioner”] to criminally punish the taxpayer twice for the same criminal offence of *intentional tax evasion*: inconsistent with the constitution and therefore invalid.
- [3] The gravamen of the applicants’ complaint is that the impugned statutory provisions in the TAA violate their rights to a fair trial in that the applicants were already found guilty of intentional tax invasion by the Commissioner and a sanction was imposed in the form of the understatement penalty. They, further, contend that in a subsequent criminal trial the taxpayer cannot tender a plea contrary to the finding of the Commissioner, i.e. guilty of intentional tax evasion.
- [4] The issue to be decided is whether or not the impugned Statutory provisions are unconstitutional and invalid. The application is opposed by first and second respondents only. The third and fourth respondents abide by the decision of the court.
- [5] The facts in this matter are largely common cause. The second applicant is registered with the South African Receiver of Revenue Services (SARS) as a Value Added Tax(VAT) vendor in terms of the VAT Act 89 of 1991. The second applicant was obliged to submit returns for remittance of VAT on the prescribed form every second uneven month as prescribed by the VAT Act.
- [6] The second applicant is also registered with SARS for Income Tax in terms of the Income Tax Act 58 of 1962 (ITA). During January 2019 SARS conducted a full scope audit of the second applicant for VAT over the period covering March 2014 to July 2018 and Corporate Income Tax(CIT) for the 2015, 2016 and 2017 tax years. Over the relevant period, the second respondent had

submitted all VAT and CIT returns to SARS as zero returns, each of the returns indicated that the second applicant had generated no income and incurred no expenses.

- [7] SARS sent an audit finding letter to the applicants setting out the findings of the audit and afforded the applicants 21 days to provide reasons why they did not agree with the findings. It further afforded the applicants 21 days within which to supply reasons why understatement penalties should not be levied. The applicants did not dispute SARS' calculation of tax liability.
- [8] The applicants admit that as a result of zero returns SARS suffered a prejudice to the amount of R819 607.09 on VAT and R493 600 on Income Tax. SARS levied 10 % late payment penalties and further imposed 150% understatement penalty on both Income Tax and VAT. The 150% was imposed for intentional tax evasion.
- [9] On 15 October 2020, first and second applicants were criminally charged for intentional tax invasion. At the beginning of the trial the applicants raised a special plea in terms of section 106 (1) (c) of the Criminal Procedure Act 51 OF 1977 (CPA). The special plea was dismissed on the grounds that the conduct of the Committee to levy understatement penalty does not constitute a conviction in terms of the CPA.
- [10] The first and second respondent contend that the issue of whether it is permissible to impose both the understatement penalties and criminal penalties arising from the same conduct was unsuccessfully argued in the criminal proceedings before the Regional Court. They submitted that instituting fresh proceedings arising from the same issue is precluded by the doctrine of issue estoppel. They argued that the correct step to take after the dismissal of the special plea is for the applicants to appeal the decision of the Regional Magistrate.
- [11] The primary purpose of *res judicata* is to inculcate finality into litigation by precluding re-litigation of the same issues twice between the same parties.

- [12] The requirements of *res judicata* are well established: (1) the same parties; (2) the same cause of action; and (3) the same relief. In **Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others**¹ Khampepe, J remarked as follows:

“[69] *Res judicata* strictly means that a matter has already been decided by a competent court on the same cause of action and for the same relief between the same parties. In *Evins*, Corbett JA stated that:

“Closely allied to the ‘once and for all’ rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions

[70] In essence, the crux of *res judicata* is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party should not be allowed. The underlying rationale for this principle is to ensure certainty on matters that have already been decided, promote finality and prevent the abuse of court processes.

[71] The requirements of *res judicata*, although trite, can be summed up as follows: (i) there must be a previous judgment by a competent court (ii) between the same parties (iii) based on the same cause of action, and (iv) with respect to the same subject-matter, or thing. In a Lesotho case, *Masara*, the Court of Appeal stated that the defence of *res judicata* requires that a party must establish that the present case and the previous case are based on the same set of facts that have been finalised by a competent court or tribunal by the same parties on the merits of the same cause of action.”

- [13] In **Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another**² Brand JA said the following:

‘[10] The expression ‘res iudicata’ literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the *exceptio* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor, idem res et eadem causa petendi*) (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 SCA* ([2001] 1 All SA 417) at 239F – H and the cases there cited).

¹ *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41 delivered on 24 October 2019

² *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 SCA para 23

[14] In **Democratic Alliance v Brummer**³ the court dealt with issue estoppel and remarked as follows:

[13] The first question is to determine whether, as a matter of fact, the same issue of fact or law which was determined by the judgment of the previous court is before another court for determination. This is so because if the same issue (*eadem quaestio*) was not determined by the earlier court, an essential requirement for a plea of *res judicata* in the form of issue estoppel is not met. There is then no scope for upholding the plea. It does not, however, necessarily follow, that once the inquiry establishes that the same issue was determined, the plea must be upheld. That is so because the court considering the plea of issue estoppel is, in every case, concerned with a relaxation of the requirements of *res judicata*. It must therefore, with reference to the facts of the case and considerations of fairness and equity, decide whether in that case, the defence should be upheld'

[15] In the current matter the applicants are challenging the constitutionality of specific sections of the TAA. In the Regional Court they raised a plea that in addition to the charges levelled against them in that court, SARS has already punished them for the same offence by levying understatement penalties for intentional tax evasion at 150%. They were not challenging the constitutionality of sections 222 and 235 of TAA.

[16] Although the same issues that are raised in this application were considered by the Regional Court and arise from the same facts, the type of relief the applicants are seeking in the current matter differs from the one they sought before the Regional Court. The nature of the two matters are not the same. The fact that the facts in both matters overlap does not mean that the defence of issue estoppel can be sustained. Even if the applicants were to appeal the decision of the Regional court, the issue of the constitutionality of the impugned sections of TAA would remain unresolved. Therefore the issue estoppel does not arise in the current matter.

³ Democratic Alliance v Brummer (793/2021) [2022] ZASCA 151 3 November 2022 at par. 13

[17] Double jeopardy is a universally recognised principle in many legal systems across the world. This principle stems from the rule that no one may be punished for the same offence twice. The rule prevents repeated prosecutions for the same offence. It was introduced into our legal system through common law and gained statutory recognition in Section 106(1) (c) of the CPA. The rule was endorsed in section 35(3) (m) of the 1996 Constitution of South Africa, 1996⁴ as a fundamental right of the accused to a fair trial. The subsection provides as follows:

“Every accused person has a right to a fair trial, which includes the right– ... not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.”

[18] Section 222 of the TAA provides:

1. Understatement penalty

(1) In the event of an ‘understatement’ by a taxpayer, the taxpayer must pay, in addition to the ‘tax’ payable for the relevant tax period, the understatement penalty determined under subsection (2) unless the ‘understatement’ results from a *bona fide* inadvertent error.

(2) The understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in section 223 to each shortfall determined under subsections (3) and (4) in relation to each “understatement”.

(3) The shortfall is the sum of—

(a) the difference between the amount of ‘tax’ properly chargeable for the tax period and the amount of ‘tax’ that would have been chargeable for the tax period if the ‘understatement’ were accepted;

(b) the difference between the amount properly refundable for the tax period and the amount that would have been refundable if the ‘understatement’ were accepted; and

(c) the difference between the amount of an assessed loss or any other benefit to the taxpayer properly carried forward from the tax period to a succeeding tax period and the amount that would have been carried forward if the ‘understatement’ were accepted, multiplied by the tax rate determined under subsection (5).

(4) (a) If there is a difference under both paragraphs (a) and (b) of subsection (3), the shortfall must be reduced by the amount of any duplication between the paragraphs.

⁴ The Constitution of the Republic of South Africa, 1996

(b) Where the 'understatement' is the failure to submit a return, the 'tax' that resulted from the 'understatement', had the 'understatement' been accepted, for purposes of subsection (3), must be regarded as nil.

(5) The tax rate applicable to the shortfall determined under subsections (3) and (4) is the maximum tax rate applicable to the taxpayer, ignoring an assessed loss or any other benefit brought forward from a preceding tax period to the tax period.

[19] An understatement is defined in Section 221 of the TAA as follows:

“**understatement**’ means any prejudice to SARS or the fiscus as a result of—
 (a) a default in rendering a return;
 b) an omission from a return;
 (c) an incorrect statement in a return;
 (d) if no return is required, the failure to pay the correct amount of ‘tax’; or
 (e) an ‘impermissible avoidance arrangement.’”

[20] The applicants contended that the understatement penalty is a criminal punishment hence TAA distinguishes it from the other administrative penalties defined in section 208 of TAA. They, further, submitted that the administrative penalties are automated and mechanical in nature unlike the understatement penalties which require that an enquiry be held before they are levied. In their view the process followed in levying understatement penalties is the same as the process in the criminal court.

[21] The applicants are relying on Canadian cases , **Wigglesworth v R**⁵ and **R v Shubley**⁶ to support their assertion that an understatement penalty levied by SARS is a criminal punishment in that the applicants have been called twice by the state to answer to society on the same offence. The applicants, relying on **United States v Halper**⁷ , submitted that under the double jeopardy defence, a person who has already been punished in a criminal prosecution may not be subjected to an additional civil remedy based upon the same conduct where the civil remedy constitutes punishment.

[22] In Wigglesworth the court held as follows:

“.. a true penal consequence which would attract the application of section 11 is imprisonment or a fine which by its magnitude would appear to be imposed for purpose of redressing the wrong done to society at large rather to the maintenance of internal discipline within a limited sphere of activity

⁵Wigglesworth v R (1987) 32 CRR 219 (SCC)

⁶ R v Shubley [1990] 1 SCR 3 (SCC)

⁷ 490 US 1989 par 11 at 441 -2

[23] The court further held that a disciplinary action brought against a policeman for assault in terms of the police code, a so-called ‘service offence’, did not bar subsequent criminal proceedings for the same assault because the fine imposed was designed to achieve a particular private purpose namely, discipline in the police force, and not to redress harm done to society as a whole.⁸

[24] In **Halper** it was held that the double jeopardy defence is also applicable to civil penalties. **Halper** was overturned by **Hudson v United States**⁹ where the Court held that the double jeopardy clause was not a bar to criminal prosecution because the administrative proceedings were not criminal in nature. The court made the following remarks:

“14 How. 13, 19 (1852)). The Clause protects only against the imposition of multiple *criminal* punishments for the same offense, *Helvering v. Mitchell*, 303 U. S. 391, 399 (1938); see also *Hess, supra*, at 548–549 (“Only” “criminal punishment” “subject[s] the defendant to ‘jeopardy’ within the constitutional meaning”); *Breed v. Jones*, 421 U. S. 519, 528 (1975) (“In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution”), and then only when such occurs in successive proceedings, see *Missouri v. Hunter*, 459 U. S. 359, 366 (1983). Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. *Helvering, supra*, at 399. A court must first ask whether the legislature, “in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” *Ward*, 448 U. S., at 248.”

..... We believe that *Halper’s* deviation from longstanding double jeopardy principles was ill considered. As subsequent cases have demonstrated, *Halper’s* test for determining whether a particular sanction is “punitive,” and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable.”

[25] In **Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and Another**¹⁰ the court dealt with the constitutionality of section 59 of the Competition Act 89 of 1998 (Competition Act), to the extent that it permitted the Competition Tribunal to impose a discretionary penalty for contraventions of the Competition Act. The court said the following when dealing with double jeopardy:

⁸ Wigglesworth

⁹ *Hudson v United States* 522 US 93 (1997)

¹⁰ *Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and Another* 2005 (6) BCLR 613 (CAC)

“Both the first respondent and the amici relied on several decisions in North American jurisprudence involving pleas of double jeopardy. In most jurisdictions this plea is typically raised when a person alleges that he or she is being tried twice for the same crime. The court in dealing with this plea has to develop an approach to classification, which helps it decide whether both proceedings are criminal in nature, in which case the plea succeeds or whether there is some distinction that renders the one proceeding non-criminal, and hence the plea fails.”

[26] In *Pather And Another v Financial Services Board And Others*¹¹.

[22] The first issue raised by the appellants cannot be answered without examining the nature and purpose of criminal proceedings. In the words of Lord Steyn, '(t)he aim of criminal law is not punishment for its own sake but to allow everyone to go about their daily lives without fear of harm to person or property'. 'Criminal law', observed Lord Atkin, 'connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?' And, criminal proceedings, according to Lord Bingham of Cornhill CJ, 'involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant'.

[23] In the proceedings before the EC, neither the police nor the prosecutorial authority is involved at all. That the facts underpinning the complaint can as well give rise to a criminal offence does not alter the nature of the complaint before the EC. The EC is primarily concerned with the exercise of a disciplinary power in respect of a limited group of persons possessing a special status. There is no formal accusation of a breach of the criminal law. The proceedings are initiated by way of a complaint by the DMA to the EC, not a criminal charge. In *Martineau* the court observed:

'This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of civil action'.

Those considerations find equal application here.

[24] Moreover, sight cannot be lost of the fact that criminal prosecutions come with many challenges. First, the responsibility for the prosecution lies with the National Directorate of Public Prosecutions, not the regulatory authorities, such as the FSB. Given an already overburdened prosecutorial staff, such contraventions generally do not enjoy priority and the regulator, as complainant, has to stand in line with many other complainants. Second, a criminal prosecution can be both time consuming and fraught with difficulty and the prosecuting authority may not always possess the necessary expertise. Third, the stigma attached to a criminal conviction will often mean that industry professionals are likely to vigorously contest even relatively minor contraventions. Fourth, a criminal prosecution may not be a suitable enforcement option in respect of some less serious contraventions, especially those where an industry player simply failed to adhere to the rules, as opposed to committing an offence which is truly deserving of a criminal sanction.

[25] Accordingly, for all of the reasons given, I take the view that proceedings before the EC do not lie within the criminal sphere and cannot be classified as being criminal in nature. The court below was accordingly correct in holding that the EC, when imposing administrative penalties 'decidedly remains administrative'. Its conclusion in

¹¹ *Pather And Another v Financial Services Board And Others* 2018 (1) SA 161 (SCA)

this regard is consistent with decisions in this country by the Competition Appeal Court, Tax Court and Labour Court.”

[27] Section 235 of the TAA criminalises tax evasion. The section provides as follows:

235. **“Evasion of tax and obtaining undue refunds by fraud or theft**

(1) A person who with intent to evade or to assist another person to evade tax or to obtain an undue refund under a tax Act—

(a) makes or causes or allows to be made any false statement or entry in a return or other document, or signs a statement, return or other document so submitted without reasonable grounds for believing the same to be true;

(b) gives a false answer, whether orally or in writing, to a request for information made under this Act;

(c) prepares, maintains or authorises the preparation or maintenance of false books of account or other records or falsifies or authorises the falsification of books of account or other records;

(d) makes use of, or authorises the use of, fraud or contrivance; or

(e) makes any false statement for the purposes of obtaining any refund of or exemption from tax, is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding five years.

(2) Any person who makes a statement in the manner referred to in subsection (1) may, unless the person proves that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part, be regarded as being aware of the falsity of the statement.

(3) Only a senior SARS official may lay a complaint with the South African Police Service or the National Prosecuting Authority regarding an offence under this section.”

[28] The above authorities demonstrate that nothing precludes civil administrative proceedings and criminal proceedings from the single act. Administrative penalties and criminal proceedings do not serve the same purpose. The other is aimed at strengthening internal controls of the administrative authority and to promote compliance while the other is aimed at correcting a behaviour that caused harm to the society.

[29] Section 222 of TAA prescribes that taxpayers are liable not only for the shortfall or unpaid tax for the relevant period, but, in addition to the tax payable, for an understatement penalty. Section 222 addresses the damage

and shortfall flowing from an understatement. It further deters non-compliance with tax administration laws. Section 235 criminalises an intentional evasion of tax and obtaining undue refunds by fraud or theft which does not arise in section 222. Section 235 deals with the criminal state of mind of the taxpayer at the time of an understatement.

- [30] An understatement is described as prejudice suffered by SARS or the fiscus as a result of impermissible conduct by a taxpayer. Prejudice is defined as harm or injury resulting from some action. The main purpose of penalty is to deter impermissible conduct that results in violation of TAA and to enforce compliance with the provisions thereof. There is a duty on every taxpayer to honour their obligations to SARS. It follows that the understatement penalty regime like many penalties imposed by other administrative bodies is not aimed at punishing criminal conduct but serves as a regulatory function aimed at assisting SARS to meet its obligations as prescribed by the enabling legislation.
- [31] The amounts recoverable for violating provisions of a specified statute are not to be categorised as criminal punishment. The process of arriving at a punishment in a criminal case and a penalty imposed by an administrative body are not the same. The burden of proof differs. In **Pather** the court held that the fact that the penalty is intended to have a deterrent effect does not mean that it is not administrative in nature. The court found that to hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' for double jeopardy purposes would severely undermine the government's ability to effectively regulate institutions.¹²
- [32] Section 35(3) (m) of the Constitution protects an accused's right to a fair trial. In the **Oxford dictionary** the word accused is defined as a person or gang of people charged with a crime or on trial in a court of law. The section is available to people who have been charged with crime. It is aimed at protecting the rights of the arrested, detained and accused persons as stipulated in its heading. It is clear that the purpose of section 35(3) (m) is to

¹² Pather page 179 par. 34

protect the accused persons' rights to freedom. It mitigates against the risk of loss of liberty emanating from repeated charges for the same act. That a single act may give rise to more than one consequence is not tantamount to double jeopardy.

- [33] The TAA distinguishes between the criminal offences in section 235 and understatement penalties in section 223. I have already mentioned that the understatement penalties levied under sections 222 and 223 are aimed at addressing the shortfall. The percentage of the penalty imposed under Section 223 is determined according to the severity of the blameworthiness attributed to the conduct of the taxpayer. Section 235 deals with a conduct that falls squarely within the terrain of the police which is not the case with section 222. An understatement is determined through audit and assessment by SARS while conviction in a criminal court follows after the involvement of the Police and the National Prosecuting Authority.
- [34] Taxation is one of the mechanisms through which the government seeks to meet some of its objectives. The ability of the government to budget and live up to its responsibility of providing basic services to the people is dependent on the ability of SARS to enforce applicable tax laws. It would be wrong to force SARS to stick to only one legal process to enforce tax laws. SARS has a duty to maintain effective tax administration as a means to strengthen the relationship between citizens and the government.
- [35] Having found that calling the taxpayer to account for the wrongdoing before an administrative body as well as the criminal are two distinct processes, I am of the view that double jeopardy does not arise in the circumstances of this matter. I am unable to find that sections 222 and 235 of TAA offend the provisions of section 35 (3) (m) of the Constitution. The application must fail. As regards to costs, there is no reason to depart from the general rule that costs must follow the result.
- [36] I make the following order:

1.The application to declare sections 222 and 235 of Tax Administration Act unconstitutional is dismissed with costs.

2. Costs to include that of counsel.

N.M. MBHELE, AJP

Appearances:

For the 1st & 2nd Applicants: Adv.MB Mojaki & Adv J Nkhahle
Instructed by Modisenyane Attorneys
Bloemfontein

For the 1st Respondent: Adv.G Marcus SC, & Adv E.Mkhawane
Instructed by Claude Reid Attorneys

For the 2nd Respondent Adv K Tsatsawane SC
Instructed by State Attorney
Pretoria