IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: **33918/2021**
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 24 APRIL 2023
SIGNATURE:

In the matter between:

SAUL EVAN TOMSON N.O	First Applicant
COLIN STANLEY DATNOW N.O	Second Applicant
GARY WAYNE HERBERT N.O	Third Applicant
MARTIN HOWARD SACKS N.O	Fourth Applicant
SEAN ALAN MELNICK N.O	Fifth Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
THE MASTER OF THE HIGH COURT	Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] The applicant, **Chevrah Kadisha Capital Trust** ("the Trust"), represented herein by its duly appointed trustees, seeks the review of the decision taken on 29 March 2021 by the first respondent ("SARS"), to decline the trust's request in terms of section 18A(2A)(b)(i) of the Income Tax Act, 58 of 1962 ("the Act") to waive the minimum distribution requirements provided by the section.

FACTS

Introduction

[2] The trust is registered with the second respondent for the sole purpose of funding the Johannesburg Jewish Helping Hand & Burial Society (in Hebrew "Chevrah Kadisha") and its affiliated Public Benefit Organisations.

[3] In order to contextualise the relief claimed herein, it is apposite to have regard to the different role players and their status in terms of the Act.

[4] The Chevrah Kadisha is an unincorporated association not for gain that conducts public benefit activities in the Jewish community. The Chevrah Kadisha has eight affiliated organisations, all of which conduct public benefit activities. These public benefit activities include looking after the aged, indigent, disabled, neglected, abused and psychiatrically ill members of the Jewish community through the provision of food and shelter, medical care and medication, protected employment, social services and various day care facilities.

[5] The organisations are operated effectively as a single organisation with shared senior management, finance, human resources, IT transport, catering and fundraising functions, while each entity focuses on its unique area of service delivery and its specific compliance requirements.

[6] Section 30 of the Act provides for two broad categories of PBOs, which the trust has conveniently named the *"doer PBOs"* and the *"conduit PBOs".* Doer PBOs carry on public benefit activities listed in Part II of the Ninth Schedule. The Chevrah Kadisha and its affiliated organisations fall into the *doer* PBOs *c*ategory.

[7] The second category, which includes those contemplated in paragraph 10 of Part I of the Ninth Schedule, have the sole function of providing funds to the *doer* PBOs and are categorised as the *conduit* PBOs. The trust is a *conduit* PBO and has been created to fund the activities of the Chevrah Kadisha and its affiliated organisations.

[8] The distinction between the two categories of PBOs is important for the purposes of tax deductions envisaged in section 18A(1) of the Act. Section 18A(1)(a) of the Act allows for tax deductions for donations to *doer* PBOs and section 18A(1)(b) for donations to *conduit* PBOs. In order to claim a tax deduction in respect of section 18A(1) donations, a tax payer must be in possession of a receipt issued in terms of section 18(2).

[9] The important section for present purposes is section 18A(2A)(b)(i) which regulates the administration of donations received by *conduit* PBOs:

"(2A) A public benefit organisation, institution, board, body or department may only issue a receipt contemplated in subsection (2) in respect of any donation to the extent that-

(b) in the case of a public benefit organisation contemplated in subsection (1)(b)-

> *(i) that organisation will within 12 months after the end of the relevant year of assessment distribute or incur the obligation to distribute at least 50 per cent of all funds received by way of donation during that year in respect of which receipts were issued: Provided that the Commissioner may, upon good cause shown and subject to such conditions as he or she may determine, either generally or in a particular instance, waive, defer or reduce the obligation to distribute any funds, having regard to the public interest and the purpose for which the relevant organisation wishes to accumulate those funds; …."*

[10] On 23 January 2020 the trust, in terms of section 18(2A)(b)(i), applied to SARS for a waiver of the distribution requirement.

The application

[11] The application forms the basis for the decision by SARS not to waive the distribution requirements contained in section 18(2A)(b)(i) of the Act. In the result, I find it apposite to quote liberally from the application.

[12] Having explained the reason for the existence of Chevrah Kadisha, the trust dealt with the financial position of the Chevrah Kadisha as follows:

"The combined organisation requires substantial funding amounting to more than R300m per year of which approximately 65% needs to be raised through donation income. ….

Expense growth has averaged 5,5% per annum over the past 5 years. In addition to this, we are seeing that a weak economy is resulting in greater demand for our welfare services and poverty relief interventions and these expenses are growing at substantially more than inflation, with welfare distributions growing at around 12,5% per annum over the past 5 years. We recover whatever contribution towards our services our residents can afford, but this figure grows at around 3-4% per annum and does not keep up with expense growth. The net impact of this is that the fundraising burden needs to grow at substantially higher rates than inflation to keep these organisations operating without a significant curtailment in services."

[13] The trust detailed the reasons for the steady decline in donations and proceeds to explain the dilemma this causes as follows:

"Given the growing expanse pressure on the one hand and declining annual revenue opportunities on the other, the organisation finds itself in a position that, should the current trends continue, it will lead to the organisation significantly curtailing its critical services, with a greater burden placed on the

State. Should the State be unable to provide a greater volume of services, the result would be a social and humanitarian tragedy.

[14] One of the main interventions identified by the Board is the creation of the trust. The rationale behind the decision is set out as follows:

"The intention in the founding of the Chevrah Kadisha Capital Trust is to build up a capital base that will in time grow through large donations from a select number of wealthy donors, asset growth and investment income and ultimately be in a position to assist the Johannesburg Jewish Helping Hand & Burial Society and its affiliates to bridge expected future funding shortfalls. The assistance will be in the form of annual income derived from the capital fund being distributed to other PBOs. This 'endowment fund' model is common place in the funding of non-profits in overseas jurisdictions, especially in the United States.

[15] The reason for the request is formulated as follows:

"However, in order for a viable Fund to be created, the Trust will need to target and retain significant donations and investment returns to build up a capital base large enough for the future Investment Income from this capital base to be sufficient to fund a large portion of the future funding needs of the organisation. Our projections (Annexure 3) foresee that on a 20-year horizon the Fund would need to grow to R4.5-billion in capital and accumulated returns."

[16] In respect of an alternative to the aforesaid, the following is stated:

"It is noted that an alternative could be accommodated within each of the affiliated s18A(1)(a) PBOs themselves. There is no specific restriction against a s18A(1)(a) registered entity accumulating capital and earning returns to fund its activities. Thus each PBO could set up its own fund of capital to finance its operations over time. However, the creation of a single, separate Trust for this purpose is advantageous for a number of reasons. It strengthens governance

around these funds as the operational management of the day-to-day activities of the organisations and funding decisions made by the Trust are kept separate and managed independently. A number of donors have indicated that this segregation between the operational and funding entities and the resultant stronger governance is a condition to them giving. Also, a single Trust will allow the assets to be managed more effectively as a single portfolio and significantly reduce the cost of administration and accounting for these assets. Given that the same end can be accomplished in a manner that is not contrary to the provisions in s18A, allowing this fund instead to be housed in a single entity leads to no loss to the Fiscus, allows for greater efficiencies and provides stronger governance."

[17] The Trust requested that the distribution requirements be waived indefinitely.

The decision

[18] On 29 March 2021, SARS provided the following reasons for its decision not to grant the request by the Trust:

"4.5 Section 18A(2A)(b)(ii) of the Act provides that the donations for which section 18A receipts are issued may only be utilised solely to provide funds to an organisation contemplated in section 18A(1)(a) or section 18A(1)(c), which in turn will utilise the funds solely in carrying on public benefit activities (PBAs) contemplated in Part ii of the Ninth Schedule.

4.6 The 50% distribution requirement will not be waived for purposes of providing a general endowment or capital reserve fund as this is not an approved public benefit activity for purposes of section 18A.

4.6 The Commissioner will consider waiving the obligation to distribute the 50%, if funds are accumulated for a specific capital project which qualifies as a section 18A approved PBA. As an example, this may be where the funding PBO is accumulating funds for example a specific capital project such as building an orphanage. In terms of the projected cost and annual donations received for funding the project it will take

the funding PBO 3 years to accumulate the sufficient funds to finance the project. The Commissioner may under these circumstances be approached to relax the 50% distribution requirement."

[19] I pause to mention, that SARS provided further reasons for its decision in the answering affidavit. This approach is impermissible and as a result, I do not propose to consider these further reasons. [See: *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at paras 27-28]

SUBMISSIONS, LEGAL PRINCIPLES AND DISCUSSION

[20] Section 18A(2A)(b(i) bestows a discretion on SARS to waive the distribution requirement contained in the section on good cause shown and having regard to the public interest and the purpose for which the relevant organisation wishes to accumulate the funds. In exercising its discretion, SARS may impose conditions in respect of the waiver to distribute funds.

[21] The trust submitted that the reason provided by SARS for its decision not to accede to the request emanates from a misinterpretation of Section 18A(2A)(b)(i). This problem arose because SARS, according to the Trust, did not appreciate the *"purpose"* of the *"relevant organisation"*.

[22] The submission is developed as follows: any *conduit* PBO that applies in terms of section 18A(2A)(b)(i) by definition wants to build up a capital reserve. The purpose of the Trust is not, as stated by SARS, to provide a *"general endowment or capital reserve"*. Instead, as the application and deed of trust makes clear, the sole purpose of the Trust is to fund PBOs that do carry on *"approved public benefit activities for purposes of section 18A."* Providing a *"general endowment or capital reserve fund"* is the mechanism for achieving that purpose; it is not the purpose itself.

[23] The Trust, furthermore, contends that SARS's suggestion in paragraph 4.6 of the refusal letter that the Commissioner will consider waiving the distribution obligation *"if funds are accumulated for a specific capital project which*

qualifies as a section 18A approved PBA", betrays a fundamental misunderstanding. It firstly misconceives the purpose of the Trust. The application makes it, according to the Trust, clear that the income that would be derived from the capital fund would be used to fund ongoing operational costs of the Chevrah Kadisha group. Secondly, funding operational costs of PBOs that undertake Part II benefit activities is an *"approved public benefit activity for the purposes of section 18A"*.

[24] In a somewhat surprising about turn, SARS submitted in its heads of argument that the legislator does recognise the need for waivers of distributions for a limited time to facilitate *conduit* PBOs to build-up reserves over time so as to ensure some degree of financial sustainability.

[25] This concession lends credence to the submissions on behalf of the Trust set out *supra*. This entails that SARS erred in law in its contention that the *"50% distribution requirement will not be waived for purposes of providing a general endowment or capital reserve fund as this is not an approved public benefit activity for purposes of section 18A."*

[26] Having made the aforesaid concession, SARS, however, submitted that such a waiver will only be granted for a limited time and not indefinitely. This new fact did not form part of the reasons relied upon by SARS for its decision to decline the Trust's request and is not an issue for determination in the present application. One should also bear in mind that SARS has the discretion to impose conditions on any waiver it grants. The mere fact that time may be a factor in determining a request does, therefore, not entail that an application for an indefinite period will summarily be declined.

[27] I pause to mention, that SARS, notwithstanding the aforesaid concession persisted in its opposition of the application on various other grounds. These grounds are, needless to say, inconsistent with the concession it made initially.

[28] In the result, I am satisfied that the decision was materially influenced by an error of law as envisaged in section 6(2)(d) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") and stands to be reviewed and set aside.

SUBSTITUTION

[29] The Trust requested the court, in terms of the provisions of section 8(1)(c) of PAJA, to order SARS to approve its application to waive the distribution requirements. The Trust advanced the following reasons for its request:

21.1 the court is as well qualified as SARS to make the decision;

21.2 the outcome is a foregone conclusion; and

21.3 SARS acted in bad faith by withholding the problems it perceived with the Trust's application in two meetings held between the parties and the amount of time, to wit ten months, it took SARS to take a decision.

[30] In considering the request for a substitution order, a court should, first of all, be mindful of the doctrine of separation of powers. This much has been confirmed in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA (CC) at para [43] and [44]:

"[43] In our constitutional framework a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.

[44] It is unsurprising that this court in Bato Star accepted Professor Hoexter's account of judicial deference as —

*'a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for — and the consequences of — judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.' " (*footnotes omitted)

[31] There may, however, be circumstances in which a court, notwithstanding, the doctrine, consider certain factors to weigh in favour of the granting of a substitution order. The test to be applied has been formulated in *Trencon* as follows at para 47:

"*[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."* (footnotes omitted)

[32] Applying the aforesaid test to the facts in *casu*, I am mindful that SARS committed an error in law in reaching the decision, but am of the view that various others factors influence the decision by SARS to grant a waiver. These factors fall within the specialised knowledge of the Commissioner and is best left in that sphere of administration.

[33] I am not convinced that the decision to be taken by SARS is a foregone conclusion. SARS is now aware of the correct legal position in respect of the purpose for which a waiver may be granted and is, with such knowledge, in a position to consider the waiver application afresh.

[34] Lastly, I could find no evidence that SARS acted in bad faith. Insofar as time is of the essence, I will impose strict timelines for the matter going forward.

[35] In the result, I am not prepared to grant a substitution order.

COSTS

[36] The Trust requested the costs of two counsel, which request is more than reasonable in the circumstances.

ORDER

The following order is issued:

1. The first respondent's decision of 29 March 2021 to decline the applicant's request in terms of section 18A(2A)(b)(i) of the Income Tax Act, 58 of 1962, to waive the minimum distribution requirements provided by that section is reviewed and set aside.

2. The first respondent's decision to decline the applicant's request is remitted to the first respondent for reconsideration in the light of the principle articulated herein.

3. The first respondent is ordered to make and communicate to the applicant a fresh decision, accompanied by full reasons, within 30 days of date of this order.

4. The first respondent is ordered to pay the costs of the application, including the costs of two counsel.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD:
20 February 2023

DATE DELIVERED:
24 April 2023

APPEARANCES

For the Applicants:	Advocate A Subel SC
	Advocate C Steinberg SC
Instructed by:	Werksmans Attorneys
For the First Respondent:	Advocate Alisdair Sholto-Douglas SC
	Advocate Sam Dzakwa
Instructed by:	Ramushu Mashile Twala Inc.