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

**Case No:** 2022-043103
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES:NO
REVISED: NO
**DATE: 20 September 2023**

In the matter between:

| | |
|---|---|
| CITIBANK, N.A.<br>SOUTH AFRICA BRANCH | First Applicant |
| CITIGROUP GLOBAL MARKETS (PTY) LTD | Second Applicant |
| and | |
| THE COMMMISSIONER<br>FOR THE SOUTH AFRICAN REVENUE SERVICE | Respondent |

**JUDGEMENT**

MOOKI AJ

1 The first applicant ("Citibank SA") is a corporation chartered in the United States of America. It carries on the business of a bank in South Africa by means of a branch. Citibank SA is a part of Citigroup Inc ("Citigroup"), a global group of companies with fiscal branches throughout the world. Citibank SA is registered for value-added tax in South Africa.

2 The second applicant is a private company registered in accordance with

South African law. It too is part of Citigroup Inc. It is a wholly owned subsidiary of Citigroup Financial Products Incorporated (USA). The second applicant is a member of the Johannesburg Stock Exchange. It is also registered for value-added tax.

3 The respondent is the Commissioner for the South African Revenue Service. The respondent is responsible for the administration of the Value-Added Tax Act No 89 of 1991, together with the Tax Administration Act No 28 of 2011.

4 The applicants seek the following relief:

1 It is declared that payments made by the first and second applicants to the Citigroup home country entities, in relation to seconded employees, comprise the reimbursement of salary costs paid to the first and second applicants' employees on behalf of the first and second applicants, which fall outside the scope of value- added tax, and which are exempt from section 7 (1) (c) of the Value-Added Tax Act No 89 of 1991 (as amended) and ("VAT Act") in terms of section 14 (5) (d) of the VAT Act;

2. The respondent is ordered to pay the applicants' costs including the costs of two counsel, where so employed;

3. Further and/or alternative relief.

5 The respondent opposes the relief being sought.

6 Citigroup has a global presence. Persons employed by members of Citigroup are seconded to constituents of Citigroup in other countries. The constituent companies are described as "Home Country Entities." A Home Country Entity in a country may second its employees to a Home Country Entity in a different country. A Home Country Entity concludes an assignment agreement with employees who are to be seconded to another Home Country Entity.

7 I describe the Home Country Entity that seconds an employee as "the Sending Home Entity." The Home Country Entity that receives an employee is "the

Receiving Home Entity."

8 The Sending Home Entity and the Receiving Home Entity conclude an "Intra-City Service Agreement" concerning the seconding of employees. There is a further Citigroup constituent company that is involved in the seconding of employees. This company is called "Citigroup, N.A."

9 The relationships among the Citigroup constituent companies and the agreements mentioned above are material to a determination of the relief sought by the applicants.

10 The assignment agreement stipulates as follows. The Sending Home Entity lends the services of the seconded employees to the Receiving Home Entity. The lending is done in terms of an inter-company agreement between the Sending Home Entity and the Receiving Home Entity. The inter-company agreement is "for the supply of employee services."

11 The assignment agreement also provides that: a seconded employee will be on an "expatriate assignment." A person seconded by the Sending Home Entity remains an employee of the Sending Home Entity in that "During this time you will not be an employee of [the Receiving Home Entity]. A seconded employee is also not an employee of Citigroup, N.A. Citigroup, N.A. administers the "expatriate salary and benefits" of a seconded employee. It does so "as agent" of the Sending Home Entity.

12 The following appears in the intra-city agreement:

12.1 Citibank SA is described as "Service Recipient", with the counterparty described as "Service Provider."

12.2 The "Standard Pricing Method" is "Cost plus mark-up – includes salaries, benefits, incentive comp (sic), and other expenses related to personnel engaged in the rendering of Services […]"

13 The applicants make the case as described below in connection with the

relief that they seek.

14 The applicants are a Receiving Home Entity in relation to the seconded employees.

15 The applicants contend that the seconded employees are employees of the applicants, for the following reasons:

15.1 The seconded employees place their productive capacity at the disposal of the applicants and furthered the enterprise of the applicants in the course of their employment.

15.2 The applicants have the right of supervision and control over the seconded employees for the duration of their secondment to the applicants.

15.3 Applicants paid the Sending Home Entity for the supply of the seconded employees' services to the applicants, who in turn made payment to the seconded employees. The amount so paid were at all relevant times equal to the remuneration due by the Sending Home Entity to the seconded employees, and no mark-up thereon was charged or paid.

15.4 The seconded employees received remuneration for the supply of their services to the applicants, and the applicants deducted and withheld employees' tax from such remuneration as their employer.

16 The seconded employees are employees are also employed by the Sending Home Entity.

17 The applicants say they are not liable for value-added tax on the supply by the seconded employees' of services to the applicants. That is because value-added tax is not payable in respect of a supply by a person of services contemplated in proviso (iii)(aa) to the definition of "enterprise", i.e., the rendering of services by an employee to his employer in the course of his employment, to the extent that remuneration is paid to such employee.

18 In terms of s 7(1)(a) read with proviso (iii)(aa) to the definition of “enterprise” in s 1 of the VAT Act, no VAT may be levied on the supply by the seconded employees’ of services to the applicant.

19 The applicants say services rendered by the seconded employees are not “imported” services. They further contend that, and even if the services are “imported services”, VAT that would be chargeable in terms of s 7(1)(c) of the VAT Act is not payable where the seconded employees provide services to the applicants in the course of their employment with the applicants, as contemplated in s 14(5)(d) of the VAT Act.

20 The applicants conclude that no value-added tax is chargeable or payable by the applicants to SARS on (in respect of) the services supplied (to the applicants) by the seconded employees.

21 The applicants say that the system by which the applicants engage seconded employees, with the home entity paying the seconded employees and the applicants in turn paying the home entity, result in the following outcome:

21.1 There is no imported services in relation to the seconded employees.

21.2 The seconded employees render services of an employee to his employer in the course of their employment.

21.3 The reimbursement payments fall outside the scope of VAT.

21.4 Applicants are not liable for value-added tax in terms of section 7(1)(c).

22 The respondent maintains an opposite stance. The case for the respondent is as detailed below.

23 The question, according to the respondent, is not whether seconded employees are employees in terms of South African law. The question is whether

the applicants are liable to pay VAT on such imported services. These entail, amongst others, determining whether the applicants are employers of seconded employees in terms of the definition of employer in the relevant tax acts.

24 The respondent says it is not the case that being an employee in labour law equates to being an employee for the purposes of the VAT issue in this case.

25 The respondent disputes that the seconded individuals are employees of the applicants; that [the Sending Home Entity] pays the salaries of these individuals on behalf of the applicants; and that the applicants reimburse the [Sending Home Entity].

26 The seconded individuals are supplied in terms of "*Intra-Citi agreements*" which indicate that the seconded individuals are supplied by the relevant [Sending Home Entity] as service provider to Citibank SA. The payments made by Citibank SA in terms of these agreements are payments made to the service provider, the [Sending Home Entity], for the seconded employees as payment made for a service in terms of the relevant service agreement.

27 In addition, the applicants contend that the secondment is achieved by the conclusion of an assignment agreement, which expressly confirms that seconded individuals remain employees of the [Sending Home Entity] and that salaries are administered by Citigroup NA on behalf of the employer, the [Sending Home Entity].

28 There is no support that seconded employees report directly to the applicants or are under the supervision and control of the "South African operations". The individuals remain employees of the [Sending Home Entity] during the expatriate assignment.

29 The respondent contends that tax legislation defines "employees" differently from what constitutes an employee for labour law purposes. The seconded personnel are not employees for purposes of the VAT Act or the Fourth Schedule to the Income Tax Act.

30 The applicants pay the Citigroup Home country entities. Those entities are not employees as defined in the Fourth Schedule to the Income Tax Act.

31 The respondent says the applicants do not pay remuneration for services rendered by its employees.

32 The respondent makes the following further contentions regarding payments by the applicants, with reference to the intra-city service agreements between the applicants and the Sending Home Entity: Payments by Citibank SA are payments for a service in terms of a service agreement, and such payments do not constitute the recovery of a disbursement.

33 The intra-city service agreements do not indicate that "the service provider" is obliged to pay salaries to seconded employees on behalf of the applicants. The agreements do not support the contention that the seconded employees are employees of the applicants, or that a "Citigroup Home country entity" pays the salary, related contributions and travel costs of seconded employees.

34 The respondent also points out that, according to the intra-city service agreements, payments by the applicants in relation to the seconded employees do not constitute the cost of the salary and other contributions without a "markup" and that the standard pricing method for every product or service furnished by the relevant "Citigroup Home country entity" is "cost plus applicable markup".

Analysis

35 The applicants do not deal with the meaning of "employer" or "employee", as defined in paragraph 1 of the Fourth Schedule to the Income Tax Act, in addressing the nature of the relationship between the applicants and the seconded employees. This would have been expected to be factored into the applicants' persuasion of the court as to the nature of the relationship between the applicants and the seconded employees.

36 The applicants were expected to show why the court ought to have regard, in

determining the nature of the relationship between the applicants and the seconded employees, to the definition of "employer" and "employee" only according to the labour laws. This was not done. I agree with the contention on behalf of the respondent that, given that the relief deals with a taxation issue, and that this issue requires consideration of the meaning of the concepts "employee", "employer", and "remuneration"; that these concepts are dealt with in the taxation statutes for purposes of the subject matter of the relief sought.

37 The relevant legislation provides as detailed below.

38 Section 7(1)(c) of the VAT Act provides as follows:

*"(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax […]*

*(c) on the supply of any imported services by any person on or after the commencement date …"*

39 Section 1 defines *"imported services"* as:

*"a supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies".*

40 Section 14(5)(d) of the VAT Act provides as follows: […]

*"(5) The tax payable in terms of section 7(1)(c) shall not be payable in respect of –*

*(d) a supply by a person of services as contemplated in terms of proviso (iii)(aa) to the definition of 'enterprise' in section 1".*

41 The proviso reads as follows:

> "*Provided that – (iii)(aa) the rendering of services by an employee to his employer in the course of his employment or the rendering of services by the holder of any office in performing the duty of his office, shall not be deemed to be the carrying on of an enterprise to the extent that any amount constituting remuneration as contemplated by the definition of 'remuneration' in paragraph 1 of the Fourth Schedule to the Income Tax Act is paid or is payable to such employee or office holder, as the case may be*".

42 An *"employee"* is defined in paragraph 1 of the Fourth Schedule to the Income Tax Act as:

> *"(a) any person (other than a company) who receives any remuneration or to whom any remuneration accrues;*
>
> *(b) any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker;*
>
> *(c) any labour broker;*
>
> *(d) any person or class or category of person whom the Minister of Finance by notice in the Gazette declares to be an employee for the purposes of this definition; or*
>
> *(e) any personal service provider"*

43 The applicants must show that proviso (iii)(aa) to the definition of "enterprise" applies as regards the relationship between the applicants and the seconded employees, for the applicants not to otherwise be liable for VAT. The proviso stipulates as follows:

> "*Provided that – (iii)(aa) the rendering of services by an employee to his*

*employer in the course of his employment or the rendering of services by the holder of any office in performing the duty of his office, shall not be deemed to be the carrying on of an enterprise to the extent that any amount constituting remuneration as contemplated by the definition of 'remuneration' in paragraph 1 of the Fourth Schedule to the Income Tax Act is paid or is payable to such employee or office holder, as the case may be*".

44 The applicants must show that:

44.1 The applicants are "employers" as contemplated in the proviso.

44.2 The seconded employees are "employees of the applicants", also as contemplated in the proviso.

44.3 The seconded employees render services in the course of their employment with the applicants.

44.4 The applicants pay the seconded employees "remuneration."

45 An *"employer"* is defined in paragraph 1 of the Fourth Schedule as:

*"any person … who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds … or out of funds voted by Parliament or a provincial council".*

46 "*Remuneration*" is defined inter alia as:

"*any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered,* […].

47 The definition of "employer" contemplates that the "person" being paid by an employer must be a natural person. This construction is consistent with the meaning of "remuneration", namely "*any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, […]*". The categorization connotes application only to natural persons.

48 The applicants referenced the decision of the Labour Appeal Court in Denel (Pty) Ltd v Gerber[1] to substantiate their contention that the seconded employees are employees of the applicants. Denel is authority for the proposition that one considers the substance, not labels, in determining whether there is an employment relationship between parties.

49 The applicants refer to "supervision and control" over performance as an element in considering whether there is an employment relationship. This is the language found in paragraph (ii) of the definition of "remuneration" in paragraph 1 of the Fourth Schedule to the Income Tax Act.

50 The respondent took issue with the claim by the applicants that the seconded employees are under supervision and control of the applicants. The applicants did not substantiate what constitutes "supervision and control" of the seconded employees. For example, they say nothing about what restrictions, if any, the applicants impose on seconded employees; such restrictions would include how much leave etc. the seconded employees may take. That is the usual form of "supervision and control" that an employer has over an employee. The decision in Denel requires the applicants to have gone further in justifying why, according to the applicants, the seconded employees are employees of the applicants. An assertion that the seconded employees are under the supervision and control of the applicants is precisely the form that the court in Denel said must be avoided.

51 The applicants, in using the formula of "supervision and control" in relation to the seconded employees, did nothing more but recite the wording of a statute.

[1] [2005] 9 BLLR 849 (LAC)

52 The applicants do not address the assignment agreement other than in general terms, by saying the seconded employees are also employed by the home country entities in terms of their contracts of employment. This does not address the specific injunction in the assignment agreement that seconded employees do not become employees of the entity to which they have been assigned.

53 Applicants do not make payments to seconded employees. They pay the Sending Home Entity. Citibank, N.A., in making payments to seconded employees, does so as "agent" of the Sending Home Entity.

54 The obligation of the applicants to pay the Sending Home Entity arises from a reading of both the assignment agreement and the inter-city agreement. The assignment agreement stipulates to the seconded employees that the Sending Home Entity "lends" the services of the seconded employees to the Receiving Home Entity, with the seconded employees remaining employees of the Sending Home Entity.

55 The high point to the applicants' case about seconded employees being employees of the applicants is the unsubstantiated assertion that the seconded employees are under the supervision and control of the applicants. The applicants referenced issuing the seconded employees with IRP 5 certificates. There was no further explanation such as, for example, how the salary of the seconded employees is treated in the light of the fact that the Sending Home Entity, according to the assignment agreement, remains liable for the salary of the seconded employees; paid by Citigroup, N.A. as agent of the Sending Home Entity.

56 The respondent submitted that there is no live dispute and that the court ought to refuse exercising its discretion to grant declaratory relief on this account. The mere absence of a live dispute is not a bar to a court considering whether to grant declaratory relief.[2] The applicants raise an important issue which, in the court's view, merits the court considering the relief sought. The respondent's response to the

[2] Ex Parte Nell 1963 (1) SA 754 (A)

issues raised by the applicants demonstrate that the applicants have raised a weighty issue.

57 The respondent has applied to strike various averments as inadmissible hearsay. It is unnecessary to address this application given my conclusion that the applicants have not made out a case for the relief sought.

58 The application faulters at two levels. First, the applicants have not shown that they are "employers" of the seconded employees. Second, the applicants have not shown that payments by the applicants to the Sending Home Entity constitute "remuneration" within the meaning contemplated in proviso (iii)(aa) to the definition of "enterprise."

59 I make the following order:

(a) The application is dismissed.

(b) The applicants are ordered to pay costs, including the costs of two counsel.

Omphemetse Mooki
Judge of the High Court (Acting)

Heard on: 7 August 2023
Delivered on: 20 September 2023

For the Applicants: P A Swanepoel SC (together with C A Boonzaaier)
Instructed by: Cliffe Dekker Hofmeyr Inc.

For the Respondent: F Southwood SC (together with A Louw), heads also drawn by A Pantazis.
Instructed by: Dyason Inc.