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

CASE NO: 52374/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
Date:21 FEBRUARY 2024

In the matter between:

KISHORE RAMHARAKH Applicant

and

SOUTH AFRICAN REVENUE SERVICES (SARS) Respondent

JUDGMENT

TRUMPIE, AJ

Introduction:

[1] The Applicant, Kishore Ramharakh *("Ramharakh")* have launched an application against the Respondent, SARS *("SARS")* seeking to review Respondent's decision by refusing to furnish the Applicant with tax information contained in source documents in Respondent's

possession of a company called Raputha Investments (Pty) Ltd ("*Raputha*"), with registration number 215[…].

[2] The Applicant brought the application in terms of the provision of the Promotion of Administrative Justice Act[1], *("PAJA")* as well as in terms of the principle of legality.[2]

[3] The application was opposed by the Respondent. In its answering affidavit the Respondent set out the grounds of its opposition as well as raising two (2) points *in limine,* namely the non-compliance with section 11 of the Tax Administration Act[3] ("*TAA*"), as well as the non-joinder of Raputha, same, according to the Respondent, being an important, necessary, and a relevant party to this matter. I will deal later with these points *in limine*.

[4] In his replying affidavit, the Applicant disagreed with the contention of the Respondent, denied the averments made by the Respondent, including said points *in limine* and requested the Court to grant the order as prayed for.

[5] Both parties were represented by counsel at the time of the hearing and the Court was addressed on all issues relating to the matter.

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[1] Act 3 of 2000
[2] Section 1(c) of the Constitution of the Republic of South Africa, 1996
[3] Act 28 of 2011

Background:

[6] According to the Applicant, he was, up until approximately December 2018, the sole and only director and shareholder of Raputha. During the abovementioned time, he disposed of full shareholding, as well as resigned his directorship of the said Raputha, whereafter, according to the Applicant, he was never again involved in Raputha's company business.

[7] During June 2019 the Respondent notified Raputha that it intended to do an audit into Raputha's VAT affairs for the period of 2017/07 to 2019/03[4]. The Respondent also notified everyone, according to its records, who was involved in Raputha's tax affairs during this period of its intention of doing an audit. This notification also included the Applicant[5], as according to the Respondent's records, the Applicant was still the director of Raputha until 27th March 2019.[6]

[7] As no response was received from Raputha, the Respondent proceeded and on 12th December 2019, issued Raputha a letter of its audit findings. In this abovementioned letter, Raputha was informed that the Respondent intends to hold Raputha liable for an amount of

[4] CaseLines Answering Affidavit, Annexure "SARS 3", 006-41 to 006-43
[5] CaseLines Answering Affidavit, par. 24 006-8
[6] CaseLines Answering Affidavit, par. 31 006-10

R500 244 898.49 for outstanding VAT for the period of 2017/07 to 2019/03.[7]

[8] Again, Raputha was afforded an opportunity to make representations regarding the audit findings, and again no response was received by the Respondent. As no response was forthcoming from Raputha, the Respondent finalised its audit of Raputha's tax affairs and issued a finalisation of audit dated 24th March 2020, in which the Respondent held Raputha liable for payment of the amount of R 1 000 489 798.08 in unpaid tax and penalties raised for the period 2017/11 to 2019/04.[8]

[9] In the meantime, on 14th February 2020, the Respondent issued a notice in terms of section 47(1) of the TAA, in which the Respondent requested the Applicant to attend an interview, for discussing the issues of Raputha's tax affairs.[9] Although it is stated in the said section 47-notice that the interview was to be held on the 28th February 2020, it seems that both parties agreed that same was only scheduled to be held on 05th March 2020.[10]

[10] According to the Respondent, the Applicant did attend the said interview on the 05th March 2020, but objected against the interview

[7] CaseLines Answering Affidavit, Annexure "SARS 4", 006-45 to 006-59
[8] CaseLines Answering Affidavit, Annexure "SARS 9", 006-73 to 006-89
[9] CaseLines Answering Affidavit, Annexure "SARS 6", 006-63 to 006-65
[10] CaseLines Founding Affidavit, par. 6.5 002-7 & Answering Affidavit, par. 32 006-10

on the basis that his counsel did not have enough time to prepare and the said interview was rescheduled for the 02nd April 2020.[11] It is unknown what happened with this said interview, but was in all probability cancelled as a nationwide lockdown due to COVID-19, came into effect on 26th March 2020.

[11] The Respondent, on 30th June 2020, issued the Applicant with a notice of its intention of holding the Applicant personally liable for Raputha's tax debt in terms of section 180 of the TAA, which debt at that time, amounted to R 1 644 305 790.44, said amount to be inclusive of penalties and interest.[12]

[12] In terms of paragraph 4 of the abovementioned notice,[13] the Applicant was afforded an opportunity to make representations in terms of the TAA[14] to the Respondent, within ten (10) days of date of the said notice, as to why the Applicant should not be held personally liable for the tax debt of Raputha.

[11] CaseLines Answering Affidavit, par. 32 006-10
[12] CaseLines Founding Affidavit Annexure "KR 1" 002-20 (See also Answering Affidavit, 006-106)

[13] CaseLines Founding Affidavit Annexure "KR 1" 002-20 (See also Answering Affidavit, 006-106)
[14] Section 184(2) of TAA

[13] On 22nd July 2020 the Applicant responded to the Respondent's notice, with a letter through his attorneys, which *inter alia* recorded the following:

> *"1. …*
>
> *2. We again reiterate that that we do not act on behalf of Raputha Investments (Pty) Ltd and hold no instructions on behalf of Raputha Investments (Pty) Ltd.*
>
> *3. We however act on behalf of Mt Kishore Ramharakh, a previous Director of Raputha Investments (Pty) Ltd to whom the notice of personal liability is addressed.*
>
> *4. …*
>
> *5. As previously indicated our client is not in possession of any documents of Raputha Investments (Pty) Ltd.*
>
> *6. Therefore, we require you to provide us with all the facts and documentation which SARS had in its possession in determining the liability of Raputha Investments (Pty) Ltd. In this regard we note that the finalization of audit refers*

to inter alia Annexure "A" which was not attached to the said letter.

7. ….

8. In order to enable our client to probably consider his personal, factual and legal position, require from yourselves to provide us with the source documents referred to in the finalization of audit as well as any other documents which SARS has in their possession ostensible received from third parties which enables SARS to form a conclusion as set out in the finalization of audit.

9. We furthermore also require from yourselves a detailed summary of all other facts which led SARS to form the opinion that our client was negligent and/or fraudulent and then should be held personally liable for the tax debt of Raputha Investments (Pty) Ltd.

10. As soon as we are in possession of the abovementioned documents our client will be able to engage experts to

advise him accordingly and consider the notice of personal liability."[15]

[14] After supplying the Applicant's attorneys with the relevant annexure "A" as requested in their abovementioned letter in July 2020, the Respondent's attorneys then fully responded to the abovementioned letter of the Applicant's attorneys on 14th August 2020 stating *inter alia* the following:

"1. …

2. …

Annexures to the notice of Personal Liability:

3. With reference to your request for annexure A and annexures 1 to 3 to the Finalisations of Audit letter in respect of Raputha, we confirm that this information was supplied to your offices on 27 July 2020.

Request for Information/documents:

[15] CaseLines Founding Affidavit, Annexure "KR 2" 002-023 & Answering Affidavit, Annexure "SARS 12", 006-109 to 006-112

4. We note that you do not act on behalf of Raputha and that you only hold a mandate to represent Mr Kishore Ramharakh. ("your client").

5. In your letter dated 23 (22) July 2020 at paragraph 8 thereof, you request copies of source documents related to the conclusion drawn in the Finalisation of Audit letter addressed to Raputha dated 24 March 2020. In light of the secrecy provisions contained in Tax Administration Act, No. 28 of 2011 (the "TAA"), we cannot provide Taxpayer information to unauthorised representatives. You do not represent Raputha and your client is not currently a director of Raputha. Our instructions are not to provide you with information regarding Raputha.

…

11. …"

[15] In response to the abovementioned letter, the Applicant, through his attorneys, informed the Respondent in a letter dated 07th September 2020 that the Applicant intended to launch a review application due to

the Respondent's decision refusing to supply the Applicant with the relevant documentation of Raputha, as stated above.[16]

[16] The Applicant launched his application for review dated 13th October 2020 in which the Applicant seeking an order in the following terms:[17]

"1. *That the ruling of the Respondent, set out and contained in a letter of its attorney of record dated 14 August 2020 which is attach hereto as* ***Annexure "KR7"*** *and worded as follows:*

> *"In light of the secrecy provisions contained in the Tax Administration Act, No. 28 of 2011 (the "TAA"), we cannot provide TAX paying information to unauthorised representatives. You do not represent Raputha and your client is not currently a director of Raputha. Our instructions are not to provide you with information regarding Raputha."*

be reviewed and set aside.

2. *That, to the extent necessary, the Applicant be granted an opportunity to supplement his founding papers once a complete record of proceedings, for the decision that is*

[16] CaseLines Answering Affidavit, Annexure "SARS 2", 006-39
[17] Notice of Motion, 001-1 to 001-4

sought to be set aside, has been made available to the Applicant.

3. *The Respondent is ordered to pay the costs in this application.*

4. *Further and/or alternative relief."*

[17] The matter became opposed, and both parties have filed their respective pleadings, as set out above.

[18] I will first deal with points *in limine* raised by the Respondent.

First point *in limine*

[19] The first point raised by the Respondent in its answering affidavit was the Applicant's non-compliance with section 11 of the TAA, specifically subsections (4) and (5) thereof.

[20] Section 11(4) & (5) of the TAA states the following:

*"**Legal Proceedings involving Commissioner***

(1) …

…

(4) Unless the court otherwise directs, no legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of at least one week of the applicant's intention to institute legal proceedings.

(5) The notice or any process by which the legal proceedings refer to in sub-section (4) are instituted must be served at the address specified by the Commissioner by public notice."

[21] Adv Greyling, counsel for the Applicant, in response to this first point *in limine* raised, argued that this section is not peremptory and that a Court has the authority to condone any non-compliance in the absence of any formal notice in terms of the abovementioned section.

[22] He referred me in his heads of argument to an unreported judgment of Fourie J in this division in the matter of ***WPD Fleetmas v Commissioner: South African Revenue Services and another***.[18] I will later deal more fully with this case.

[18] Case number 31339/2020, [2020] JOL 49693 (GP)

[23] Adv Greyling argued that the Court, in determining the said issue, ought to take the following factors into consideration, namely:

23.1 That the Respondent had ample notice of the Applicant's intention to proceed with the review application, namely:

23.1.1 Notice was given of such intent in the abovementioned letter dated 07th September 2020,[19]

23.1.2 That more than a month or 25 Court days have lapsed from the notice before the application was issued,

23.1.3 That the Respondent had an opportunity to file an answering affidavit, and

23.1.4 Both parties could file heads of argument and were fully prepared to argue the matter.

23.2 That no substantial prejudice was raised and/or suffered by Respondent.

[19] CaseLines Answering Affidavit, Annexure "SARS 2", 006-39

23.3 That the Court should grant condonation, if a case is made that condonation is required.

23.4 In the alternative, it was argued that the Applicant substantially complied with the said subsections.

[24] Although this first point *in limine* was not dealt with in the Respondent's heads of argument (*same drafted by Adv B Swart SC*), Adv Maritz, counsel for the Respondent, in response to the Applicant's argument in regard to Applicant's possible compliance of section 11(4) of the TAA, stated that she cannot refer the Court to any other case law contradicting of what was stated in the matter of ***WPD Fleetmas*** in regard to compliance of section 11(4) and could not take the matter further.

[25] However, Adv Maritz argued that this first point *in limine* raised, consists of two issues, namely compliance of both sections 11(4) & 11(5) of the TAA. It was argued by Adv Maritz that even if the Court should find that the Applicant possibly complied with section 11(4), it was still the Respondent's contention that Applicant did not comply with the provisions of section 11(5) of the TAA as the Applicant's letter dated 07th September 2020, was not served at an address specified by the Commissioner by public notice.

[26] In the matter of ***WPD Fleetmas v Commissioner: South African Revenue Services and another***[20] the Respondent, *in casu* also raised a point *in limine* of the said Applicant's non-compliance of section 11 (4) of the TAA. In the said matter, after hearing oral arguments from both parties, Fourie J stated the following:

> *"15. Both counsel were unable to refer me to any authority where this subsection was considered. The words 'unless the Court otherwise directs' are important in this matter. This sub-section does not require Applicant to apply on notice or in the application itself to condone a failure to comply with it. It appears that the Court is empowered with a wide discretion to condone a failure or to 'direct otherwise'. Obviously, this must be done in a judicial manner."*

[27] I agree with the findings made by Fourie J in the abovementioned case. In fact that in this matter both parties were able to file pleadings, compile, and file heads of argument, and that both parties were present at the hearing and were able to argue the matter on all issues raised, it seems no substantial prejudice was suffered and/or

[20] See footnote 18.

proved by the Respondent, due to the non-compliance of the Applicant.

[28] As a Court is empowered with a wide discretion to condone any failure, I am satisfied, due to the abovementioned, that the Applicant has substantially complied with both provisions of sections 11(4) and 11(5) of the TAA and the Applicant is allowed to proceed with its legal proceedings against the Respondent.

[29] For reasons above, I find that this first point *in limine* therefore cannot succeed and dismiss same.

Second point *in limine*: Non-Joinder of Raputha

[30] The second point *in limine* raised by the Respondent is the failure of the Applicant to join Raputha as a party to these proceedings, as according to the Respondent, the said Raputha has a substantial and material interest to the current proceedings.

[31] In answer to the Respondent's point of non-joinder of Raputha raised, the Applicant stated the following in his replying affidavit, namely:

"7.1.

7.1.1 …

…

7.1.5 Furthermore, if the respondent now contends that Raputha should have been joined, it concedes that the current director of Raputha was privy to the said information and not me, thus this argument is usually destructive for the Respondent.

7.1.6 Finally, if I am entitled as of the right of the same remedies that the taxpayer has, i.e. Raputha, then there is no reason in law and in fact why Raputha ought to be joined in these proceedings.

7.2 I respectfully state that Raputha does not have a direct and substantial interest in this matter, as I am being held personally liable and I instituted these proceedings to put me in the position to answer to the allegations made against me by the Respondent in the main application.

7.3 This point in limine is thus mutually destructive and bad in law and should be dismissed."

[32] In addition to what was stated above, Adv Greyling furthermore argued that the information and documents received and used by the Respondent to do the abovementioned audit assessment, did not only consist of bank statements of Raputha, but also contained other third-party information that did not generate from Raputha. It was thus argued that as this third-party information/material falls outside the ambit of Raputha, Raputha does not have any material and substantial interest in these current proceedings and that the said point of non-joinder should be dismissed.

[33] In response to the above, Adv Maritz for the Respondent argued that due to the fact that all information of taxpayers is secret,[21] and as no such information may be disclosed to any other party, Raputha has a legal interest if the order sought by the Applicant, is granted. Granting such an order, it was argued, could affect Raputha prejudicially, as it has a direct and substantial interest in being part of these proceedings.

Ad Law:

[34] The current test used by our courts of when a party should be joined as party to proceedings, is whether such a party has a "*direct and*

[21] Section 67(4) and section 69 of TAA

substantial interest" in the subject matter of the action. Such an interest is thus a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of a Court.[22]

[35] In the matter of ***Amalgamated Engineering Union v Minister of Labour***,[23] Fagan AJA in the Supreme Court of Appeal, after referring to the case of ***Bekker***[24] decided in 1844, recorded that the principles in the South African law are as follows, namely:

> *"(1) that a judgment cannot be pleaded as res judicata against someone who was not a party to the suit in which it was given, and (2) that the Court should not make an order that may prejudice the rights of parties not before it*."[25]

[36] Fagan AJA further stated in the abovementioned matter that it is imperative that a Court should: -

> "…*avoid all possibility of prejudicing parties not before the Court.*"[26]

[37] It was further stated in ***Almalgamated Engineering Union*** that courts: -

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[22] ***Erasmus: Superior Court Practice***, Volume 2, 2nd Edition, Van Loggenberg, D1-124 and further.
[23] 1949 (3) SA 637 (AD)
[24] ***Bekker v Meyring, Bekker's Executor*** (1828-1849) (2) Menzies 436
[25] At 651
[26] See: ***Almalgamated Engineering Union***, at 653

"… has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests."[27]

[38] In the matter of ***Judicial Service Commission v Cape Bar Council and Another***,[28] Brand JA stated the following:

"It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned."[29]

[39] In the matter of ***Matjhabeng Local Municipality v Eskom Holdings Limited***[30] the Constitutional Court stated that:

"The law of joinder is well-settled. No Court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it."[31]

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[27] See: ***Almalgamated Engineering Union***, at 659
[28] 2013(1) SA 170 (SCA)
[29] See: ***Judicial Service Commission***, at pg. 175 par. 12
[30] 2018 (1) SA 1 (CC)
[31] At 33E-F

[40] In the matter of ***Morudi and Others v NC Housing Services and Development Co Limited and Others***[32], the Constitutional Court, with approval referred to ***Almalgamated Engineering*** where the following was stated, namely:

> *"[t]he fact, however, that, when there are two parties before the Court, both of them desire it to deal with an application asking it to make a certain order, cannot relieve the Court from inquiring into the question whether the order it is asked to make may affect a third party not before the Court, and, if so, whether the Court should make the order without having that third party before it. . ."*[33]

[41] Therefore, according to our Courts, there rests a duty on a court to determine if the order granted will affect a third party[34].

Discussion:

[42] It is a fact that all information of taxpayers is kept secret,[35] and that no such information may be disclosed to any other party, unless in certain circumstances. The reasoning and rationale of protecting information disclosed by taxpayers to the Respondent is to encourage full disclosure of all tax related matters, as well as to maximise tax compliance, while

[32] 2019 (2) BCLR 261 (CC) at par. [32]
[33] See: ***Almalgamated Engineering Union***, at 649
[34] See: ***Morudi and others,*** at par. [32].
[35] Section 67(4) and section 69 of TAA

taxpayers have the peace of mind that their information will remain confidential and will not be disclosed.

[43] In response to the non-joinder point raised by the Respondent, the Applicant, in his answering affidavit states the following:

> *"Raputha is the entity whose tax information forms the heart of this application."*[36] (Own underlining)

[44] I am in total agreement with the abovementioned statement. The heart of this matter is that the Applicant is requesting an order setting aside the Respondent's decision not supplying the Applicant with Raputha's tax information, without Raputha being a party to these proceedings.

[45] In light of the above, it is clear that Raputha has a legal interest if the order sought by the Applicant is granted. I thus find that this legal interest of Raputha constitutes a direct and substantial interest and any judgment made by this Court, without Raputha been joined as a party to the proceedings, will affect Raputha's rights and could be prejudicial and detrimental to Raputha's rights.

[36] See: Replying affidavit, par 7.1, p008-5

[46] The Applicant's failure to do join Raputha as a party to the proceedings is fatal for the Applicant and it would be wrong for the Court to proceed with the application without Raputha being joined as a party.

[47] It was argued by Adv Greyling during the hearing of this matter, in the alternative, that if the Court upheld the Respondent's second point *in limine*, this matter should be postponed allowing the Applicant to join Raputha as a party herein.

[48] As this point of non-joinder was already raised in the Respondent's answering affidavit served on the Applicant on 03rd December 2020, I am of the opinion that the Applicant had ample time to join Raputha as a party to these proceedings.

[49] The failure of the Applicant not to join Raputha as a party to the proceedings where it was clear from the outset that Raputha has a direct and substantial interest to the proceedings, it would not be in the interest of justice to postpone the matter allowing the Applicant to join Raputha as a party herein. I am therefore inclined to dismiss the application outright.

Conclusion:

[50] Consequently the Respondent's second point *in limine* is upheld. In light thereof, it is therefore not necessary for me to deal with the merits of this matter.

Costs:

[51] It was argued by Mrs Maritz that if the Court finds in favour of the Respondent, costs should be awarded on an attorney-client scale. No averments for a punitive cost order are contained in the Respondent's answering affidavit, nor were any valid reasons advanced during argument as to why such a punitive cost order should be awarded in favour of the Respondent. Considering the above, I don't find any reasons for awarding such a punitive cost order.

[52] It was further stated in the Respondent's heads of argument that if the Respondent is awarded costs, such costs should include the costs of senior counsel. The senior counsel who drafted the heads of argument was not available nor present at the time of arguing this matter, therefore no such order can be made.

Order:

In the result, I make the following order:

1. The application is dismissed.

2. The Applicant is to pay the costs of the application.

A Trumpie
Acting Judge of the High Court
Pretoria

Date Hearing: 01st February 2024
Date of Judgment: 21st February 2024

Appearances:

Counsel for the Applicant: Adv PJ Greyling
Instructed by: Schabort Potgieter Attorneys Incorporated

Counsel for the Respondent: Adv S Maritz
Instructed by: FZLR Attorneys Incorporated