



**IN THE TAX COURT OF SOUTH AFRICA
HELD AT DURBAN**

CASE NO: IT45931 & VAT

22285

In the matter between:

TAXPAYER S

APPELLANT/APPLICANT

and

**THE COMMISSIONER FOR SOUTH AFRICAN
REVENUE SERVICE**

RESPONDENT

ORDER

In the premises it is ordered that:

1. The applicant's application for discovery is dismissed.
2. The respondent is ordered to pay the applicant's costs from the date when the application was instituted up to the date when the respondent filed the second discovery affidavit, including costs of two counsel on scale C.
3. No order as to costs in respect of the application.

JUDGMENT

Mathenjwa J

Introduction

[1] This is an application by the applicant, the appellant in the main application, to compel the respondent (SARS) to discover documents and records in its possession relating to the appeals against his Income Tax and VAT assessments. The application was instituted in terms of Uniform rule 35(3), read with rules 42, 36(3) and 36(6) of the rules promulgated under s 103 of the Tax Administration Act¹ (the Act). SARS opposes this application.

[2] The appeals in the main application relate to assessments of the applicant by SARS for the years 2014 to 2019, which assessments relied on a schedule produced by SARS dated 12 May 2020. The applicant objected to the income tax and VAT assessments and appealed it on the grounds that SARS:

- (a) performed an audit in respect of years for which there was no proper authority; (b) failed to properly account for all inter-account transfers;
- (c) allow for disbursements;
- (d) failed to account for property and non-taxable items correctly; and
- (e) purportedly performed an analysis in respect of years for which it has never requested or sought documentation, or has performed such assessment without reference to proper documentation.

Factual background

[3] The brief factual background to this application is that on 31 January 2023 the applicant launched an application to compel SARS to discover and make available for inspection and copying various documents pertaining to:

- (a) the minutes of all meetings held between the applicant and SAR's employees;
- (b) dates of minutes of meetings;
- (c) internal memoranda placed before such meetings and record of the meetings, including the names of committee members held by SARS in respect of the various SARS internal committees that participated in the auditing and assessment of the applicant's liability for tax;
- (d) the separate bundle of all documents which were used by and were before SARS representative/s when making the assessments, which are the subject

¹ Tax Administration Act 28 of 2011.

matter of the appeal, in order that the applicant may place the precise documents, used by SARS in making the assessments, before his intended expert witnesses;

- (e) the file of documents including but not limited to the books and records supplied by the applicant to SARS for the 2017 tax year;
- (f) copies of all documents obtained from third parties including banks, obtained by SARS for the purpose of raising the assessments in respect of the applicant;
- (g) the documents relied upon by SARS in order to calculate the figures which gave rise to the schedule found at pages 459 and 460 of the record in Case IT 4531;
- (h) the documents relied upon by SARS in order to make the assessments; and
- (i) the section 46 notices served upon financial institutions.

[4] On 14 March 2023 SARS filed a notice to oppose the applicant's application to compel. NN deposed to an affidavit on behalf of SARS in which she stated that SARS had discovered all the relevant documents. On 4 April 2023 the applicant deposed to a replying affidavit in which he disputed that most of the documents SARS claimed to have discovered had in fact been discovered by SARS. On 20 September 2023 SARS deposed to a supplementary affidavit in which it discovered additional documents.

[5] Dissatisfied with SARS further discovery, once again on 5 April 2024 the applicant re-instituted an application calling upon SARS to discover further. On 15 July 2024 SARS filed its second supplementary discovery affidavit in which additional documents were discovered. Dissatisfied with the supplementary discovery, the applicant enrolled this matter for hearing.

Applicant's contention

[6] Counsel for the applicant, submits that the progress reports discovered in SAR's second supplementary discovery affidavit as items 3,4 and 5 is not acceptable because it does not comply with the requirements of s 42(1) of the Act. According to the applicant it is not acceptable for SARS to have discovered the redacted documents in respect of items 6 to 83 in its supplementary discovery affidavit. It was

submitted on behalf of the applicant that the discovery of original documents and names of the officials who participated in the committees are relevant for the preparation for trial and to enable him to issue subpoenas to the officials who took those decisions in order that they may be examined during the appeals. The applicant contends that items 84 to 87 consisting of the analysis of bank statement deposits is not proper analysis undertaken by SARS in a format that is acceptable for the purpose of efficient tax administration. In respect of item 88 the applicant contends that he requested copies of all documents, bank statements and full information relied upon for the assessment of the year 2014 and not the excel spread sheet schedule attached to the letter of audit findings in which SARS had referred to.

[7] It was argued on behalf of the applicant that SARS should be in possession of all documents relating to items 89 to 100 and item 118 relating to the bond and revolving account statements because in its first discovery affidavit SARS had stated that these documents had been supplied by the applicant, however in its second supplementary discovery affidavit SARS stated that these documents were not received by it. In respect of items 130,134,138,142 and 143 relating to the section 46 notices it was submitted on behalf of the applicant that SARS should supply the dates on which the section 46 notices were issued and the bank statements received. This information, the argument went, is important for verification of whether SARS drew the schedule without any regard to the bank statements or it had obtained the bank statements unlawfully. In respect of item 139 relating to the bank statements the applicant contends that SARS discovered an extract of the bank statements from 2014 to 2018, and this was unacceptable as the applicant was entitled to the entire set of documents. In respect of items 145 to 341, it is submitted that SARS could not have made calculations in respect of these items without having regard to the source documents, including bank statements and other records. Further, SARS could not have relied on the schedules which it had discovered when making calculations. It was contended on behalf of the applicant that he intends making the documents available that SARS relied upon to his experts for proper calculation in preparation for the appeals.

SAR's contention

[8] Counsel for SARS, contends that first and foremost the applicant provided SARS with no information to explain massive discrepancies between his declared income on the one hand, and the amounts paid into his bank accounts. Therefore, given the paucity of information provided by the applicant, SARS relied primarily on the unexplained deposits in his bank accounts as the basis to estimate his gross income for the relevant tax years. It was submitted on behalf of SARS that the applicant's insistence that there must be more source documents than the documents already discovered by SARS is unwarranted because the assessment was based on estimates which is by definition based on limited information. Mr *Sholto-Douglas* submits that the applicant's contention that the progress reports discovered by SARS in terms of items 3,4 and 5 does not meet the requirements of s 42(1) of the Act and the documents discovered by SARS in terms of items 84 to 87 comprising the analysis of bank statements deposits is not a proper analysis undertaken by a SARS official in a format that is deemed acceptable for the purposes of tax administration is not a basis upon which discovery may be ordered because the obligation to discover relates to documents that are in existence, it does not extend to requiring the opposite party to prepare a document.

[9] Regarding the applicant's complaint about the discovery of redacted documents comprising minutes of various meetings including names of SARS representative at those meetings in terms of items 6 to 83, it was submitted on behalf of SARS that the applicant had not established any basis for the contention that the discovery of the redacted documents is not acceptable. On the contrary the discovery of the redacted documents firstly, block out personal information about SARS officials which is protected from disclosure in terms of s 68 of the Act. Secondly, the disclosure of unredacted minutes would entail disclosure of information about other tax payers. Thirdly, if the applicant wishes to subpoena SARS officials he is already aware of the identities of the SARS officials who were involved in the audit of his tax affairs since he had named five officials whom he describes as SARS officials involved in his audit.

[10] According to SARS, the applicant's submission that SARS should be ordered to discover copies of all documents, bank statements, and full information relied upon for the assessment of the 2014 tax year in terms of item 88, does not meet the

threshold which is that the document sought to be discovered must be described with sufficient accuracy to enable it to be identified. The only document identified in this request was the bank statements which SARS have already discovered. Furthermore, SARS disputes that it has more source documents than what it has discovered in terms of items 145 to 341 comprising the bank statements from 2014 to 2019 tax years and the schedule provided by SARS relating to 2017.

[11] It was further submitted on behalf of SARS that it is not required to discover dates on when it had received the bank statements that it had requested in terms of the section 46 notices under items 139, 142 and 143. Regarding the applicant's contention that SARS had discovered an extract of bank statements for the period 1 January 2014 to 28 February 2018 whereas the applicant had requested the discovery of documents from 1 March 2013 to 28 February 2018 in terms of item 139 it was submitted on behalf of SARS that the applicant had not provided a basis from which it can be inferred that SARS in fact has or had in its possession the bank statements that predate 1 January 2014 to 28 February 2018.

Issues for determination

[12] The issues for determination in this matter are:

- (a) whether the court should go behind the documents discovered by SARS and order it to discover more documents which the applicant contends should be in existence and in the possession of SARS; and
- (b) whether SARS should be ordered to discover the documents which it has discovered but in a different format as requested by the applicant.

Applicable legal principles

[13] Discovery is regulated by rule 36 of the Tax Court which enables the applicant to request SARS to make discovery on oath of any document material to a ground of the assessment. Rule 36(3) provides that:

'A party may, within 15 days after delivery of the statement under rule 32 or 33, as the case may be, deliver a notice of discovery to the other party requesting that party to-

- (a) make discovery on oath of all documents relating to the issues in appeal as referred to in rule 34; and
- (b) required and reasonable, produce specified documents in a specified manner, including electronically.'

Rule 36(6) provides that:

'If either party believes that, in addition to the documents disclosed, there are other documents in possession of the other party that may be relevant to a request under subrule (1) or (2) or the issues in appeal, as the case may be, that have not been discovered, then that party may give notice of further discovery...'

[14] Uniform rule 35(1) enables a party to any action to require any other party thereto to make discovery on oath of all documents and tape recordings relating to any matter in question in such action which are or have been in possession or control of such other party. Rule 35(3) provides that:

'If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give

notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known.'

Thus, Uniform rule 35(3) read with rule 36(6) of the Tax Court outlines the procedure for additional or further discovery when a party is dissatisfied with the discovery of another party.

[15] It is trite that the object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means 'the issues are narrowed and the debate of points which are incontrovertible is eliminated'.²

The rules prescribe for discovery of a document that relates to a matter in question. The documents will relate to the matter if it may be used by the party requesting it to advance his or her case or to damage the other party's case. In *Rellams (Pty) Ltd v James Brown & Hamer Ltd*³ Van Heerden J quoted with approval from *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co*⁴ where Brett LJ stated as follows:

² *Durbach v Fairway Hotel, Ltd* 1949 (3) SA 1081 (SR) at 1083.

³ *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A-B.

⁴ *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano (1882)* 11QBD 55.

'It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which *may* - not which *must* - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.'

[16] The party requesting discovery is required to sufficiently specify the document that is sought to be discovered. It is trite that rule 35(2) contemplates the discovery of all relevant documents, specific or otherwise, and indeed provides that a document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature which have been initialled and consecutively numbered by the deponent. Even if a document is not specified, it nevertheless should be sufficiently described in the notice. In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*⁵ it was held that:

'The notice may require production of any number of documents. Whilst a document need not be described specifically within the notice, it must be described with sufficient accuracy to enable it to be identified.'

[17] In the discovery affidavit the deponent swears as to the correctness of the contents thereof.⁶ However, the court may go behind the discovery affidavit and order further discovery if it is satisfied that there is a probability that the party making the affidavit has or had relevant documents in his possession.⁷ In *Rellams* it was held as follows:⁸

'It is, generally speaking, no doubt true that, whilst the Court should not and would not go behind a party's affidavit that the contents of a document are not relevant, such affidavit is nevertheless as far as the Court is concerned not conclusive. After an examination and consideration of the recognised sources as well as the pleadings and the nature of the case the Court may come to the conclusion that the party making discovery in all probability has other relevant and disclosable documents in his possession or power and may order further and better discovery or production in conflict with the claim in the affidavit.'

Analysis

⁵ *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323B-C.

⁶ *Gunn, NO v Marendaz* 1963 (2) SA 281 (W) at 282.

⁷ *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W).

⁸ *Rellams* above fn 4 at 560F-G.

[18] The crux of the applicant's objections to SARS discovery is that SARS did not discover all the relevant documents. The contention is premised on SARS conduct in that on 14 March 2023 a senior SARS official deposed to an opposing affidavit in which she confirmed that all the documents utilised by SARS officials in compiling the assessment had already been discovered, whereas at that point SARS had not discovered the documents. That was evident when SARS deposed to a supplementary affidavit in which it discovered further documents.

[19] It is instructive to point out upfront that the lackadaisical approach in which SARS handled the applicant's request for discovery is evident from the various requests for discovery made by the applicant, and from the first and subsequent supplementary discovery affidavits by SARS. It is clear that SARS either did not pay attention to or was simply reckless to the applicant's initial request for discovery in that SARS had alleged under oath that it had discovered the requested documents which had actually not been discovered. SARS exercises enormous powers to assess taxes and recover assessed taxes from tax payers. In the exercise of its public power SARS has a duty not to act arbitrarily when dealing with tax payers. It is not in dispute that SARS may not discover a document if such document is not discoverable by law. The undertaking by SARS that the documents were discovered knowing that they were not discovered resulted in the applicant incurring further unnecessary costs by engaging lawyers and requesting discovery of the same documents.

[20] The concession by counsel for SARS that SARS will pay the applicant's costs from the date when the initial request for discovery was made to the date when the second supplementary discovery affidavit was made is well made. However, those costs which will be incurred by the tax payers should have been avoided if SARS had discovered the documents that it was obliged to discover without the prolonged delay. While I accept that SARS conduct in this regard may be one of the factors taken into account when the court considers whether it should go behind its supplementary discovery affidavit, it is not decisive of whether SARS is withholding documents. The court must be satisfied from the supplementary discovery affidavit

itself and the documents in issue that there is a probability that SARS has or had relevant documents in its possession.⁹

[21] The applicant's objection to discovery in respect of items 3, 4 and 5 consisting of the progress reports issued by SARS officials responsible for audit is based on his contention that the discovery made is not acceptable because it does not comply with s 42(1) of the Act. This ground of objection is not sustainable because the rules require discovery of documents which are, or have been in possession or control of another party. The rules do not require SARS to compile a document which it does not have or formulate a document in a particular way and deliver it in a format that is required by another party. The same principle equally applies to the applicant's contention that the discovery of items 84 to 87 pertaining to the analysis of bank statements deposits referred to in the audit findings finalisation of audit letters; item 88 pertaining to copies of bank statements; and full information relied upon for the assessment of the tax year 2014 in a form of an excel spreadsheet in a schedule attached to the letter of audit findings is not a proper analysis undertaken by a SARS official in a format that is deemed acceptable for the purposes of tax. Discovery does not extend to discovery of a document in a particular format preferable or acceptable to a party. Discovery is limited to a document in its current form in the control or possession of the other party.

[22] The applicant's objection in respect of items 6 to 83 relating to the minutes of various meetings of SARS internal committees relating to the assessment and auditing of the applicant's taxation is based on his complaint that SARS had discovered redacted minutes without the names of the team managers, team leaders, chairpersons, audit specialists and legal advisers. It is instructive that 67 of the Act prohibits the disclosure of certain information. Section 67(1) provides that:

'This Chapter applies to-

- (a) SARS confidential information as referred to in section 68(1); and
- (b) "taxpayer information", which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.'

Section 68(1) provides that:

⁹ *Continental Ore Construction* above fn 7.

'SARS confidential information means information relevant to the administration of a tax Act that is-

(a) personal information about a current or former SARS official, whether deceased or not;..'

Discovery of redacted minutes allows the applicant to access the content of the minutes and understand how the decision was made resulting to his assessed tax. The removal of the names of SARS officials will not prejudice the applicant from exercising his rights because he already has access to the contents of the minutes. Furthermore, there is no reason to doubt SARS contention that the discovery of unredacted minutes will result in a disclosure of information about other tax payers. For that reason, the applicant's objection to discovery of the redacted minutes should fail.

[23] The complaint with regard to items 98 to 100 and 118 pertaining to the Standard Bank bond account, revolving account, call accounts and First National Bank credit card statements is based on the applicant's contention that since SARS had stated that it had received all documents from the applicant, these documents should be in its possession. In my view the applicant has not made a case for the court to go behind respondent's affidavit in which it has stated that it did not receive these items from the applicant. Reason being that when SARS stated that it had received all documents from the applicant, the documents in question were not specified, therefore there is no reason to disbelieve SARS contention that items 98 to 100 and 118 were not among the documents it received from the applicant.

[24] I agree with SARS submission that discovery of the documents under items 130,134 and 138 pertaining to the dates on which SARS received section 46 notices from the financial institutions is not relevant. The rules require the discovery of documents, not information about dates when the section 46 notices were sent to the financial institutions and the bank statements received from the institutions.

[25] Regarding the applicant's dissatisfaction with SARS discovery of item 139 relating to copies of all bank statements for the period 1 January 2014 to 28 February 2018 instead of discovery of documents from 1 March 2013 to 28 February 2018 and the spread sheets provided by SARS in respect of items 145 to 341 pertaining to working papers for the determination of amounts in specified

assessments, the applicant has not made a case for the court to go beyond respondent's affidavit wherein it stated that it does not have these documents.

[26] SARS submits that the assessment of the applicant was based on estimation.

Section 95 of the Act provides that:

'(1) SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer-

- (a) does not submit a return; or
- (b) submits a return or relevant material that is incorrect or inadequate; or
- (c) does not submit a response to a request for relevant material under section 46, in relation to the taxpayer, after delivery of more than one request for such material.

(2) SARS must make the estimate based on information readily available to it.'

[27] It is generally accepted that when making an estimate assessment SARS will not have all the documents before it because the tax payer would have failed to submit a return or submitted a return or information that is incorrect or inadequate. The court has a discretion to order SARS to discover documents which was not discovered. The discretion should be exercised judicially. It will not be an exercise of judicial discretion to order SARS to discover documents which it does not have in its control. The issue of how then SARS would have arrived at the assessment without these documents and the accuracy of the assessment is not before this court and it is a matter for hearing by the court hearing the applicant's appeals against his tax assessment.

Costs

[28] This then brings me to the issue of costs. SARS agreed to pay the applicant's costs up to the stage of the filing of the second supplementary discovery affidavit by SARS. Considering the complexity of the matter costs should include costs of two counsel on scale C. With regard to the costs of the application the applicant was not unreasonable in pursuing litigation against SARS. More particularly after SARS had initially refused to discover certain documents which it later discovered and went on to state under oath that it had discovered documents which it had not discovered. Thus it was not unreasonable for the applicant to suspect that SARS might be still

upholding other documents. For those reasons there will be no order as to the costs of the application.

Order

[29] In the premises the following order is made:

1. The applicant's application for discovery is dismissed.
2. The respondent is ordered to pay the applicant's costs from the date when the application was instituted up to the date when the respondent filed the second discovery affidavit, including costs of two counsel on scale C.
3. No order as to costs in respect of the application.

Mathenjwa J

Date of hearing: 13 November 2024

Date of judgment: 6 February 2025