

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO MANY JUDGES: **NO**
(3) REVISED.

Date: 28 November 2017

Signature:

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be the name of a judge or official.

CASE NO: 2017/44380

In the matter between:

BRITS: XANTHE JULIANA

First Applicant

TOLMAY: MAGRIETJIE

Second Applicant

PIENAAR: ELSIE ELISABETH

Third Applicant

DE LANGE: CORNELIA DOROTHEA

Fourth Applicant

and

**THE COMMISSIONER FOR
THE SOUTH AFRICAN REVENUE SERVICES**

Respondent

JUDGMENT

ADAMS J:

[1]. The applicants launched an urgent application for an order compelling the respondent to provide certain documentation on which the respondent's audit findings are based. The applicants also ask for an order interdicting the respondent from issuing any additional, estimated or other assessments pursuant to its letters of audit findings relating to each of the four applicants until thirty days after the respondent has provided these aforementioned documentation to each applicant.

[2]. The four applicants are VAT Vendors who buy jewellery containing gold from the general public and sell it to entities such as micro refineries. They had contracts with two Close Corporations, namely Henox 832 CC and Malibongwe Metals & Minerals CC, which rendered administrative services to them. These two entities were in possession of all of the documents of the applicants relating to their tax affairs, such as bank statements, invoices, proof of payments and other documents under the VAT Act, 89 of 1991.

[3]. During November 2015 the offices of these two entities were raided by the respondent, who seized any and / or all documents found at the premises, including the VAT related documents of the applicants, which related to the tax years 2012 to 2015. The respondent subsequently audited the applicants for the 2012 – 2017 tax years and during the auditing process required further documents from the applicants, which they provided. This meant that the applicants ended up with no documents of their own.

[4]. During October 2017 the respondent had completed its VAT Audits relative to the applicants and issued 'letters of audit finding' which concluded that all the transactions were fictitious and that all input VAT which they had claimed over the five year period from 2012 to 2017 should be written back. This obviously had far-reaching implications for the applicants who faced liability to the respondent for substantial amounts. The applicants therefore applied to the respondents to be furnished with documents or copies of documents on which the audits were based.

[5]. The application of the applicants is founded and based on s 42 of the Tax Administration Act, 28 of 2011, which provides as follows under the heading 'Keeping taxpayer informed':

- (1) 'A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of completion of the audit.

- (2) Upon conclusion of the audit or a criminal investigation, and where—
 - (a) the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or
 - (b) the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104(2).
- (3) Upon receipt of the document described in subsection (2)(b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.
- (4) The taxpayer may waive the right to receive the document.
- (5) Subsections (1) and (2)(b) do not apply if a senior SARS official has a reasonable belief that compliance with those subsections would impede or prejudice the purpose, progress or outcome of the audit.
- (6) SARS may under the circumstances described in subsection (5) issue the assessment or make the decision referred to in section 104(2) resulting from the audit and the grounds of the assessment or decision must be provided to the taxpayer within 21 business days of the assessment or the decision, or the further period that may be required based on the complexities of the audit or the decision’.

[6]. The reason why a taxpayer is afforded an opportunity in terms of s 42(3) to respond to the tax audit is to enable him to persuade the respondent that it was incorrect in its audit, which could avoid an assessment. See: *CSARS v Pretoria East Motors*, 2014 (5) SA 231 (SCA).

[7]. In order to reply meaningfully to the respondent’s letters of audit findings, the applicants are required to have sight of the documents on which the audits were based. In this matter however the respondent is in possession of all of the documents which they had seized from the applicants in a search and seizure operation. This means that the applicants had no choice but to ask the respondent to furnish them with the requisite documents, which they did on the 31st of October 2017. The respondent refused the request for documentation.

[8]. This meant that after the expiry of the 21 day period the respondent would become entitled to issue assessment, which in this matter would have the effect of creating liability on the part of the applicants to the respondent for substantial amounts, without having had an opportunity to make representations to the respondent and to give their side of story.

[9]. I am of the view that the applicants have a legal right to the documents requested. Also, I find that, in the circumstances of this matter, the application is urgent. It is quite clear that, if the applicant is entitled to the documents, which right has been acknowledged by the respondent furnishing certain of the documentation, they should receive same as soon as possible, because if not it would serve no purpose after the assessments are issued.

[10]. In my judgment the applicants have the right to request from the respondent the required documents if regard is had to provisions of the s 42 of the Tax Administration Act. Moreover, the applicants have the right in terms of s 32 of the Constitution to access information in possession of the respondent.

[11]. The respondent opposes the application for the relief sought by the applicants on the basis firstly that the respondent had invited the applicants to a meeting to discuss the audit findings. Also, as far as the interdictory relief is concerned the respondent alleges that there are alternative remedies available to the applicants, such as their right to object to the assessment once issued. I am not in agreement with these contentions for the simple reason that once the assessment is done, the respondent may insist on payment of the assessed amount. There is therefore no merit in the defences raised on behalf of the respondent.

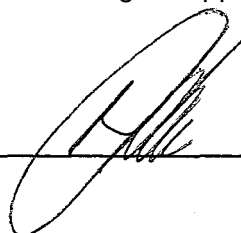
[12]. I am satisfied that the applicant on the papers before me has made out a case for the relief sought

[13]. In the premises, I am of the view that the applicant's application must succeed.

Order

In the result, I make the following order:-

1. The application is urgent.
2. In terms of prayers 1, 2, 3 and 4 (as amended) of the draft order, which I have marked 'X', signed and dated.
3. The respondent shall pay the applicants' cost of the urgent application.




L ADAMS

*Judge of the High Court
Gauteng Local Division, Johannesburg*

HEARD ON:	21 st November 2017
JUDGMENT DATE:	28 th November 2017
FOR THE APPLICANTS:	Adv P F Louw SC
INSTRUCTED BY:	Pierre Retief Incorporated
FOR THE RESPONDENT:	Adv M Molea
INSTRUCTED BY:	Brendan Muller Incorporated

" X "

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**


28/11/2017

In the matter between:

XANTHE JULIANA BRITS

MAGRIETJIE TOLMAY

ELSIE ELIZABETH PIENAAR

CORNELIA DOROTHEA DE LANGE

CASE NO. 44380/17¹

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

and

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

Respondent

DRAFT ORDER

28th

On this the ~~21st~~ of November 2017 before the Honourable Justice Adams.

Having heard counsel and having read the documents filed of record, the following order is made:

1. It is declared that the matter is urgent and the applicants' non-compliance with the prescribed rules concerning service and time periods is condoned;
2. the respondent is ordered to provide copies of all documents on which the following letters of audit findings are based:
 - (a) In respect of the first applicant (conducting business under the trade name "Charanthe Trading") — the latter that was issued on 12 October 2017;
 - (b) in respect of the second applicant (trading as "Xavier Trading") the latter that was issued on 13 October 2017;
 - (c) in respect of the third applicant (trading as "LC Trading") – the letter that was issued on 23 October 2017;
 - (d) in respect of the fourth applicant (trading under the trade name "Micor") – the letter that was issued on 23 October 2017.



3. the respondent is interdicted from issuing any additional, estimated or other assessment pursuant to the letters of audit findings relating to each of the four applicants until 30 days after the respondent has provided the documentation to each applicant that is referred to in paragraph 2 hereof;
4. the respondent is ordered to pay the costs of this application. ~~on the seal of attorney and own client.~~

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BY ORDER OF COURT

REGISTRAR