

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 3158/2018

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| (1) | REPORTABLE: YES /NO |
| (2) | OF INTEREST TO MANY JUDGES: YES/NO |
| (3) | REVISED. |

In the matter between:

PETER, ANTHONY CHARLES
and

Applicant

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

Respondent

JUDGMENT

PILLAY AJ:

Introduction

[1] This is an application for the review and setting aside of a decision taken by SARS' 'Tier Three Debt Committee' ("the Committee") on 20 September 2017 to decline the request by the applicant ("Peter"), brought in terms of section 164(2) of the Tax Administration Act 28 of 2011 ("the TAA") to suspend the payment of his tax liability in respect of additional assessments for years of assessment 2005, 2006, 2007, 2008, 2009, 2010 and 2011 pending the finalisation of his appeal which is currently pending before the Tax Court.

Background facts

[2] On 13 February 2013, the respondent issued the applicant with additional assessments for the years of assessment 2005 to 2011 for various incidences of non-compliance and alleged under-declaration of his income. Subsequent to the applicant drawing the respondent's attention to errors in the additional assessments, the respondent issued a revised reduced assessment.

[3] On 25 June 2013, the applicant objected against these assessments. A few days later, he made the first request for suspension of payment of his tax liability pending the finalisation of his objection and further appeal.

[4] On 17 October 2013, the respondent informed the applicant of its decision to refuse his request for suspension. The applicant took the decision on review. On 20 June 2014, Weiner J handed down an order reviewing and setting aside the decision and remitting it to the respondent for reconsideration.

[5] Subsequent to the order being handed down, the respondent invited the applicant to make a new request for suspension of payment given that the information contained in the first request had become outdated.

[6] On 24 January 2017, the applicant filed a new request for suspension of payment. This request was considered by the respondent's Tier Two Committee who recommended that the request be denied. The request and this recommendation served before the Tier Three Committee which ultimately adopted the recommendation and refused the applicant's request to suspend payment.

Grounds of review

[7] The applicant raises the following grounds of review:

7.1 The failure by SARS to comply with a previous court order of Weiner J handed down on 20 June 2014 by requiring a new application for suspension of tax liability was influenced by an error of law;

7.2 The Committee that took the decision was not authorized to do so in that:

7.2.1 It was not empowered by section 164(3) of the TAA to do so;

7.2.2 It was properly delegated by the SARS Commissioner to do so In that there is no written delegation of authority that complies with section 10 of the TAA;

- 7.3 The Committee acted irrationally in finding that the applicant's tax appeal was frivolous and vexatious. It failed to consider the applicant's prospects of success in the tax appeal. It also incorrectly found that the applicant was employing dilatory tactics;
- 7.4 In any event, it was irrational for the Committee to indicate that the applicant's disclosure of its assets and liabilities was incomplete given that the applicant had repeatedly submitted the financial information required which included lists of assets and liabilities; and
- 7.5 In taking into account that the applicant failed to offer payment of security, the Committee acted irregularly in that the applicant is demonstrably unable to provide security.

The statutory framework

[8] According to section 2 of the TAA, the primary purpose thereof is to provide for the effective and efficient collection of tax through:

- (a) aligning the administration of the tax Acts to the extent practically possible;
- (b) prescribing the powers and duties of persons engaged in the administration of a tax Act; and
- (c) generally giving effect to the objects and purposes of tax administration.

[9] Part B of the TAA deals with powers and duties. Section 6 thereof deals specifically with the powers and duties of SARS officials.

[10] Section 6(2) provides that powers and duties which are assigned to the Commissioner by the TAA must be exercised by the Commissioner personally but he or she may delegate such powers and duties in accordance with section 10.

[11] Section 6(3) provides that:

“Powers and duties required by this Act to be exercised by a senior SARS official must be exercised by—

- (a) the Commissioner;
- (b) a SARS official who has specific written authority from the Commissioner to do so; or
- (c) a SARS official occupying a post designated by the Commissioner in writing for this purpose.”

[12] Section 10 of the Act deals with delegation. Section 10(1) provides that

“A delegation by the Commissioner under section 6(2) must be in writing and becomes effective only when signed by the Commissioner.”

[13] Section 164 deals with payment of tax pending an objection or an appeal. In terms of section 164(1), unless a senior SARS official directs otherwise in terms of section 164(3), the obligation to pay tax; and the right of SARS to receive and recover tax, will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.

[14] Section 164(2) provides that a taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9.

[15] Section 164(3) empowers a senior SARS official to suspend the payment of tax and sets out the factors that should be taken into account in deciding whether to suspend or not. It provides that:

“A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors. including.:

- (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
- (b) the compliance history of the taxpayer with SARS;
- (c) whether fraud is prima facie involved in the origin of the dispute;
- (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or
- (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus.”

Analysis of the grounds of review

Lack of authority

[16] In terms of section 164(3) of the TAA a decision as to whether or not to suspend tax liability has to be taken by a senior SARS official. The TAA defines a ‘senior SARS official’ as a SARS official referred to in section 6(3) of the Act which, in turn, provides that the powers and duties required by the TAA to be exercised by a senior SARS official must be exercised by:

- (a) the Commissioner;

- (b) a SARS official who has specific written authority from the Commissioner to do so; or
- (c) a SARS official occupying a post designated by the Commissioner in writing for this purpose.

[17] The applicant contends that while the record reflects that the impugned decision taken under section 164(3) was made by the Tier Three Debt Committee, the record of decision did not include a delegation from the Commissioner to the Committee which complies with section 10 of the TAA. Section 10 requires that, in order to valid, a delegation from the Commissioner must be in writing and signed by the Commissioner.

[18] In response, the respondent relied on annexure "SARS2" to the answering affidavit which was a schedule of designations of powers and authority by the Commissioner. That schedule is titled "Senior SARS Official (SSO) designations" and is dated April 2016. "SARS 2" reflects that certain posts were designated to deal with decisions relating to, amongst others, section 164(1), (2), (3) and (5) of the TAA. Included in the list of positions designated to deal with these are:

- 18.1 Group Executive;
- 18.2 Executives;
- 18.3 Senior Managers;
- 18.4 Managers;
- 18.5 Ops managers;
- 18.6 Ops specialists;
- 18.7 Chairperson of Tier 1 Debt Write off and Compromise committees;
- 18.8 Chairperson of Tier 2 Debt Write off and Compromise committees;
- 18.9 Chairperson of Tier 3 Debt Write off and Compromise committees;
- 18.10 Chief officer: Business;
- 18.11 Chief officer: Enforcement; and
- 18.12 Chief officer: Legal Counsel.

[19] The respondent argued that the members of the Tier Three Committee all held posts which fell within the designations mentioned in "SARS2". Therefore, the argument that the decision of the Committee taken in terms of section 164(3) was unauthorised, is without merit.

[20] Having considered the provisions of the TAA, it is evident that the designations set out in 'SARS 2' fall within section 6(3)(c) and not section 6(3)(b) of the TAA. Given that the Commissioner has designated that certain posts may exercise powers under section 164(3) of the TAA and has not delegated this power to specific individuals, in my view section 10 of the TAA does not find application. This means that it is not required by the TAA that the document setting out the designations has to be signed by the Commissioner.

[21] What is however of concern, is that "SARS2" does not designate the power to decide under section 164(3) to the Tier Three Committee specifically. Instead it designates the posts of individuals who happen to be members of the Tier Three Committee as having that power.

[22] In contending that the Tier Three Committee was empowered to exercise the power, the respondent relied on the case of G¹ for the proposition that the power of delegation was unlimited and that a decision-maker could delegate his power to a number of functionaries. However, in G, the court expressly stated that the power was unlimited as long as the "person or bodies" to which the power was delegated were clearly indicated.

[23] In the present matter, there was no express or clear delegation to the Three Tier Committee. Nor was the Three Tier Committee expressly mentioned in the designation document. The respondent argued that, notwithstanding this, it was still competent for the Committee to take the decision in view of the fact that each of the individual members of the Committee was empowered (by virtue of the designation of the posts they occupied) to take the decision.

[24] Such a submission, in my view, is inconsistent with our constitutional order and the doctrine of legality. The Tier Three Committee sat as a committee to consider and decide on the request to suspend under section 164(3) of the TAA. It is evident from the contents of annexure "SARS1" to the answering affidavit that the Committee is a complex structure which includes a number of members, permanent invitees and specialist advisors. It even has its own secretariat. It is described by the respondent as "the highest decision-making body within SARS concerning, inter alia, taxpayers' requests for suspension of payment".

[25] Given that the Committee not only performs an advisory function but also a decision-making one, it stands to reason that the Committee (being distinct from its individual members) must be properly empowered to do so. This is precisely what the doctrine of legality requires.

¹ *G v Superintendent, Groote Schuur Hospital, and Others* 1993 (2) SA 255 (C).

[26] The respondent has not put up any information to support the contention that the Tier Three Committee was empowered to take the decision. Accordingly, I find that it lacked the authority to do so.

The request from SARS that the applicant lodge a new application to suspend

[27] The applicant contends that the order of Weiner J of 20 June 2014 setting aside the decision to refuse to suspend tax liability and remitting same to SARS was not properly implemented by SARS.

[28] Rather than reconsider the decision, SARS requested that the applicant submit a new application for suspension of payment. The reasoning for this is explained in the answering affidavit and in “ACP2” to the founding affidavit: by the time the order by Weiner J was granted, the information supplied in the original application was outdated. Hence SARS was forced to request a fresh application with updated information.

[29] This request resulted in the applicant submitting a fresh application. It is the refusal of this application which forms the subject-matter of the present review.

[30] The applicant contends that the request by SARS that the applicant submit a new application amounted to a reviewable error of law given that Weiner J had remitted the previous application to SARS. SARS therefore was obliged to decide that application.

[31] I agree that the effect of the judgment by Weiner J is that the old application was remitted to SARS and had to be redetermined taking into account the content of Weiner J's judgment. However, what the applicant's argument fails to explain is how the request by SARS for a fresh application (even if assumed to be based on an error of law) vitiates or taints the decision impugned in this application, being the refusal of the new and distinct request to suspend tax liability.

[32] Put differently, the administrative decision challenged in the present matter is the refusal of the latest application for suspension. The applicant has not challenged the failure by SARS to determine the previous application or the request by SARS that he submit a fresh application for suspension of payment. Instead, he has confined himself to only challenging the latest decision not to suspend payment.

[33] The matter is rendered more complex by the fact that the applicant had in any event acquiesced in the request by SARS that he file a fresh application when he filed a new application on 24 January 2017. He cannot now seek to collaterally challenge that request.

[34] In my view, the applicant has fallen short of demonstrating that the request by SARS that he bring a fresh application for suspension tainted the decision taken by SARS in respect of the application which forms the subject-matter of this review.

[35] This ground of review must therefore fail.

Full disclosure and Provision of Security

[36] In his founding affidavit, the applicant states that it would deny him his right to a fair trial if he were required to provide security given that his current gross asset value is R25 136 308 whereas his liabilities are R41 813 673. He argues that the Committee's failure to have regard to this renders its decision reviewable.

[37] In this regard, the applicant relied on his balance sheet at "ACP49" to the founding affidavit as well as "ANT23" which forms part of the review record. However, in the course of argument, counsel appearing for the applicant conceded that the long term liabilities reflected in these documents supplied by the applicant included long term loans to related entities in which the applicant owned shares. No explanation was proffered for why these loans were listed as the applicant's personal liabilities. It was also conceded that the financial information of the related entities was not supplied to SARS.

[38] This demonstrates that the applicant did not provide a full and accurate reflection of his financial position to SARS. In the circumstances, SARS cannot be faulted for taking this into account in deciding whether or not to grant the application to suspend payment.

[39] The applicant complains that SARS failed to have regard to the assertion made in his application for suspension that he could not afford to provide security for the tax debt. However, given his incomplete (and inaccurate) financial statements, in my view, SARS was entitled to view this assertion with scepticism.

[40] The ground of review relating to full disclosure and provision of security must accordingly fail.

Frivolous and vexatious tax appeal

[41] In "ACP1" it is stated that one of the reasons why the applicant's request has been declined is because SARS is of the view that the appeal is frivolous or vexatious. The Committee also took into account that the applicant is employing dilatory tactics in conducting the appeal.

[42] The applicant contends that these reasons are irrational in that:

42.1 There are good prospects of success on appeal. In this regard, the taxpayer argues that as three of the seven years may have become prescribed. Furthermore, even if the prescription argument does not success;

42.2 The applicant has not engaged in dilatory conduct. In sharp contrast, the conduct of the respondent and its legal representatives has resulted in a delay in the finalization of the tax appeal.

[43] The response by the respondent to this leg of the review seem to centre around establishing that the tax appeal had no prospects of success. This however does not accurately capture the reasoning underpinning the decision to refuse to suspend. According to “ACP1”, one of the reasons is that the appeal is frivolous and vexatious. In this regard, while section 164(5)(a) of the TAA empowers a senior SARS official to deny an application to suspend if the objection or appeal is ‘frivolous or vexatious’, the TAA does not provide any guidance in lending meaning to the term “frivolous or vexatious”.

[44] However, our courts have equated this term with an abuse of process. In *Price Waterhouse Coopers Inc*,² the SCA held that:

“Frivolous or vexatious litigation has been held to be an abuse of process (*per* Innes CJ in *Western Assurance v Caldwell’s Trustee (supra)* at 271 and in *Corderoy v Union Government (Minister of Finance) (supra)* at 517) and it has been said that ‘an attempt made to use far ulterior purposes machinery devised for the better administration of justice’ would constitute an abuse of the process (*Hudson v Hudson and Another (supra)* at 268).”³

[45] In *CCII Systems*⁴ the Court considered the interpretation of the term ‘frivolous and vexatious’ as used in the Promotion of Access to Information Act 1 of 2000 and held that: “The Act provides no guidelines for when a request is frivolous or vexatious. The ordinary meaning of frivolous (SOED) is ‘lacking seriousness or sense: silly’ which suggests no serious purpose. The ordinary meanings of vexatious (SOED) are ‘1. causing or tending to cause vexation, annoyance or distress: annoying, troublesome. 2. spec in LAW, of an action: instituted without sufficient grounds or winning purely to cause trouble or annoyance to the defendant’.”⁵

² *Price Waterhouse Coopers Inc v National Potato Co-Op Ltd* 2004 (6) SA 66 (SCA).

³ P81A.

⁴ *CCII Systems (Pty) Limited v Lekota NO* (23554/02) [2005] ZAGPHC 45 (15 April 2005).

⁵ Para 34.

[46] The respondent has, in its answering affidavit, fallen far short of demonstrating that the appeal instituted by the applicant is frivolous and vexatious. Furthermore, the respondent did not refer to any evidence contained in the record of decision which supports such a conclusion. Instead, it sought to demonstrate that the appeal is lacking in merit. However, as is evident from the authority referred to above, this is not sufficient to demonstrate that the appeal is frivolous and vexatious. The respondent was required to demonstrate that the appeal constitutes an abuse of process or that it was purely intended to cause annoyance to the respondent. This it has failed to do.

[47] I accordingly find that there is no rational connection between the conclusion reached by the Committee that the tax appeal is frivolous and vexatious and the material placed before it.

[48] In the circumstances I uphold this ground of review.

Amendment of the notice of motion

[49] One of the interlocutory issues argued before me was the proposed amendment of the applicant's notice of motion. The respondent took issue with the applicant's proposed amendment on the basis that the applicant had not complied with rule 28.

[50] Notwithstanding this, the court file was arranged, paginated and indexed as if the amendment had already been properly effected.

[51] Given that the matter was fully argued before me, the respondent conceded that I should not disallow the proposed amendment. However, counsel for the respondent urged the court to mark its displeasure with the applicant's conduct through a punitive costs order.

[52] I agree with the respondent that the applicant's conduct is worthy of censure. I accordingly grant the amendment but order that the applicant pays the costs occasioned by the amendment on an attorney and client scale.

Order

[53] The order I hand down is the following:

- (a) The amendment to the applicant's notice of motion is granted.
- (b) The applicant is order to pay the costs associated with the amendment on an attorney and client scale.

- (c) The decision by the respondent to refuse the applicant's request to suspend payment of his tax liability for years of assessment 2005, 2006, 2007, 2008, 2009, 2010 and 2011 pending the finalisation of his tax appeal pending before the Tax Court is reviewed and set aside;
- (d) The applicant's request to suspend payment of his tax liability for years of assessment 2005, 2006, 2007, 2008, 2009, 2010 and 2011 pending the finalisation of his tax appeal pending before the Tax Court is remitted to the respondent for reconsideration;
- (e) Save as provided for in order (b) above, the respondent is ordered to pay the costs of this application.



K PILLAY AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

Date of hearing : 27th May 2019

Date of judgment : 31st May 2019

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