IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

DATE: 10 MARCH 2017

SIGNATURE.....

In the matter between: **CASE NO. 30832/2015**

HILTON REED	Applicant
and	
THE MINISTER OF FINANCE	First Respondent
THE SOUTH AFRICAN REVENUE SERVICE	Second Respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Third Respondent

J U D G M E N T

P F LOUW, AJ

[1] On 13 November 2013 Mr Reed, the present applicant, applied for so-called voluntary disclosure (abbreviated herein as "VD") relief from the third

respondent ("SARS")[1] in terms of Part B of Chapter 16 of the Tax Administration Act 28 of 2011 ("the TAA", I refer to this application as "VD application"). SARS, under the hand of Ms du Plooy, declined the VD application on 10 July 2014 ("the VD decision") on the ground that the application was not "voluntary" as required by section 227(b) of the TAA. Mr Reed now applies for the judicial review of the VD decision and that it be set aside and remitted to SARS for reconsideration, alternatively, that it be declared that the VD application was voluntary. The main grounds for the judicial review are set out in paragraph 76 of Mr Reed's founding affidavit namely that the VD decision was made arbitrarily and capriciously and that it was not rationally connected to the facts, to the purpose for which it was taken and to the reasons SARS gave for it. This is, of course, nothing but a full frontal assault on the merits or material cogency of the decision. During oral argument Mr Rossouw SC, who appeared together with Mr Sevenster for Mr Reed, changed tack. He argued that the main line of attack is actually not the full frontal assault but it is rather procedural in nature. It concerns the manner in which SARS took the VD decision in general and SARS' failure to refer prejudicial evidence that it had received to Mr Reed for his response before determining the VD application. I refer to the two attacks as "the merits attack" and "the procedural attack".[2]

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[1] The first and second respondents played no role in the proceedings and the events that underlie the application.

[2] Mr Reed initially sought an order substituting the court's decision viz that the VD application complied with the relevant statutory requirements for SARS' decision but Mr Rossouw abandoned this relief at the hearing. He, however, did not abandon prayer 2 containing the declaratory relief referred to in the text. As I explain in the text, he argued that the VD decision is liable to be reviewed for procedural reasons, alternatively, and if the procedural attack were to fail, on the merits, hence the retention of the declaratory relief. How the declaratory relief is to be squared with the abandonment of the substitutionary relief is unclear to me but, given the view I have formed of the matter the conundrum does not require a solution.

[2] Ms Rajab-Budlender, who appeared together with Messrs Burger and Mpshe for SARS, argued that Mr Reed is precluded from raising the procedural attack at this stage because it was not foreshadowed in the founding papers. On the other hand, Ms Rajab-Budlender had no reservation to meet the merits attack as it had been fully set out in the founding papers.

[3] In what follows I first set out the facts. I then turn to the procedural attack and, in particular, whether this line is open to Mr Reed for considerations of pleading and prejudice. I then give a concise overview of the most important aspects of the relevant legislation for present purposes and I then consider the merits attack.

[4] The facts are for the most part common cause. Mr Reed held the majority member's interest in a close corporation, International Trade and Commodities 205 CC, which traded under the name Assortim Duty-free, "Assortim" herein. Assortim carried on business as a duty-free merchant that had extraordinary tax implications (value-added tax was, for example, not charged on the supplies that it made) and it had to comply with strict provisions to conduct this business. It maintained a warehouse for business purposes. During September 2013 Assortim as entity and the warehouse as facility attracted the attention of SARS' customs and excise division who requested Mr Visser, a tax specialist and SARS official, to look into Assortim for tax compliance. It is a standard operating procedure for SARS investigators, such as Mr Visser, to consider the tax compliance of the members of a close corporation whenever the tax affairs of the corporation

are considered.[3] He consequently commenced a desk-top investigation of Mr Reed's tax affairs. It must be stressed that Mr Visser did not have any written authorisation from a senior SARS official for his investigations into Assortim and Mr Reed. The relevance of this remark will become apparent below.

[5] Mr Reed is evidently a businessman of parts, successful to the world outside with many motorcars and the accoutrements of wealth, but with a dark secret: He had last submitted a personal tax return in 1991, 22 years before 2013. Needless to say, the failure to submit tax returns can be penalised by administrative penalties and criminal sanctions.

[6] Assortim's other member is an attorney who is a partner in the firm representing Mr Reed in these presents namely C J Willemse, Muller and Babinsky Attorneys. Mr Muller of this firm acted as Assortim's and Mr Reed's legal representative. Assortim's representative in its normal contact with SARS was the late Mr Pienaar and its professional tax advisor was Mr Cortese.

[7] When Mr Visser performed the hygiene test he immediately determined that Mr Reed had not submitted tax returns and he was thus not tax compliant. Given the importance of this point I quote in full what Mr Visser said in paragraph 11 of his affidavit:

> "During the tax hygiene exercise referred to above, I discovered that the Applicant had not filed any tax returns for the past 22 years. I however could not pick up his active tax number in the system. It appears that his tax number was suspended by SARS. The Applicant's tax number was reflected as "05PENDINACT"."

[3] This is colloquially referred to by SARS as a "hygiene test". One of the core issues in this case is whether Mr Visser was conducting an investigation as contemplated by s 266 of the TAA when performing the hygiene test. I deal extensively with this issue below and use the term "investigate" at this point in a neutral sense and not to indicate a formal investigation as contemplated in s 148.

[8] After his overview of Assortim's tax affairs, Mr Visser provisionally concluded that Assortim was also not tax compliant. He thus had two matters that he wished to follow up with Assortim and Mr Reed namely Assortim's apparent non-compliance and Mr Reed non-compliance namely his non-submission of returns for a period of 22 years. Mr Visser then contacted Mr Pienaar who referred him to Mr Muller who in turn referred him to Mr Cortese. Mr Muller made it clear to Mr Visser that Mr Cortese was the tax advisor of both Assortim and Mr Reed. Mr Visser telephoned Mr Cortese on a number of occasions and managed to speak to him on 30 September 2013. Mr Visser informed Mr Cortese that he was investigating Assortim and "looking at the tax affairs" of Mr Reed. The gist of the discussion between Messrs Cortese and Visser pertaining to Mr Reed appears from paragraph 23 of Mr Reed's founding affidavit, where he stated the following:

> "During the aforesaid telephonic conversation Mr Visser informed Mr Cortese that he was tasked by his head office to investigate the VAT account of Assortim and requested a meeting to be set up. Mr Visser also made the following statement to Mr Cortese: *'Ek het na die indiwidu gaan kyk en hy het nie 'n belastingnommer nie'*. Mr Cortese indicated that I indeed had a tax number but that same was made inactive by SARS. Mr Cortese was requested by Mr Visser to confirm the tax number on the meeting to be arranged." (sic)

[9] Around the time of this telephone conversation, Mr Cortese informed Mr Reed of the VD programme and advised him to make a VD application. Mr Reed decided to do so and to inform SARS that he had not submitted returns for 22 years in order to obtain the benefits of the VD programme (which I set out below). A VD application was prepared and submitted on the SARS e-filing platform on 30 November 2013, as I have noted above. The electronic submission was accompanied by a memorandum of which paragraph 4.3 read:

> "The Applicant confirms that he has not been advised that he has been subjected to an official audit or investigation by a SARS official in the prescribed format as required by the TAA nor is he aware of a pending audit or investigation into his affairs or that an audit or investigation has commenced, but not yet concluded."

[10] Shortly after the submission of the VD application, on 19 November, Mr Visser and another SARS official, Ms Smit, met with Mr Cortese and Mr Muller. Mr Cortese informed Mr Visser and Ms Smit of the VD application, of which they were ignorant at the time. Mr Visser, in somewhat contorted grammar, explained their response (presumably expressed by Mr Visser) to this communication as follows:

> "On being informed of the VDP application, Estelle Smit and I, made it known to both Mr Cortese and Mr Muller that the application for VDP was invalid, due to the fact that the audit into the matter preceded the application. They both acknowledged that the audit preceded the VDP application." (sic)

[11] Mr Cortese later denied that he had made the concession. However, it is common cause that Mr Reed's tax affairs were discussed at the meeting. After the meeting Mr Visser drafted minutes recording the concession. Alas, they were not sent to Mr Cortese – or, for that matter, to anyone else in Mr Reed's camp.

[12] Mr Reed's VD application was allocated to Ms du Plooy (to whom I referred in the first paragraph above) for evaluation. She contacted Mr Visser and he told her of the 30 September telephone discussion with Mr Cortese, what he had informed Mr Cortese and the latter's 19 November concession.

[13] Ms du Plooy did not refer Mr Visser's account to Mr Reed for his comment. This is the (non) event that Mr Rossouw argued constituted a violation of the audi principle. In any event, after many tos and fros between the SARS and

Reed camps, Ms du Plooy declined the VD application, on 10 July 2014, giving the reason stated in paragraph 1 above, namely that the disclosure was not "voluntary". On 4 August 2014, after a request had been made for further reasons for the decision, SARS responded by restating its original reason.

[14] The present application was launched on the 4th of May 2015. SARS raised two points in limine namely breach of the 180 day time limit within which proceedings have to be instituted in terms of section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and non-compliance with the notice period contemplated in section 11(4) of the TAA. Ms Rajab-Budlender, wisely in my estimation, did not ask for determinations of these points.

[15] Against this background I now turn to the procedural attack which is, I repeat, that Ms du Plooy (as the embodiment of SARS) could and should have referred Mr Visser's version of the 19 November meeting to Mr Reed before deciding on the VD application.

[16] That an administrator may have to refer prejudicial evidence for comment to an applicant in practical application of the audi alteram partem principle behoves of no doubt. Mr Rossouw referred to the judgment of Brand AJA (as he then was) in **Nortje v Minister of Correctional Services**[4] in this regard. What happened in Nortje's matter was that the abolition of the death penalty

[4] [2001] 2 All SA 623 (A) at paragraph [14]. See also Hugh Corder "The Content of the *Audi Alteram Partem* Rule in South African Administrative Law" 1980 **THRHR** 156 for the common law position and Cora Hoexter **Administrative Law in South Africa** 2ed 327 and further for the constitutional position and especially 379 et sec where she deals with the topic "An opportunity to present and dispute information and arguments". Whilst s 3(3) of PAJA requires that the aggrieved individual ought to be given the opportunity to deal with prejudicial evidentiary matter, the rule is not absolute. Where an applicant applies for some benefit and he or she is obliged to establish some fact for the administrator to find in his or her favour and in the absence of any indications relevant in the legislation to the contrary, the administrator may accept that the applicant has been afforded a full right to be heard. The rule takes on a different complexion where the aggrieved individual is not an applicant but a party affected by conduct of the administrator, i.e. where the initiative to change the legal order does not come from the individual but from the administrator or someone else.

required the reclassification of long term prisoners. A number of prisoners, the applicants in the matter, were reclassified and transferred to a maximum security facility where they forfeited many of their previous privileges. They argued that the decision to transfer them was procedurally unfair and in particular, alleged that the audi alteram partem rule was not honoured. The respondent conceded that the audi rule was a prerequisite for a valid decision to change benefits and transfer prisoners. Brand AJA then remarked as follows on this concession:

> "Hierdie toegewing is na my oordeel tereg en billik gemaak. Dit beteken uiteraard nie dat elke gevangene wat oorgeplaas word van een afdeling van 'n gevangenis na 'n ander of van een gevangenis na 'n ander gevangenis geregtig sal wees op 'n aanhoring nie. Elke geval moet op sy eie feite beoordeel word. Volgens artikel 33 van die Grondwet, 108 van 1996, het elke persoon die reg op administratiewe optrede wat prosedureel billik is. Ten spyte van die veranderde konstitusionele bedeling wat deur die aanvaarding van die Grondwet teweeggebring is, is die beginsels van die gemenereg steeds rigtinggewing oor wat in 'n bepaalde geval prosedureel billik sal wees ... . Die formulering van die gemeenregtelike beginsels in die verband is te vinde byvoorbeeld in **Administrator Transvaal and Others v Traub and Others** 1989 4 SA 731 (A) te 758 D-E and **South African Roads Board v Johannesburg City Council** 1991 4 SA 1 (A) te 10 G-I. Hiervolgens vind die audi reël toepassing waar die administratiewe besluit 'n persoon tot so 'n mate kan benadeel dat die besluit, ooreenkomstig die persoon se gebillikte verwagting (legitimate expectation) nie geneem sal word sonder om hom aan te hoor nie."

[17] The question that consequently arises is whether the circumstances of this case gave rise to an audi duty. It is precisely at this point that Ms Rajab-Budlender argued that I cannot determine whether such duty burdened Ms du Plooy because this aspect of the case was not identified as an issue nor was it fleshed out in the founding or supplementary founding affidavits; the affidavits, it is trite, being both pleadings and evidence.

[18] There is, indeed, no statement in the founding affidavit that Ms du Plooy had the duty to act positively by referring Mr Visser's version to Mr Reed, nor is there such a statement in the supplementary founding affidavit. There are some oblique statements that may on a very, very liberal reading point towards the audi argument but they are so non-specific that I have come to the conclusion that there is much force in Ms Rajab-Budlender's argument. The test to apply to determine whether Ms du Plooy was as a matter of fact and law obliged to invite Mr Reed's response to Mr Visser's reports to her is, it seems to me, akin to the test that should be applied to determine whether there was a duty on someone to speak in a misrepresentation case. A variety of factors, dictated by the surrounding circumstances, have to be taken into account to determine whether there is a duty to act positively and whether the breach of the duty is legally relevant.

[19] In **McCann v Goodall Group Operations (Pty) Ltd**[5] a full bench considered what the categories of element may be that will require a person to speak up in order to convert a legally relevant omission into a legally relevant act. This list is not closed but include considerations such as whether the fact in question was exclusively to the knowledge of the person whose conduct is being tested for legal relevance, whether the other party was wholly dependent upon a frank disclosure, whether there were any unusual characteristics in the transaction at hand and whether the person whose conduct is being tested knew that the other party was under a misapprehension. All these factors are simply manifestations of the bigger principle namely that the boni mores dictate when inactivity is not acceptable and when there is a duty to act positively.

[5] 1995 2 SA 718 (C).

[20] Translated to the facts of the present matter it seems to me that there are many considerations that could point the one way or the other and the boni mores are not as such affronted by an administrator in Ms du Plooy's position not informing Mr Reed of Mr Visser's report and inviting him to respond thereto. These include the fact that the TAA is quiet on how an official in the position of Ms du Plooy ought to determine disputed factual issues. As I explain in more particulars below, the finding of a fact that serves as a jurisdictional threshold for some administrative decision is not something that lies within the area of expertise of the administrative organ. The normal deference that must be shown by a court to the executive limb of the state is thus notionally absent in such a case.[6] Whether SARS has a code advising its officials on how to deal with factual disputes or, perhaps, even a training manual are issues that are relevant. It is also necessary, I would think, to have knowledge of similar cases to see how SARS as a matter of course deals with such factual disputes. I also think that it would have been necessary for SARS to consider, particularly, that the onus of proof insofar as the "voluntary" aspect is concerned burdened Mr Reed.

[21] There is one further issue specific to this matter that would probably have been explored differently had the procedural attack been brought to SARS'

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[6] This does not mean, I hasten to add, that the approach of a court in review proceedings where a finding that a jurisdictional fact existed or was absent falls to be reviewed is any different from the approach where a policy-laden discretionary decision is reviewed. See for example **Demani v Nair** 2013 2 274 (SCA) at paragraph [26] to [33], the judgment of Cloete JA, with whom Mpati P, Heher, Cachalia and Theron JJA concurred. Cloete JA reaffirmed that factual findings of administrators are in principle reviewable, as Plasket AJA had expressly found in **Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman State Tender Board v Sneller Digital (Pty) Ltd** 2012 2 SA 16 (SCA) where he said in paragraph [34] that a material error of fact is a ground for review and that it probably falls under section 6(2)(i) of PAJA. However, as Cloete JA was at pains to stress, the distinction between appeals and reviews may not be blurred. A finding of fact may thus be reviewed but not on the basis that the reviewing court will substitute its decision for that of the administrator, save in the exceptional type of case. In other words, deference must still be shown to the administrator's decisions and this means that a wrong factual decision will not automatically lead to the setting aside of the overall decision on review, but this may be the case if the factual decision can be brought home under one of the rubrics of PAJA, where PAJA applies.

attention right from the outset. It concerns Mr Visser. Mr Visser is clearly the pivotal SARS official in this part of the case. He deposed to an affidavit that forms part of SARS' answering affidavits. The replying affidavit was not delivered on time and, at some point after its due date, Mr Visser resigned from his position with SARS. He then allegedly consulted with the Reed camp and reportedly recanted some of the evidence that was contained in his previous affidavit. However, Mr Visser did not depose to an affidavit in support of what he told the Reed camp, and his alleged recantation thus remained hearsay. This prompted SARS to deliver a fourth set of affidavits in which the hearsay allegations were dismantled. SARS could not get hold of Mr Visser and given the nature of the attack on the decision made in the founding affidavits, namely the attack on the merits, SARS was content that its response to the hearsay contained in the replying affidavit was adequate. Had the case been fought on the procedural issue, it is possible that SARS may have committed more resources to finding Mr Visser. The possibilities are also that Ms du Plooy's affidavits would have dealt with other topics. I am thus of the view that had the procedural point been raised in the founding or supplementary founding affidavits, different evidence would have been presented by SARS to protect its position. It is essentially a matter of fairness whether I should allow the procedural attack to continue.

[22] Weighing heavily against allowing the procedural attack to proceed is the following consideration. As I have pointed out above it was Mr Reed's case, from the outset, that Mr Visser had informed Mr Cortese as early as the 30th of September 2013 that "Ek het na die indiwidu gaan kyk en hy het nie 'n belastingnommer nie". The only logical conclusion that can be drawn from this statement is that Mr Visser had investigated Mr Reed's tax affairs.

Whether the hygiene test was an investigation or an audit as contemplated by sections 226 and 227 of the TAA is a matter of statutory interpretation, thus law, to which I turn below. But, it was an investigation. Assuming, for the moment, that a "looking at" the affairs of a taxpayer by a tax specialist who is an official of SARS is an investigation for purposes of sections 226 and 227, it seems to me that on Mr Reed's say-so in his founding affidavit an investigation had commenced or was at least pending that was aimed at determining his tax compliance and he was aware of it. Mr Visser states on oath that it was known to SARS that Mr Reed had not submitted returns for 22 years before he made his VD application. Taking all this into account, what else could Ms du Plooy find should the decision be remitted to her for reconsideration? It seems to me to be an absolute foregone conclusion that (once again, subject to the interpretation of investigation and audit to which I turn below) Ms du Plooy would be compelled to come to the conclusion that she previously came to. Does a court in these circumstances uphold an audi argument?

[23] A similar problem arose in **Manong and Associates v Director General: Department of Public Works**[7] where it was successfully argued that the administrator marred the process that had been followed when making the impugned decision but, even had the correct procedure been followed, it was manifest that the same decision would be made. It would thus be an exercise in futility to remit the matter, notwithstanding the clear procedural problem, to the administrator. At 685 to 686 Davis J said the following:[8]

> **"Prejudice adversely affecting rights**

[7] [2004] 1 All SA 673 (C) a judgment of Davis J.
[8] I realise that this is a long extract but, given the importance of the points made therein, I hope to be forgiven for quoting it in full.

The formulation of administration (sic, administrative) action in section 1 of PAJA appears to retain the concept of prejudice in our administrative law. This section refers to "any decision taken ... which adversely affects the rights of any person and which has a direct external or legal effect ...". In turn, this implies that the finding in **Grove Primary School v Minister of Education and Others**[9] (supra) applies to this dispute namely "that where an irregularity is calculated to cause prejudice to a party it is for the party to show that the irregularity in fact cause no prejudice" (at 997 H). Notwithstanding much learned argument by counsel as to the correctness and status of this dictum, there is a prior question which remains: What right of applicant was affected by the decision of the first and second respondent? A key passage in the founding affidavit reads thus: ...[10]

It would therefore appear to be undisputed that, were the roster to have been strictly followed, four other firms would have been entitled to the appointment, notwithstanding that these firms were not APSP firms. They have been elevated to the top of the list despite the adverse waiting to which they had been subjected in terms of the formula.

In passing, none of these firms were party to the present litigation. Even were applicant to have been granted the relief as prayed, it would not have been allocated to the appointment in terms of the system which it contends should have been followed. For this reason, Mr Rosenberg was constrained to argue that the right of applicant which had been adversely affected was a right to fair administrative action and to a fair procedure.

Currie and Klaaren[11] at 80-81 address this argument in the following way:

> '[i]t may be possible to argue that one of the rights affected in some instances is the constitutional right to just administrative action itself. It is somewhat circular to use an allegation that a constitutional right is affected to cross the threshold to access the protection afforded by a statute giving effect to that same constitutional right. The Act conditions the holding of the rights it grants on adverse effect to a right. The right affected logically speaking, must be a right other than the Act's rights. Nonetheless, given that access to the constitutional right has been limited by the statute and given that the right of just administrative action has several different components, this interpretation may be viable , at least in certain instances, such as to claim the right to be given reasons.'

In the present case the enforcement of a right which allegedly has been infringed leads to an academic cul-de-sac in that the applicant's

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[9] 1997 4 SA 982 (C).
[10] Quotation from the founding affidavit omitted.
[11] Promotion of Administrative Justice Bench Book 2001.

papers lay no basis for any argument other than that one of the four firms which headed the list should have been appointed on the basis of an argument based on the roster."

[24] As a consequence of these arguments Davis J refused the application. His 4approach was followed in **Cecele v Matjabeng Local Municipality**[12] where it was held at paragraph [24] that if a procedural error is reviewable it does not necessarily lead to the setting aside of the decision.

[25] Flexibility is thus required in the application of the audi alteram partem principle.[13] This is in line with the injunction of section 8 of PAJA namely that the court in proceedings for judicial review has to grant an order that is just and equitable. There then follows a number of examples of orders that may be contemplated but they are mere examples of what might be just and equitable in a given case. If it is not just and equitable to grant any relief at all even if a procedural rule has notionally been breached, then the just and equitable outcome is that no relief ought to be granted. This is in reality a discretionary trip switch to avoid pettifogging and the determination of moot and academic cases. If the procedural breach is wholly without consequence, then the correct remedy might even be to review but not set aside.[14]

[26] For all these reasons I have concluded that Mr Reed is not entitled to continue with the purely procedural attack. I now turn to the merits attack. Before doing so I have to give a concise overview of the relevant legislation.

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[12] 2005 JDR 1201 (O) by Musi J. See also Hoexter op cit 584 et seq.
[13] See for example **Mabitu v Mpumalanga Provincial Government** (1999) 8 BLLR 821 (LC).
[14] See again **Manong's** case supra. This judgment pre-dated the seminal judgment in **Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd** 2011 4 SA 113 (CC) where it was held that, in terms of section 72 of the Constitution, an illegal act must be set aside and then, after that, appropriate relief may be considered. Bengwenyama, however, did not deal with "colourless" breaches of process but with the type of case where the decision falls to be set aside on the merits and the two approaches run parallel to one another.

[27] The voluntary disclosure programme that is provided for in Part B of chapter 16 of the TAA was introduced into our legal landscape when the TAA commenced on 1 October 2012. It is an innovative creation and is clearly aimed at promoting ethical and moral conduct by incentivising errant taxpayers to make their amends with the Revenue by informing it of things that are detrimental to them and of which the Revenue is ignorant. By making a clean breast of it a taxpayer may obtain the VD relief promised in section 229. This is that SARS will not pursue criminal prosecution for a tax offence and will grant relief in respect of understatement penalties and in respect of administrative non-compliance penalties that could otherwise have been imposed. The approval of a VD application and relief granted under section 229 must be evidenced by a written agreement between SARS and the applicant in terms of section 230. The purpose of a VD application is thus to enter into a VD agreement.

[28] There are three cardinal components to the VD programme. They are the concepts of "default", "voluntary" and "disclosure". Of these three only "default" is defined in the TAA. At the time that the events relevant herein occurred, default was defined in part to mean the submission of inaccurate or incomplete information to SARS or the failure to submit information where such submission or non-submission resulted in (a) the taxpayer not being assessed for the correct amount of the tax, (b) the correct amount of tax not being paid by the taxpayer or (c) an incorrect refund being made by SARS. Counsel on both sides agreed that a failure to submit a return is a default.[15] Mr Reed thus fulfilled the first requirement.

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[15] The definition was amended by the Tax Administration Laws Amendment Act of 2015 and now reads:

[29] Turning now to the concept of volition that is the second component of a VD application. "Voluntary" is not defined. Its meaning must be found in the two main sections in which it is used viz 226 and 227. The requirements for a VD application are set out in section 227. These include, in section 227(a), that the disclosure must be "voluntary". Section 226 sets out the personal qualities of a prospective VD applicant. I quote it in full:

> **"Qualifying persons for voluntary disclosure**
>
> 1. A person may apply, whether in a personal, representative, withholding or other capacity, for voluntary disclosure relief, unless that person is aware of –
>
>   a. a pending audit or investigation into the affairs of the person seeking relief; or
>
>   b. an audit or investigation that has commenced, that has not yet been concluded.

"**Default** 'means the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a "tax position", where such submission, non-submission, or adoption resulted in an understatement."

It is significant that the consequences of the act of errant submission stated in the previous incarnation (an assessment, the payment of the incorrect amount of tax or incorrect refunds) no longer form part of the definition. However, at the time of the events herein they did form part of the definition. The reason why I make a point of the definition is that to my way of thinking the argument could perhaps be made that the non-submission of a return is not a "default" as it was defined before the 2015 amendment. Where no return was submitted there could logically be no assessment, no tax paid or refunds made. The same holds true under the new definition. It introduced the "understatement" qualifier. The triad of events (assessment, payment or refunds) now have to result in an understatement. The defined event must thus be causally linked to a position of understatement. "Understatement" is defined in section 221 to include a default in rendering a return. This would mean that the rendering of a return can only be a default if the submission of inaccurate or incomplete information gives rise to the default in rendering a return or if the failure to submit information results in a default in rendering a return. This does not seem to me to fit. Inaccurate or incomplete information presupposes a return. The failure to submit information also presupposes a return. A return is not information, it is a statutory obligation. The fact that "understatement" is defined to include a default in rendering a return is because understatement penalties as set out in s 223 include, expressly, the non-rendering of returns. It would be wrong to determine the meaning of "default" in s 225 via the implied reference to s 221 in s 223 and thus to equate the understatement of s 225 to that of s 223. There is of course a presumption that language is used consistently in legislation but it can be rebutted by the context, see **Johannesburg Municipality v Gauteng Development Tribunal** 2010 6 SA 182 (CC) paragraph [52] to [53]. To equate the two understatements requires the meaning of "default" to be pulled into grammatically intolerable constructions and is a procrustean interpretation. I put these views to counsel during argument and Mr Rossouw, not surprisingly, argued strongly that the point is wrong whilst Ms Rajab-Budlender urged me not to go down this route because it has not been taken by SARS and is unexplored in the affidavits. There might be unforeseen consequences should I decide the matter on the basis of this point. Ms Rajab-Budlender is, of course, correct – the point has not been explored in the affidavits and it would be wrong for me to base my judgment on it. What is set out in this footnote is thus not the ratio for any finding made in this judgment.

2. A senior SARS official may direct that a person may apply for voluntary disclosure relief, despite the provisions of subsection (1), where the official is of the view, having regard to the circumstances and ambit of the audit or investigation, that

   a. The "default" in respect of which the person wishes to apply for voluntary disclosure relief would not otherwise have been detected during the audit or investigation; and

   b. the application would be in the interests of good management of the tax system and the best use of SARS' resources.

3. A person is deemed to be aware of a pending audit or investigation or that the audit or investigation has commenced, if —

   a. a representative of the person;

   b. an officer, shareholder or member of the person, if the person is a company;

   c. a partner in a partnership with the person;

   d. a trustee or beneficiary of the person, if the person is a trust; or

   e. a person acting for or on behalf or as an agent or fiduciary of the person,

   has become aware of a pending audit or investigation or that the audit or investigation has commenced."

[30] Section 226 thus contains threshold requirements that are specific to the person of the applicant. The crucial factor is lack of knowledge that there is a pending audit or investigation. Put differently, the applicant has to be ignorant of any pending audit or investigation or audit or investigation that have already commenced. The VD applicant must allege and prove this ignorance. "Voluntary" thus means bringing information to SARS when there is no causal SARS investigation underfoot and if there is, in ignorance of it. Once again, Mr Cortese and thus Mr Reed knew of Mr Visser's "looking into the individual". There was thus the required knowledge to disentitle Mr Reed as VD applicant,

but only if the "looking into" was an "investigation or audit" as contemplated in sections 226 and 227. The cardinal issue in the present matter is consequently whether the fact that Mr Visser "het na die indiwidu gaan kyk en hy het nie 'n belastingnommer nie" connotes an investigation or audit for purposes of section 226. Was Mr Reed thus aware (taking into account the deeming provision contained in section 226(3)(a) of the TAA) that an investigation or audit had commenced? What is an audit or investigation for purposes of section 226? That is the question.

[31] Mr Rossouw argued that "investigation" and "audit" have specialised meanings for purposes of the TAA. He referred to the information gathering provisions of chapter 5 of the TAA in this regard. Chapter 5 consists of four parts, part A provides general rules for inspection, verification, audit and criminal investigation, part B deals with inspections, request for material, audits and criminal investigations, part C deals with enquiries and part D with searches and seizures. It is common cause that a formal audit or investigation as contemplated in part A of chapter 5 did not commence prior to the VD application. In terms of section 41 a SARS official is authorised to conduct a field audit or criminal investigation only if a senior SARS official granted him or her written authorisation to do so. This did not happen here. What is immediately striking from section 41 is that it does not deal with audits or investigations in generic terms but with very specific audits and investigations, namely field audits and criminal investigations. Although no provision of the TAA deals with any audit other than a field audit, or any investigation other than a criminal investigation, there is, to my way of thinking, no need for the TAA to deal with desk audits and non-criminal investigations. The reason for this is that the privacy and other

constitutionally protected rights of third parties, in other words persons other than taxpayers and SARS and the taxpayers themselves, may be affected by field audits and criminal investigations but not by desk audits and non-criminal investigations. Very specific rights are afforded to persons who are subject to field audits and criminal investigations. There is no need for the protection of privacy and other constitutionally protected rights and interests under desk audits or non-criminal investigations. To my mind section 41 thus deals with specific types of audits and investigations with the inescapable result that there must also be other types of investigations and audits. Section 226 is specifically not particular and refers to general audits and inspections, which may include formal field audits and criminal investigations. Non-criminal investigations and non-field audits must thus be included under section 226. This being the case the question is whether Mr Visser's hygiene test can be seen as an investigation or an audit for purposes of section 226.

[32] Audit is not defined in the TAA. "Audit" can be used either as a noun or a verb. Its origin is the Latin stem "audire" meaning "hear". The Shorter OED gives five meanings for audit. The first is an official examination and verification of financial accounts, especially by an independent body. The second is a statement of account or a balance sheet. The third is a hearing, an enquiry, a methodological and detailed review. The fourth is a periodical settlement of accounts between landlord and tenant and the last is a searching examination, a reckoning, a settlement, especially the Day of Judgment. "Investigation" is also Latin in origin and is defined in the Shorter OED as the action or process of investigating, systematic examination, careful research or an instance of this, a systematic enquiry, a careful study of a particular subject. "Investigate" is a transitive verb and indicates the activity of

searching or inquiring into something, examining a matter systematically or in detail, or the making of an official enquiry into something.

[33] There is consequently a substantial overlap between the meanings of audit and investigate in their ordinary usages. But investigation seems to be of a lessor order of formality than audit. It seems to me that the hygiene test to which Mr Visser deposed is nothing but an investigation. It might very well be preliminary in nature because at the time that it is conducted there is no reason to suspect any wrongdoing by a taxpayer. It is "scoping" in nature. It does not proceed from an a priori position where there is some prima facie evidence to point to wrongdoing, but to determine whether there is wrongdoing; it is the same as a screening test used in medical practice, hence its apt description as a "hygiene test". It focuses on internal SARS resources. It is aimed at a specific person to determine whether the person is tax compliant. In the present case Mr Visser was confronted with the massive discrepancy between a person holding a substantial membership in a close corporation and yet not having an active tax number and, to top it all, not having submitted a return for 22 years. The purpose was clear: Determine whether the specific person is tax compliant. The methodology was clear: Research SARS' own database. The result was clear: Non-compliance for a period of 22 years and an inactive registration. Further investigations could quite clearly be conducted from this factual foundation but Mr Visser was already in possession of all the facts to make out a prima facie case against the taxpayer for a criminal prosecution for the failure to submit returns and depending on what returns would be submitted in due course or what estimated assessments would be made by SARS in due course, there were real prospects of substantial administrative penalties to be paid (even if no tax

was payable). In my view there was thus an investigation ongoing at the time that Mr Reed submitted his VD application.

[34] I return again to the question: Was Mr Reed aware of the investigation? In Mr Reed's own words, Mr Cortese was told that Mr Visser was looking into Mr Reed's tax affairs. A SARS official looking into a taxpayer's tax affairs to my way of thinking connotes an investigation in the broad sense set out above.

[35] I am consequently of the view that Mr Reed was not entitled to apply for VD relief because he was aware of the Visser investigation into his affairs. The VD application was not voluntary. There is, however, a further reason for this conclusion. As I pointed out one of the components of section 226 is (apart from default, and the element of voluntariness) the concept of disclosure. Disclosure is, once again, not defined in the TAA and it must carry its ordinary grammatical meaning. According to the Shorter OED the verb "disclose" (also originally from the Latin "dis" meaning "non" on "un" plus "claudere" meaning close, thus "unclose") means to open up something closed or folded up, to expose to view, make known or reveal, come into light and disclosure as noun carries the meanings of the action of making known or visible. If somebody knows something then it is difficult to see how, without straining language into incomprehensibility, another person can "disclose" the thing known to the first person. Determining whether something is (disclosable) is not a subjective matter but is purely objective – does the person have knowledge of the thing or not; if not, it can be disclosed, if yes it cannot be disclosed. In the present matter Mr Visser's evidence was that he knew of the 22 years of outstanding returns by his own effort; he had discovered this fact in the records of SARS,

prior to the VD application being made. How can the VD application then disclose to SARS something that SARS knew?

[36] To summarise: In my view Mr Visser's hygiene test was an investigation for purposes of section 226, Mr Reed was aware of the investigation and he did not disclose anything to SARS that SARS was unaware of when he informed SARS on 13 November 2013 in his VD application that he had not submitted returns for 22 years. At that point SARS was well aware of this fact.

[37] In the result the application falls to be dismissed. The SARS team comprised of three advocates which is in my view an unnecessary extravagance. Mr Reed employed two counsel and given the issues involved in the matter I am of the view that it was prudent for both parties to employ two counsel. I accordingly make the following order:

1. The application is dismissed.

2. The applicant is ordered to pay the defendant's costs including the costs consequent upon the employment of two counsel.

P. F LOUW, AJ
JUDGE OF THE HIGH COURT

APPEARANCES:

For Applicant:	A. B Rossouw SC (with him C.G.V.O Seventer) Instructed by: C J Willemse, Muller & Babinsky attoneys, Pretoria
For Second to Third Respondents:	N. Rajab-Budlernder (with her J Berger and H Mpshe) Instructed by: Mashiane, Moodley & Monana Inc, Sandton Malan Mohale Attorney,Pretoria