REPUBLIC OF SOUTH AFRICA

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

CASE NO: 26244/2015

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

....
DATE SIGNATURE

In the matter between:

CART BLANCHE MARKETING CC 1st Applicant

CBM HOT EXPRESS CC 2nd Applicant

MICHELLE JENNIFER AIREY 3rd Applicant

and

COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICES Respondent

Interpretation of section 40 of the Tax Administration Act, 28 of 2011 considered and discussed. Whether the decision to select taxpayers for audits, in the context of the facts of this case, should be reviewed on the basis of the principle of legality. Held that ripeness and the principle of subsidiarity posing obstacles in reviewing the decision. Selection of the taxpayers taken on a 'risk assessment' basis and court concluding decision not unlawful even assuming legality review competent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 31 August 2020.

J U D G M E N T

INGRID OPPERMAN J

INTRODUCTION

[1] On 4 August 2014, and acting in terms of the provisions of section 40 of the Tax Administration Act, 28 of 2011 ('the TAA'), the respondent (also referred to as 'the Commissioner' or 'SARS') selected the applicants for an audit ('the decision') to allegedly verify their compliance with the Income Tax Act, 58 of 1962 ('the income Tax Act') and the Value Added Tax Act, 89 of 1991 ('the VAT Act' collectively referred to hereafter as 'the Tax Acts').

[2] The applicants seek the review and setting aside of the decision on the basis that it was unlawful by virtue of the following reasons: it was taken for an ulterior purpose; it was taken for a reason not authorised by the empowering legislation (i.e. the TAA); it was irrational; it was taken in bad faith.

[3] The Commissioner's opposition is founded on two bases: a decision in terms of section 40 of the TAA does not constitute reviewable administrative action but even if a selection in terms of section 40 is reviewable, the decision in issue was lawful and should not be set aside.

SALIENT FACTS

[4] The first two applicants are close corporations, involved in the provision of commercial transport services to their clients. The first applicant has been in business for 23 years, and the second applicant for 12 years. During this period, neither the first nor the second applicant have ever had any income tax or VAT difficulties with SARS. The third applicant is the sole member of the first applicant, and a 40% member of the second applicant. Two other natural persons own the remaining 60% of the second applicant.

[5] The first and second applicants are said to be affiliated to a group of companies that are controlled by the third applicant, Ms Airey, and a certain Mr Muller. The other companies include Clear Enterprises (Pty) Ltd, West Trucking (Botswana) (Pty) Ltd and Goss Motors (Pty) Ltd ('the Airey/Muller companies').

[6] The Airey/Muller companies have since 2004 been involved in a plethora of litigation against, in the main, the Commissioner.

[7] This litigation concerned the said companies' alleged non-compliance with the provisions of the Customs and Excise Act, 91 of 1964 ('the Customs Act and 'customs litigation'). The companies involved imported second hand trucks and trailers into South Africa without allegedly making due entry as required by the Customs Act. Although some of the cases have been finalised, 11 cases are still pending before this Court.

[8] The decision forming the subject of the current litigation was taken jointly by Ms De Swardt and Ms Biyela who, at the time, were members of SARS' Tax and Customs Enforcement Unit ('TCEI Unit').

[9] In essence the function of the TCEI Unit was to investigate reports of noncompliance with, or breach of, the Tax and Customs Acts and, if necessary, to initiate the relevant processes to, e.g. assess the tax. The TCEI Unit was not involved in the customs litigation. It only became aware of the applicants and their conduct when it received the '2010 memorandum' referred to and dealt with herein under.

[10] In 2010, and apparently based on the activities that formed the subject of the customs litigation, SARS' customs division provided the TCEI Unit with a "suspicious activity" memorandum in respect of Ms Airey, Mr Muller and the Airey/Muller companies ('the 2010 memorandum').

[11] The reason and need for information sharing within SARS and the conclusions that can be drawn from non-compliance with the legislation administered by the Commissioner was explained as follows by Ms De Swardt:

> "Experience has taught that if a company does not comply with one tax Act it almost without exception does also not comply with the other acts. In some instances the reason is because its management or 'owners' conscientiously decide not to comply and in other because non-compliance with one act axiomatically makes compliance with the other two impossible. In a commercial setup non-compliance with the Customs Act inevitably results in non-compliance with both the Value Added Tax Act ("VAT Act") and the Income Tax Acts ("IT Act"). The principle can further be extrapolated to the management or 'owners' of the company: if the company is not tax compliant then they inevitably are also non-compliant."

[12] In the 2010 memorandum the TCEI Unit: a) was informed that a suspicious activity report had already been lodged on 10 October 2006 but that nothing had been done about that; b) was provided with comprehensive explanations regarding the relationship between the individuals and the Airey/Muller companies as well as the nature and extent of the activities in which they were involved. This included confirmation that all the Airey/Muller companies were "owned" and/or managed by Ms Airey and Mr Muller and that all the South African registered members of the group were conducting business from 60 Moore Street, Wadeville, Germiston; c) was urged to apply for a warrant in terms of the Tax Acts in order to investigate the tax affairs of Ms Airey, Mr Muller and the Airey/Muller companies the various entities and individuals; d) was informed that "(f)rom the information available it (was) clear that there (was) also not due compliance with the Income Tax and Vat (sic) legislation".

[13] Because of a lack of resources the TCEI Unit stated that it could not immediately initiate a full investigation on receipt of the 2010 memorandum. It was thus decided to do the investigation in two phases: first a customs investigation and thereafter income tax and VAT.

[14] The customs investigation commenced on 12 June 2012 with inspections undertaken in terms of the provisions of the Customs Act of the first and second applicants' business premises (which are also the business premises of the other Airey/Muller companies) located in Germiston, Rosslyn and Port Elizabeth. As a result of this investigation 110 vehicles were detained in terms of the Customs Act, 7 of which were subsequently seized and forfeited to the State.

[15] The income tax and VAT investigation was proceeded with in October 2013 when the applicants VAT and income tax records were retrieved from SARS' system.

[16] On 4 August 2014 the applicants were formally notified that they had been selected for an audit in terms of section 40 of the TAA. In these letters the applicants were called upon to make available certain records in order to enable the audit team to do the audit. The three notices stated that the decision to conduct the audit was based on a risk assessment.

[17] As the applicants refused to provide the Commissioner with any documentation to prove their compliance, the audits were proceeded with and regard was had to the documentation in the Commissioner's possession only.

[18] In letters dated 18 February 2015 the Commissioner informed the applicants of the findings in respect of the first and second applicants, the bases thereof and that, based thereon, he intended to issue additional assessments to them for payment of the income tax allegedly underpaid by them.

[19] Pursuant to those letters the present application was instituted on 14 April 2015.

[20] The applicants claim that their tax affairs have always been in order. In support thereof they rely on the fact that they have never before been subjected to any audit and that tax clearance certificates have in the past been issued to them by SARS.

[21] Applicants contend that right from the outset, SARS pinned its colours to the mast, and committed itself to a *"risk assessment basis"* being the relevant consideration upon which it decided to subject the applicants to audit. The lawfulness of the decision therefore depends, among other reasons, so the argument goes, on SARS having in fact established the existence of an income tax risk pertaining to the three taxpayers.

[22] In support of their contention that, objectively adjudged, no risk existed, the applicants rely on the evidence of their auditor, Mr Barnes, and a tax consultant, Ms Balios: Mr Barnes was the auditor who had prepared the applicants' tax returns since 2008, i.e. during the relevant period. His affidavit formed part of the founding papers. He concluded that "(t)he income tax affairs of the applicants are to the best of my knowledge entirely in order"*;* In her answering affidavit Ms De Swardt invited the applicants to, in their replying affidavit, have Mr Barnes confirm that he had actually audited the affairs of the applicants, further, to explain what was to be made of his "best of my knowledge" qualification of his evidence. Notably, the replying papers did not include an affidavit by Mr Barnes.

[23] The replying papers included an affidavit by Ms Balios. Her evidence is founded on two reports prepared by her. Her two reports comprise 422 pages. The applicants' contention that the issuance in the past of tax clearance certificates to them demonstrates that, in fact, they were fully compliant was dealt with by Ms De Swardt. She explained the status of a tax clearance certificate as follows:

> "A 'tax clearance certificate' is issued to a taxpayer when he/she/it does not have any outstanding tax returns and when the taxes declared to be payable in those returns have been paid. **It does not constitute any proof that the taxable income/assessed loss were correctly determined.** The only means available to SARS to verify compliance with a tax Act is by means of a full audit and a tax payer's only proof of compliance is a finding to that effect pursuant to a full audit."

(emphasis provided)

[24] Immediately after being advised of the decision to audit them, the applicants insisted that their income tax affairs were in order. From the outset, they contend, they suspected that the decision to subject them to an audit was unlawful and an abuse of power and accordingly refused to provide the information sought. In their very first communication with SARS, the applicants asked for the risk assessment upon which the decision to audit them had been taken by SARS, in the following words:

> "You will be aware of the long and complex history of SARS' engagement with our clients. In

> light of that history, our clients wish to put at ease that the intended audits are motivated by considerations irrelevant to the proper administration of any tax acts."

[25] SARS was asked for the un-redacted and unabridged copies of the risk assessments. SARS initially refused access to the risk assessment but subsequently while still not providing the written risk assessment, SARS' attorneys stated that the

> "risk identified stemmed from the customs investigation into your clients' activities and the litigation in that regard over a period of just less than ten years".

[26] In response, the applicants communicated a range of suggestions to SARS aimed at, so they contend, avoiding the need for litigation. One of these proposals was that the risk assessment be made available to the applicants, on the basis of which they could take an informed decision whether or not to challenge the legality of the decision. The applicants advised that should they decide not to challenge the legality of the decision, the information sought by SARS in the notification of audit of 4 August 2014, would be made available, as requested. SARS refused to make the risk assessments available. The applicants responded by asserting that their tax affairs are in order, that they remain unconvinced that SARS has legitimate grounds to conduct the audits, restated their wish to avoid litigation, and that should the risk assessments contain valid grounds, they would immediately endeavour to comply, to the best of their abilities, with the request for information.

[27] In response SARS insisted that there was no legal obligation on it to explain the basis upon which a taxpayer was selected for the audit.

[28] In response, SARS finalised its audit findings on 18 February 2015 without access or reference to the information sought from the applicants. SARS was advised on 24 March 2015 that the applicants would initiate legal proceedings to review the decision to conduct the audit. SARS was expressly advised that

> "The main ground upon which the review application will be based is that the decision to conduct the income tax audit is unlawful due to it being based on ulterior motive"; and
>
> "Our clients will contend that your client's refusal to hand over the risk assessment referred to in the notice of audit of 4 August 2014 is probably the result of the fact that no such risk assessments existed at the time."
>
> "The notice of motion supporting affidavits are intended to be formally served on your client **by no later than 14 April 2015. We accordingly request your client to refrain,** for the time being, from proceeding with the audit, or any other further steps that flowed from the decision to commence the audits."

(Own emphasis.)

[29] SARS proceeded to issue additional income tax assessments on 13 April 2015, one day before the date that the applicants undertook to launch the review. The assessments issued created an immediate indebtedness in excess of R238 million for the first applicant, and R62 million for the second applicant, excluding interest and penalties. SARS refused to agree to suspend the obligation[1] to make payment on the disputed tax raised by means of the assessments issued. This, in turn, required the applicants to bring an urgent application to hold the collection process in abeyance pending finalisation of the review.[2]

[30] Only after the commencement of the review proceedings, did the "risk assessments" come to light during the production of the record. The discovery process was interrupted when halfway through, SARS objected to further and better discovery. It required the applicants to bring an interlocutory application, to compel full discovery ('the discovery application'). SARS opposed the discovery application on the basis that, the decision is not reviewable.

[31] Judgment was handed down in favour of the applicants on 7 June 2017, whereupon SARS was compelled to complete the discovery process.

[32] SARS' answering affidavit relies on three separate areas of risk, upon which it reached the conclusion in August 2014 that the three applicants each posed an income tax risk that warranted their selection for income tax audits. The first area of risk is composed of the applicants' alleged customs non-compliance ('customs noncompliance'). The second area of risk is composed of the alleged discrepancy in turnover between the (first and second) applicants' VAT returns when compared to their income tax returns ('turnover discrepancies'). The third area of risk is composed of the alleged discrepancy in income declared by the applicants in their income tax returns when compared to the content of their bank accounts ('bank account revelations').

THE BASIS OF THE REVIEW

[33] In the matter of *Minister of Defence and Another v Xulu*[3] the process to be followed when impugning an action taken by an organ of State was analysed by the Supreme Court of Appeal and confirmed to be the following:

> "The development of a coherent administrative law demands that litigants and courts start with PAJA, and, only when PAJA does not apply, should they look at the principle of legality and

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1 As permitted to do in terms of section 164 of the TAA, with specific reference to having to take into account the taxpayer's compliance history. Notwithstanding the applicants' compliance history, the request for suspension was refused.

2 The matter became settled when SARS agreed to a court order interdicting collection pending finalisation of the review.

3 201 8 (6) SA 460 at [47) & [50]; Minister of Home Affairs v Public Protector 201 8 (3) SA 380 SCA at [28].

any other permissible grounds of review lying outside PAJA."[4]

[34] The Applicants' case was founded primarily on the provisions of PAJA and, to the extent necessary, on the principle of legality. During oral argument, counsel for the applicants, Mr Mastenbroek abandoned reliance on the argument that the decision constituted administrative action as contemplated by PAJA and no longer relied on the provisions of PAJA for this review. The matter proceeded on the basis that it was brought as a legality review only.

IS THE DECISION REVIEWABLE UNDER THE PRINCIPLE OF LEGALITY?

Interpretation of section 40 of the T AA

[35] The first question, which falls for determination, is what powers does the empowering provision (section 40) give the Commissioner, thus a question of interpretation.

[36] In *Road Traffic Management Corporation v Waymark*,[5] the Constitutional Court summarised statutory interpretation succinctly as follows:

> "[29] The principles of statutory interpretation are by now well-settled. In *Endumeni,* the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation. The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in legislation. This process, it emphasised, entails a simultaneous consideration of –
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> (a) the language used in the light of the ordinary rules of grammar and syntax;
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> (b) the context in which the provision appears; and
>
> (c) the apparent purpose to which it is directed.
>
> [30] What this Court said in *Cool Ideas* in the context of statutory interpretation is particularly apposite. It said:
>
> > 'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
> >
> > (a) that statutory provisions should always be interpreted purposively;
> >
> > (b) the relevant statutory provision must be properly contextualised; and
> >
> > (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a). (Footnotes omitted.)'

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4 At 479 C/D - D.

5 2019 (5) SA 29 (CC) (2 April 2019).

[31] Where a provision is ambiguous, its possible meanings must be weighed against each other given these factors. For example, a meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred. Neither is one that unduly strains the ordinary, clear meaning of words. That text, context and purpose must always be considered at the same time when interpreting legislation has been affirmed on various occasions by this Court.

[32] Allied to these factors, courts must also interpret legislation to promote the spirit, purport and object of the Bill of Rights. Again, courts should not unduly strain the reasonable meaning of words when doing so. But this obligation entails understanding statutes to "lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa."

(Footnotes omitted)

[37] The purpose of the TAA is "to ensure the effective and efficient collection of tax". Section 2 of the TAA provides:

"**2 Purpose**

The purpose of this Act is to ensure the effective and efficient collection of tax by—

(*a*) aligning the administration of the tax Acts to the extent practically possible;

(*b*) prescribing the rights and obligations of taxpayers and other persons to whom this Act applies;

(*c*) prescribing the powers and duties of persons engaged in the administration of a tax Act; and

(*d*) generally giving effect to the objects and purposes of tax administration;"

(emphasis provided)

[38] The TAA is to be read against the background of the SARS Act, in particular sections 3 and 4 thereof which provides:

"**3 Objectives**

SARS's objectives are the efficient and effective

(*a*) collection of revenue; and

(*b*) control over the import, export, manufacture , movement, storage or use of certain goods;

4 Functions

To achieve its objectives SARS **must—**

(*a*) **secure the efficient and effective, and widest possible, enforcement of—**

(i) the national legislation listed in Schedule 1; and

(ii) any other legislation concerning the collection of revenue or the control

> over the import , export, manufacture, movement, storage or use of certain goods that may be assigned to SARS in terms of either legislation or an agreement between SARS and the organ of state or institution concerned;"

[39] Section 4 prescribes that in order to meet its objective of efficient and effective tax collection the Commissioner "must . . . secure the efficient and effective, and widest possible, enforcemenf" of, among others, the Income Tax Act. The Commissioner is therefore not only empowered to use the available mechanisms to collect all taxes payable to the fiscus, it is legally enjoined to do so.

[40] All the Tax Acts function by means of self-assessment systems which cause the Commissioner not to be in possession of the information and documentation that would prove or disprove compliance with the said Acts. In order to enable the Commissioner to verify compliance it is therefore essential that:

40.1. the taxpayer be statutorily enjoined to keep the records that would prove its compliance with the relevant Act and to make them available when called upon to do so;

40.2. the Commissioner be provided with extensive powers to obtain the evidence that would enable him to properly administer and enforce the relevant legislation.

[41] These duties and powers were introduced and are regulated by the TAA.

[42] One of the powers of the Commissioner is the right to select a tax payer for an audit "… **on the basis of any consideration relevant for the proper administration of a tax Act,** including on a random or a risk assessment basis".

[43] Section 40 of the TAA provides:

> "**40 Selection for inspection, verification or audit**
>
> SARS may select a person for inspection, verification or audit **on the basis of any consideration relevant for the proper administration of a tax Act,** including on a random or a risk assessment basis.

(emphasis provided)

[44] The wording, context and purpose of section 40 suggests that provided that the intended audit is to be undertaken for the proper administration of a tax Act, there is no limitation to the considerations on which a decision to select a taxpayer is to be founded.

[45] The "administration of a tax Act" is explained in section 3(2):

> " **'Administration of a tax Act'** means to—
>
> (*a*) obtain full information in relation to—
>
> (i) anything that may affect the liability of a person for tax in respect of a previous, current or future tax period;
>
> (ii) a taxable event; or
>
> (iii) the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act;
>
> (*b*) ascertain whether a person has filed or submitted correct returns, information or documents in compliance with the provisions of a tax Act;
>
> (*c*) establish the identity of a person for purposes of determining liability for tax;
>
> (*d*) determine the liability of a person for tax;
>
> (*e*) collect tax debts and refund tax overpaid;
>
> (*f*) investigate whether a tax offence has been committed, and, if so—
>
> (i) to lay criminal charges; and
>
> (ii) to provide the assistance that is reasonably required for the investigation and prosecution of the tax offence;
>
> (*g*) enforce SARS' powers and duties under a tax Act to ensure that an obligation imposed by or under a tax Act is complied with;
>
> (*h*) perform any other administrative function necessary to carry out the provisions of a tax Act;
>
> (*i*) give effect to the obligation of the Republic to provide assistance under an international tax agreement; and
>
> (*j*) give effect to an international tax standard."

[46] The applicants contend that right from the outset, SARS pinned its colours to the mast, and committed itself to a 'risk assessment basis' being the relevant consideration upon which it decided to subject the applicants to audit and the lawfulness of the decision therefore depends on SARS having in fact established the existence of an income tax risk pertaining to the applicants.

[47] What needs to be explored, is what was sought and for what purpose.

Analysis of the notifications sent

[48] All three applicants received notifications dated 4 August 2014 ('audit notifications') in which they were advised, amongst other things, that SARS would be conducting audits, the officials who would be conducting such audits, the scope of the audits and the documents they

should be providing under oath or solemn declaration as required in terms of section 46 of the TAA.

[49] The documents sought from the first and second Applicants included: Annual Financial Statements, General Ledgers, Trial Balances, Loan Agreements, List of Debtors & Age Analysis, Asset Registers, details regarding donations, Insurance Premiums Schedules, Payrolls, other expenses. The Third Applicant was requested to provide: her source of income, list of assets, insurance contracts, bank statements, other relevant information and she was also requested to complete a life style questionnaire.

[50] It bears mentioning that section 29 of the TAA provides that a taxpayer has a statutory duty to keep records, books of account and documents for a required retention period but is also obliged to retain all records relevant to the audit until the conclusion thereof in terms of section 32 of the TAA.

[51] The documents called for in the audit notifications are of the kind that would prove the correctness of the VAT and income tax returns filed by a taxpayer. Put differently, they are typical of the documents which section 29 of the TAA enjoins a taxpayer to keep; are typical of the documentation with reference to which the applicants' VAT and income tax returns would have been prepared.

[52] On the face of it, it seems as though every enquiry directed was relevant for the administration of a Tax act ie the Income Tax Act. Objectively adjudged it seems that no value could be served and no purpose (to SARS) could be achieved, save to prove or disprove the correctness of the applicants' VAT and income tax returns but more importantly falling squarely within the definition of an ‘administration of a tax Act’ as defined in section 3(2) of the TAA.

Ripeness

[53] The decision taken in terms of section 40 of the TAA and the subsequent making of the assessments against the first two applicants, are separate decisions.

[54] The taking of the decision to select a taxpayer for audit does not necessarily lead to the making of an assessment.

[55] Similarly, the making of an assessment does not require the prior selection to subject the taxpayer to audit. The overwhelming majority of assessments are made by SARS without any prior audit.

[56] While applicants seek both of these to be set aside (the setting aside of the assessment is justified by the applicants, as a consequence of a successful review, if indeed that should occur, of the decision to audit), the applicants argue that they need to be treated in a conceptually separate manner. This argument is accepted for purposes of this judgment.

[57] The applicants summarise SARS' argument as being that no prejudice can result from mere selection for an audit; that SARS maintains that if a taxpayer is compliant the audit will find the taxpayer compliant, and, if not, the dispute resolution process set out in chapter 9 of the TAA will result in the assessment being set aside. Therefore, so SARS argues, there is no need for a court to determine whether or not the jurisdictional requirement of section 40 has been met. The applicants counter this by arguing that the logic of SARS' argument is that a taxpayer's grievance under section 40[6] would never become ripe for hearing. As a result, the 'right' contained therein (a 'right' not to be selected for audit where the object of the audit is something other than the proper administration of a tax act) will be rendered meaningless and accordingly this argument should not be sustained. The applicants contend that the right under section 40 does not somehow wither away upon SARS making an assessment. That is specifically so in a matter such as the present where SARS raised the assessment one day before the launch of the review proceedings.

[58] The aforegoing criticism ignores section 42 of the TAA which provides in relevant parts:

> "42 (1) A SARS official involved in or responsible for an audit under this Part 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 a l lowed by SARS based on the complexities of the audit, **respond in writing to the facts and conclusions set out in the document.**"

(emphasis provided)

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6 See par. [43] above.

[59] In terms of section 42 of the T AA, the Taxpayer is kept informed during the entire audit process. The taxpayer is to be provided with a report indicating the stage of completion of the audit. If the audit is inconclusive, the taxpayer is informed. Where material potential adjustments are identified, the taxpayer must be informed of the outcome of the audit including the grounds for the proposed assessment or decision referred to in section 104(2) and the taxpayer is then afforded an opportunity to respond.

[60] It is the applicants' case that they were fully tax compliant. As such they would have had the documentation necessary to prove their compliance; if not the documentation called for, then other documents. All that the applicants therefore needed to do in response to the section 40 notice was to provide the auditors with the relevant documentation. That would have been the end of the matter. In the – on their version – unlikely event of them not being satisfied with the outcome they could (and should) have used the objection and appeal processes prescribed by the TAA.

[61] Mr Mastenbroek accepted that the decision was not one which falls within the definition of administrative action as defined in PAJA. This is so, as the decision to select a taxpayer for an audit does not adversely affect the taxpayers' rights and does not have a direct external legal effect – or certainly in this instance. As was stated in *Viking Pony Africa Pumps v Hidro-Tech Systems:*[7]

> "[38] …It is unlikely that **a decision to investigate and the process of investigation,** which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.
>
> [39] If the City were about to pronounce on the culpability or otherwise of *Viking, Hidro-Tech and Viking* would have to be afforded the opportunity, in terms of PAJA, to make whatever representations they may wish to make. Similarly, if *Viking* were found guilty, then the relevant provisions of PAJA would have to be invoked before an appropriate sanction is considered and imposed by the City. This case has not, however, reached that stage yet. The need to give some guidance is accentuated by the apparent lack of clarity and direction displayed by the City and the DTI. The next question relates to the adequacy of the steps taken by the City."

(emphasis provided)

[62] The same question was also considered by the Supreme Court of Appeal in the matter of *Corpclo 2290* CC *t/a U-Care v Registrar of Banks.*[8] The finding of the Court and the reasons therefore are set out in paragraph [26] of the judgment:

> "[26] Even if the argument could be found to relate in some way to the interpretation of the sections, the appellants' reasoning is seriously flawed. First, it will be remembered that the Registrar's cause of action in the court a quo was simply the contravention of s 11 of the Act

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7 2011 (1) SA 327 (cc) at para [38] See too, *Gamede v Public Protector*, 2016 (1) SA 491 GP.

8 (755/11) [2012] ZASCA 156 (2 November 2012).

read with the Notice and s 81 of the Act. The Registrar's decision to investigate the appellants' business was of no relevance whatsoever. Secondly, **the Registrar's decisions to investigate the appellants' business and institute proceedings** against the appellants for an interdict in terms of s 81 of the Act were not administrative actions for the purposes of PAJA as they did not (as required by the definition of 'administrative action' in s 1 of PAJA) adversely affect the rights of the appellants or have a direct, externa l legal effect or have that capacity. Whether or not administrative action, which would make PAJA applicable, has been taken, cannot be determined in the abstract. Regard must always be had to the facts of the case. **A decision to investigate and the process of investigation,** which exclude a determination of culpability, could not adversely affect the rights of the appellants in a manner that has a direct and external legal effect. So too a decision to institute proceedings in the high court for an interdict does not affect the rights of the appellants or have that capacity. It is the high court which decides that the Act is being contravened and decides to g rant the interdict."

(emphasis provided, footnotes excluded)

[63] In *Bhugwan v JSE Limited*[9] the court, commented as follows:

"[11] Ultimately the facts in each circumstance will have to be evaluated to determine whether or not the processes referred to above have been complied with, or to what degree these processes exist, for purposes of deciding whether an administrative decision had been taken. When applied to a set of facts it will be a matter of degree to determine whether an issue is ripe for review adjudication on the basis that the decisional process had been completed. In Baxter Administrative Law 1984 at 727 the following is said in regard to the process of determining whether or not the decision had been taken:

> 'It is submitted that the appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has already resulted or is inevitable , irrespective of whether the action is complete or not. Once unlawfulness is manifest in a form which cannot be corrected no matter how the public authority continues to act, there is no point in insisting that the complainant should continue to go through the motions before bringing the matter to court.' "[10]

[64] In *Wingate-Pearce v SARS*[11] Meyer J held as follows:

"[41] SARS' receipt of information relating to Mr Wingate-Pearse from officers of the SAPS Organised Crime Un it, its **decision to investigate his tax affairs, the process of investigation** or **the decision to apply for the warrant,** could not in itself adversely affect the rights of Mr Wingate-Pearce in a manner that has a direct and external legal effect and could hardly be said to constitute an administrative action."

(emphasis provided)

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9 2010 (3) SA 335 (GSJ) at 340 D-1.

10 See also Hoexter at 585 - 586.

11 2019 (6) SA 1 96 (GSJ).

[65] The documents called for in the audit notifications are those that a compliant taxpayer would have. Documents need to be retained in terms of section 29 of the TAA. There can be no prejudice to produce documents one is statutorily obliged to keep. As argued by Mr Mastenbroek, the TAA is a modern piece of legislation and provides in chapter 5 (under which section 40 resorts) for the mechanism by which information can be gathered, the 'toolbox of SARS' as he labelled it.

[66] By selecting a person for an audit an investigative process is set in motion, nothing more. The initiation of an investigation does not constitute a decision which is capable of review: simply put, it is not yet ripe for review as it is incomplete.

[67] Before the process envisaged in section 42 of the TAA had played out, the applicants had intimated that they would approach the court to review the decision. Section 42 has embraced a procedurally fair process and these processes were available to the applicants but not utilised.

[68] The decision to subject the applicants to audit, was made on 4 August 2014. No audit was done as the applicants failed to co-operate. In letters dated 18 February 2015, SARS informed the Applicants of the findings in respect of the first and second applicants, the bases thereof and that, based thereon, it intended to issue additional assessments to them for payment of the income tax underpaid by them. SARS raised additional assessments against the first two applicants on 13 April 2015 and this review application was launched on 14 April 2015 although SARS was told 3 weeks prior thereto that the applicants would launch the review proceedings on 14 April 2015.

[69] In 1988, five judges of the Appellate Division in *Cabinet*[12] were unanimous on the following view on ripeness:

> "I am of the opinion, for reasons which will appear below, that the Court a quo erred in rejecting the appellant's objection to the respondent's *locus standi*, and that it should have held, as was argued by the appellant, that the respondent's attack on s 9 of Act 33 of 1985 was **not** … **justiciable** ... **at the time when the application was brought**. My view is not affected by the consideration that s 9 may possibly constitute an infringement of some of the articles of the Bill of Rights, …"

(emphasis provided)

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[12] *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A)

[70] A few years later and shortly after its establishment, the Constitutional Court had to decide the matter of *Ferreira,*[13] concerning the constitutionality of section 417 of the 1973 Companies Act and the possible impairment of the right to remain silent. Some judges felt that the matter was not ripe for hearing. Ackerman J held as follows:

> "[41] The s 25(3) rights accrue, textually, only to 'every accused person'. They are rights which accrue, in the subjective sense, when a person becomes an 'accused person' in a criminal prosecution. The examinee is not such an 'accused person'. It is a matter of pure speculation whether the applicants will ever become accused persons. Even should they become accused persons, their rights against extra-curial self-incrimination (assuming for the moment that such a right is an implied right in the larger category 'right to a fair trial') are not automatically infringed when they become accused persons. It will depend upon whether self-incriminating evidence given by the applicants at the s 417 enquiry is tendered in evidence against them. **At that moment, for the first time, there is a threat** to any s 25(3) right against extra-curial self-incrimination. The inescapable conclusion, therefore, is that s 417(2)(*b*) does not constitute an infringement or threat of infringement of any s 25(3) rights of the applicants and that their attack on s 417(2)(*b*) on this basis can accordingly not succeed.'

(emphasis provided)

[71] Kriegler J agreed, in the following terms:

> "[199] **The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally, the Canadians call it, 'ripeness'.** That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. **Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air.** And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of *this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.*" [14]

(emphasis provided)

[72] The dictum of Kriegler J was quoted with approval by Ponnan JA[15] in *Clear Enterprises (Pty) Ltd v* SARS.[16]

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13 *Ferreira v Levin no and others*; *Vryenhoek and others v Ppowell no and others* 1996 (1) SA 984 (CC).

14 The majority disagreed finding that public interest required the matter to be decided.

15 With whom Cachalia, Leach, Wallis J JA and Petse AJA concurred.

16 (757/10) [2011] ZASCA 164 (29 September 2011) at a para [17].

[73] In my view, the essential flaw of the applicants is also one of timing: The first and second applicants, in respect of whom additional assessments have been raised, can raise the lawfulness of the decision in the Tax Appeal Court once they have raised objections. It is clear that such Court has the jurisdiction to entertain legality issues.[17]

[74] All the applicants had an opportunity to participate in the section 42 of the TAA procedure but they elected not to do so. Section 42 performs the function of section 3(2) of PAJA i.e. it affords a taxpayer, in the position of the applicants in receipt of the audit notifications, reasonable opportunities to make representations, and once that procedure is exhausted, the decision would potentially have reached the required degree of ripeness capable of forming the subject of a review.

[75] Of the 3 reasons advanced by SARS,[18] I focus for the moment on the 'turnover discrepancies'. The application was launched on 14 April 2015. The answering affidavit in the discovery application was deposed to on 19 May 2016 and the answering affidavit in the review application, on 5 April 2019. A replying affidavit was deposed to on 18 July 2019 incorporating the expert evidence of Ms Balios, the tax consultant. Her evidence, which was based on two reports introduced as part of her affidavit, comprised, as I have said, 422 pages. When confronted with the fact that this evidence was introduced for the first time in the replying affidavit, Mr Mastenbroek explained that SARS only disclosed the turnover discrepancies consideration for having initiated the audit in the answering affidavit in this review application. Mr Meyer, representing SARS, pointed out that the turnover discrepancies were dealt with in SARS's answering affidavit deposed to on 19 May 2016 in the discovery application ie more than 3 years prior to the filing of the replying affidavit. There was thus ample opportunity to apply to supplement the founding affidavit in the review application. Had this information been raised during the section 42 of the TAA procedure or during a Tax Court hearing, credibility findings could have been made (in the Tax Court) and conclusions could have been drawn from tested evidence. Instead this court is faced with an 'undisputed' 422 page report, in a replying affidavit.

[76] The tax court created in Chapter 9 of the T AA has jurisdiction to entertain legality issues such as those raised by the applicants in this review. As a speciality court it is also best equipped to adjudicate the issues forming the subject of the present application. The comments of Meyer J in *Wingate-Pearse* would have equal application here:

> [48] …The tax court, consisting of a judge of the high court, an accountant and a representative of the commercial community, is best suited at first instance to deal with the tax dispute relating to the merits of the additional estimated assessments. The tax dispute here

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17 *Wingate-Pearse v SARS* (supra) where the court at para [47] followed *South Atlantic Jazz Festival (Pty) Ltd v Commissioner, South African Revenue Service*, 2015 (6) SA 78 (WCC) at para [23].

18 See para [32] above.

> hinges almost exclusively on the factual findings SARS had made as part of the capital reconciliation in determining Mr Wingate-Pearse's alleged undeclared taxable income. It is a technical assessment that Mr Wingate-Pearse wishes this court to undertake, also in the absence of proper evidence. **Proof of the claim that the additional estimated assessments are materially wrong and the assessed amounts materially overstated is dependent on evidence which has not been fully and adequately ventilated in the affidavits.** (See *United Manganese of Kalahari* paras 25-26.)

(emphasis provided)

[77] The evidence necessary to support the conclusion that there was no ground for an audit selection based on the turnover discrepancies consideration is the same (or substantially so) as the evidence that will be required to show that the additional assessments are materially wrong. It does not avail the applicants to contend that they have not objected to the additional assessments. They were either tax compliant or not. If they were, the additional assessments are wrong and the applicants should object. If the additional assessments are correct, an audit was objectively justified. This feature has certainly not been adequately ventilated in these affidavits – SARS hasn't dealt with the 422 pages of Ms Balios' evidence at all.

Subsidiarity

[78] The ripeness argument dovetails with the subidiarity principle. The subsidiarity principle is an important principle in our constitutional order. *Tsele* explains:[19]

> "[l]n our constitutional jurisprudence, subsidiarity has come to mean that a litigant may not rely directly on a constitutional provision to assert his or her rights if there is legislation that gives effect to that right, and that a litigant cannot seek a general declarator of constitutional principle divorced from the existing legislative or common-law framework. The appropriate course is to identify the relevant law that governs the issue and then to interpret (in the case of legislation) or develop (in the case of common or customary law) it in line with the Constitution. If that is not possible, the law must be declared invalid to the extent of its inconsistency."

[79] The principle of subsidiarity requires that a party rely on the lower norm, which regulates or should regulate the subject matter in issue.[20] In *Mazibuko v City of Johannesburg,*[21] O'Regan J explained that

> "where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution".[22]

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19 Michael Tsele, "Constitutional principles and two overlooked problems with the Nkandla judgment: A brief comment" (2019) 135 SALJ 220, at 224.

20 *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC), at para 46.

21 2010 (4) SA 1 (CC).

22 Mazibuko, at para 73.

[80] In this application, the lower norm is the section 42 procedure of the TAA or the sections 116 or 117 processes of the TAA. These sections of the TAA give effect to the Constitutional rights the applicants wish to protect with this application. Mr Mastenbroek argued that section 116 and 117 have no application as the first and second applicants have not raised objections to the additional assessments. If the first and second applicants contend that the additional assessments are incorrect, as their vast replying affidavit suggests, then objections will surely follow and the disputes can be properly ventilated. If not, they ought to have utilised the section 42 procedure.

[81] The applicants do not challenge the validity of the Chapter 9 of the TAA appeal process or any shortcomings therein that affect their constitutional rights and/or their ability to enforce them. They deliberately chose not to utilise "*the lower norm"* and directly approach this court. In doing so they have breached the subsidiarity principle. Absent a challenge to the constitutional validity of the Chapter 9 appeal process on the basis that it 'falls short of constitutional standards' this Court cannot entertain the application; to do so would impliedly impugn the validity of the Chapter 9 appeal process, without there having been a properly mounted constitutional attack.

Conclusion on whether the decision is reviewable

[82] I agree with the view expressed by CR Jansen AJ in the discovery application judgment at para [17]:

> "… I accept that the instances where a court will interfere with such decision will b e extremely rare. On the other hand, the words relevant for the proper administration of a tax act and for the purposes of the administration of a tax act cannot be ignored. Utilising the provisions of the act for ulterior purposes will always be unlawful and will be a serious breach of the mutual trust that should exist between a tax payer and SARS. The express wording of the act requires this. In other words, a finding that an act was not taken for purposes of the administration of a tax act, would vitiate such an act. Whatever one's scepticism may be about the merits of this matter, that does not mean that as a matter of law the decision involved cannot be reviewed."

(footnotes omitted)

[83] As stated, in my view, the timing of this application on the facts of this case, was wrong, for all the reasons referred to herein.

[84] In addition, I cannot find on the evidence placed before this court (and with the constraints imposed upon me in applying the *Plascon Evans* principle) that the decision was taken for a purpose other than for purposes of the administration of a tax act as contemplated in section 3(2) of the TAA. I can certainly not find, as contended in the founding affidavit, that the decision was taken to exert pressure on the applicants to pressurise Mr Muller.

WAS THE DECISION LAWFUL

[85] I have already concluded that the decision is not capable of forming the subject of a legality review within the factual matrix of this case. I proceed to deal with the lawfulness of the decision on the basis that I am wrong in that conclusion. If not wrong, these findings will only be *obiter* and not binding should these issues be raised in the Tax Court as they are based on the limited evidence before me and have been assessed on the basis of the *Plascon Evans* approach.

[86] SARS initially claimed that three areas prompted it to take the decision. The bank account revelations were abandoned by SARS after the filing of the replying affidavit. SARS now admits that this area of risk was non-existent at the time of the taking of the decision. Ms De Swardt for SARS in a fourth affidavit explained that she mistakenly thought that SARS had received the bank statements prior to the decision having been taken. She says that her inclusion of this as a consideration was due to a *bona fide* oversight. The applicants did not formally oppose the delivery of the fourth affidavit but argued that the unfolding events raised certain questions concerning Ms De Swardt's credibility which have a bearing on the entirety of SARS' case. As suggested previously, these are issues which can, in the fullness of time be raised with Ms De Swardt at a hearing in the Tax Court.

The Turnover discrepancies

[87] This area of risk upon which SARS seeks to justify its decision, relates to a set of alleged discrepancies in turnover when comparing the first two applicants' VAT returns with their income tax returns. The background to the alleged discrepancies is as follows: Both the first two applicants[23] are VAT vendors, required to submit monthly VAT returns. Both the first and second applicants are also subject to income tax, which is assessed on an annual basis. Although VAT and income tax are fundamentally different tax types, both a taxpayer's VAT returns and its income tax returns, contain a declaration of a taxpayer's turnover. If a taxpayer were to declare, in the same period, more turnover for VAT than for income tax, a legitimate question arises from a compliance point of view. A business can only legitimately calculate one figure as its turnover, for both income tax and VAT purposes.

[88] From SARS' point of view, it is therefore a legitimate risk detection methodology to compare a taxpayer's VAT returns and income tax returns, for a given period, to confirm if the same turnover has been declared.

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[23] The third applicant is not registered as a VAT vendor, and therefore submits no VAT returns.

[89] This risk detection methodology (i.e. to compare VAT turnover with income tax turnover) however, requires to be properly applied. In this particular instance, the applicants contend it was not done. For this exercise they rely on their 422 page report attached to the replying affidavit prepared by their tax consultant, Ms Balios. Ms Balios conducted a comparison between the turnover declared by the first two applicants in their VAT returns and the income tax returns for the five years that SARS sought to audit, namely 2008 – 2012. She found no material discrepancies.

[90] Some of the other criticisms include that SARS failed to consider 24 months of the first applicant's VAT returns in its own possession; that the risk assessments rely on the comparison of incomparable figures; that there are material inconsistencies between the written risk assessments pertaining to the first applicant and the answering affidavit.

[91] The deponent to the answering affidavit for SARS stated that the first applicant had declared zero turnover for the years 2008 and 2009. This was shown in the report to be factually incorrect. The applicants point out that it is not clear whether SARS' failure to consider the VAT returns was a genuine mistake or a wilful oversight. It does not matter for purposes of the review they argue, as the returns were in SARS' possession and it failed to consider them. Had it done so, it would have found no evidence of income tax risks. To the contrary, it would have found evidence of meticulous compliance.

[92] They further point out that SARS employed an irrational methodology to arrive at the VAT figures used for the first applicant for the years 2010. They show, in these reports attached to the replying affidavit that SARS had taken the VAT declarations of one third of a year and compared it to the full year of income tax declarations, and had found an inconsistency. They therefore argue that objectively, the risk assessment methodology was fundamentally flawed, which could only have an irrational result as a conclusion .

[93] In some, but not all instances SARS extracted not the turnover figure from the first applicant's income tax returns, but "taxable income". "Taxable income" is derived at after deducting "exempt income" and the permissible deductions from "gross income", and adding any taxable capital gain. "Gross income" as defined in the Income tax Act equals turnover. Applicants argue that it is irrational to compare "taxable income" with VAT turnover and to expect a rational result. This is what SARS did in the comparison of the 2008 income tax and VAT turnover comparison for the first applicant.

[94] The applicants argue that Ms Balios' reports show that there are no material discrepancies when the VAT and income tax turnover is compared for the five tax years in quest ion for the first two applicants.

[95] SARS has filed no response to this ostensibly persuasive analysis. The question is whether this court should accept the new matter in the replying affidavit which stands 'undisputed' simply because it finds itself on the wrong side of the answering affidavit? I think not. SARS' argument in opposition to the receipt of this evidence with which I agree, was that it is both irrelevant[24]24 and prejudicial – irrelevant because it is not relevant to the case made out in the founding affidavit (it constitutes new matter) and prejudicial because SARS has not been able to respond to it.

[96] In my view the point was well taken ie that what it does show, is that a 422 page expert report was required, not to prove Tax compliance, but rather to explain why the *prima facie* interpretation of the documents by the SARS auditors was flawed. This in turn evidences that the discrepancies justified a decision to undertake an audit.

[97] If I accept that, which I do, I find that the decision to audit was a rational one based on the turnover discrepancies.

Customs non-compliance

[98] Turning the focus onto the customs non-compliance as a separate ground for initiating the audit, the applicants contend that the customs risk, to the extent that it existed at all, is irrelevant for purposes of determining an income tax risk.

[99] SARS contends that non-compliance with the Customs Act invariably results in non-compliance with the Income Tax Act. The applicants argue that the Customs Act serves a fundamentally different purpose than the Income Tax Act. Customs legislation is aimed at imposing controls and duties on goods and people entering and exiting the country.[25] The purpose of the Customs Act is not simply to collect revenue. Instead, it seeks to control the borders of the Republic.

[100] Income tax legislation on the other hand is exclusively aimed at generating revenue for government. The applicants argue that non-compliance in the realm of customs and excise does not imply non-compliance in the realm of income tax.

[101] They also contend that the administration of income tax is governed by the TAA. The TAA applies to all *"tax acts"* from which is excluded the Customs Act. Legally, there is no connection between the two statutes and thus, they say, even if, as a matter of fact, the three applicants were customs non-compliant (which they deny) it would be no indicator of an

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[24] *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*, 1999(2) SA 279 (T) at 335 and *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd*, 1974 (4) SA 362 (T).

[25] *Gaertner And Others v Minister Of Finance And Others* 2014 (1) SA 442 (CC).

income tax risk.

[102] What this does not deal with is Ms De Swardt's experience in this field. It is worth repeating what she stated:

> "In a commercial setup non-compliance with the Customs Act inevitably results in non-compliance with both the Value Added Tax Act ("VAT Act") and the Income Tax Acts ("IT Act"). The principle can further be extrapolated to the management or 'owners' of the company: if the company is not tax compliant then they inevitably are also non-compliant."

[103] Applying *Plascon Evans,*[26] as I am compelled to do, I am to accept this statement, which comprises of both fact and opinion of an experienced person drawing on that experience to found a conclusion that a risk of non-compliance under the Tax Act often arises from non-compliance with the Customs Act.

[104] SARS relies largely on a judgment of Murphy J ('Judge Murphy's judgment')[27] for showing customs non-compliance on the part of the applicants. The applicants resist this by pointing out that they do not own the vehicles they use in their business. All that SARS relies upon, they argue, is a poor attempt to taint the applicants by association. They contend that Judge Murphy's judgment deals with a technical interpretation of the relationship between the Customs Act and the 2002 Southern African Customs Union agreement, and the implications thereof when vehicles registered in Botswana move across South Africa's borders. They point out that the second and third applicants to the current dispute were not parties to the dispute adjudicated by Murphy J. Apart from being cited as the third respondent, the first applicant played no role. The manner in which SARS seeks to overcome the factual nexus between the dispute adjudicated by Murphy J and the parties before this Court is by the claim that the applicants belong to a "group of companies" which, so the argument goes, is logically flawed.

[105] The trigger that commenced the process of determining whether or not the applicants constituted an income tax risk (and hence should be audited) was the handing over in 2010 by the customs division of a memorandum detailing the customs dispute. The very first person mentioned in the customs memorandum is Mr Eric Muller. According to the 2010 memorandum, he is the manager and director of the key protagonist in Judge Murphy's judgment, namely the Botswana registered company called Clear Enterprises (Pty) Ltd. The central question deliberated in Judge Murphy's judgment was whether or not there was *prima facie* proof that the vehicles owned by Clear Enterprises (Pty) Ltd were illegally imported into South Africa. Judge Murphy found that SARS was permitted to detain and seize three vehicles belonging to Clear Enterprises (Pty) Ltd on the basis that "*prima facie* vehicles were imported

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26 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A).

27 *Clear Enterprises (Pty)Ltd v CSARS and others* -Case no 35978/07 (heard 7 – 10 October 2008).

and dealt with contrary to the provisions of the C&EA".[28] The third applicant's association with Clear Enterprises (Pty) Ltd. is that she is the life partner of its director, Mr Muller. The risk posed by the first two applicants is that they occasionally, in the years prior to SARS taking the decision, contracted with Clear Enterprises (Pty) Ltd, a company that owned vehicles that were unlawfully inside the country.

[106] The applicants contend that at best, the customs dispute could have served as a trigger to conduct an income tax risk assessment, with a view to determining whether the three applicants do pose an income tax risk.

[107] In my view, the applicants have set the bar too high. I agree with the late CR Jansen AJ when he said, in the discovery application judgment, that:

> "[17] It should be noted that the threshold for SARS to pass before it can utilise section 40 must be extremely low … ."

Conclusion on rationality

[108] In my view, objectively adjudged and having regard to the cumulative effect of both the turnover discrepancies (accepting they were flawed and that it took an tremendous amount of analysis to show they were inaccurate) and the customs noncompliance (again accepting the 'hook' of association was quite tenuous) there was nonetheless sufficient information to initiate an audit as contemplated in section 40 of the T AA based on a risk assessment basis.

COSTS

[109] SARS argued for a punitive costs order. In my view, this is not justified. There is a dearth of authorities on the interpretation of section 40 of the TAA and, in my view, the points were fairly taken, though obviously 'try-on' arguments. Having said that, I see no reason why the costs should not follow the result.

ORDER

[110] I accordingly make the following order:

The application is dismissed with costs, including the costs of two counsel where so employed.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

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[28] Paragraph 51 of the Murphy J judgment.

Counsel for the applicant: Adv R Mastenbroek

Instructed by: Antonie Van Wyk and Associates

Counsel for the respondent: Adv A Meyer SC and Adv H Mpshe

Instructed by: RW Attorneys

Date of hearing: 20 & 21 May 2020

Date of Judgment: 31 August 2020