THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 1984/14

In the matter between:

GARY WALTER VAN DER MERWE	1st Applicant
CANDICE-JEAN VAN DER MERWE	2nd Applicant
MONIQUE VAN DER MERWE	3rd Applicant
ROBERT VAN DER MERWE	4th Applicant
KARIN VAN DER MERWE	5th Applicant
FERN-JEAN CAMERON	6th Applicant
LENO DE VILLIERS	7th Applicant
SHAUN PAUTZ	8th Applicant
ALAN FANAROFF	9th Applicant
BILL OLMSTEAD	10th Applicant
ADRIAAN ROUX	11th Applicant
HILDA McGOVERN	12th Applicant
DEON PEROLD	13th Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	1st Respondent
PIET J J MARAIS	2nd Respondent
ELLE-SARAH ROSSATO	3rd Respondent
MINISTER OF FINANCE	4th Respondent

JUDGMENT: 17 FEBRUARY 2014

VELDHUIZEN J:

[1] This is an application for and order:

'2. That a *rule nisi* / temporary interdict be issued preventing the second respondent from commencing with an inquiry on Tuesday, 11 February 2014 which inquiry was authorised by Mr Justice Davis in terms of a court order made on 11 December 2013 . . . by virtue of the provisions of Part C of Chapter 5 of the Tax Administration Act, No. 28 of 2011 pending the final outcome of an application to have the aforesaid order reviewed and set aside, alternatively, to declare the relevant provisions of the Tax Administration Act which may authorise such an inquiry notwithstanding the fact that civil and/or criminal proceedings having commenced, being declared unconstitutional and invalid.

4. That the third respondent allow the applicants, and other interested parties, access to the court file herein to enable the aforesaid review application to be made; alternatively, ordering that such access is allowed on such conditions as the Court may deem appropriate for the purpose of such a review.'

[2] The interim interdict is clearly sought to suspend the inquiry for the purpose of bringing an application to review and set aside the order of Davis J or to have the relevant provisions of the Tax Administration Act, No. 28 of 2011 (TAA) declared unconstitutional. Prayer 4 aims to obtain access to the court file to enable the aforesaid application to be made.

[3] Founding affidavits were filed by the first and second applicants and confirmatory affidavits by the third, fourth, fifth, ninth and eleventh applicants. The confirmatory affidavits of the sixth, eighth and tenth applicants were not signed by them although they profess to having been attested to before a commissioner of oaths. In the result only first, second, fourth, fifth, ninth and eleventh applicants are before me and any order I make can only affect them.

[4] The requirements for an interim interdict are trite. An applicant must show on a balance of probabilities that (a) the right that forms the subject matter of the main action and that the applicant seeks to protect is *prima facie* established, even though open to some doubt; (b) there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right; (c) the balance of convenience favours the granting of interim

relief; and (d) the applicant has no other satisfactory remedy. I am also mindful of the decision in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC). On p 237B the court stated:

> 'A Court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of the claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.'

[5] On 11 December 2013 the first respondent brought an *ex parte* application which served before Davis J. On the same day Davis J made an order that: 'Adv. PJJ Marais SC, a member of the Pretoria Bar, be designated to act as the presiding officer for purpose of the inquiry in terms of Part C of Chapter 5 of the Tax Administration Act, Act 28 of 2011 . . . , which inquiry is identified and defined herein;' The order then sets out the purpose of the inquiry and its ambit. Paragraph 4 of the order further reads:

> '4. Access to the court file in this application will be restricted and it is ordered that:
>
> 4.1 A copy of the application and order signed by the Judge be retained by the Registrar of this Court; and
>
> 4.2 the court file and its contents be kept in a locked cabinet or safe; and

4.3 any request for access to the application or the court file is to be made to the applicant's officer, Elle-Sarah Rossato, a SARS official, employed as the Manager: Centralised Projects, Tax and Customs Enforcement Investigations at SARS' office situated at Lehae La SARS, 299 Bronkhorst Street, Nieuw Muckleneuk, Pretoria.'

[6] The first applicant is presently arraigned before Le Grange J on eleven counts of fraud. Several of the charges allege that the first applicant contravened the provisions of the Income Tax Act, No.58 of 1962 or the Act on Value Added Tax, No. 89 of 1991. The first applicant and the second applicant are also the first respondent and the second respondent respectively in a preservation order application brought in terms of section 163(4)(a) of the TAA. The second applicant anticipated the return day of this application and the parties are presently awaiting the decision of Savage AJ.

[7] The following provisions of the TAA are relevant:

'50(1) A judge, on application made *ex parte* by a senior SARS official grant an order in terms of which a person described in section 51(3) is designated to act as presiding officer at the inquiry referred to in this section.'

57(1) A person may not refuse to answer a question during an inquiry on the grounds that it may incriminate the person.

(2) Incriminating evidence obtained under this section is not admissible in criminal proceedings against the person giving the evidence, unless . . .'

58 Unless a court orders otherwise, an inquiry relating to a person referred to in section 51(1)(a) must proceed despite the fact that a civil or criminal proceeding is pending or contemplated against or involves the person, a witness or potential witness in the inquiry, or another person whose affairs may be investigated in the course of the inquiry.'

[8] Rule 6(12)(c) provides: 'A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.' It does not appear that the application before me has been brought in terms of this rule. In any event no facts were placed before me enabling a reconsideration of the inquiry order.

[9] The applicant rather submits that:

(a) On a proper interpretation of the relevant provisions of the TAA that Davis J did not have authority to order an inquiry in circumstances where civil and criminal proceedings relating to the subject-matter of the inquiry were underway;

(b) If that is not what, on a proper construction of the TAA, it means, it is unconstitutional to the extent that it permits of inquiries in such circumstances.

[10] It was argued that the word '*pending*' used in s58 should be interpreted to mean '*about to happen*' and does not include proceedings which have in fact commenced. According to The Shorter Oxford English Dictionary the primary meaning of p*ending* means: 'Remaining undecided, awaiting settlement; *orig.* of a lawsuit.' The secondary meaning is: 'Impending, imminent.' This is the meaning given in all the other dictionaries that I was able to consult. One cannot, of course, view the word in isolation; it should be given a meaning having regard to the section as a whole. Also in legal parlance *pending* means: *proceedings having begun but not yet concluded.* In my view *pending* in s58 means that an inquiry must continue even *during* civil or criminal proceedings unless a court orders otherwise. It follows that the fact that civil or criminal proceedings involving any one of the applicants have commenced do not lead to the exclusion of such an applicant from the ambit of s58 of the TAA. There is, in my view, no reasonable prospect of the applicants' contention being upheld.

[11] The applicants, anticipating the above result, relies on alternative relief namely to have the above provisions declared unconstitutional.

[12] They complain that they have been denied access to the court file and this has frustrated their application to have the provision of the TAA declared unconstitutional. The first applicant states:

> '21. With reference to paragraph 4 of the inquiry order, those who have been affected and/or subpoenaed as a consequence are not able to have access to the court file upon which the order was granted, and are consequently unable to appreciate or challenge the ambit and averments underlying the inquiry application, a fact which, I respectfully submit, has serious constitutional ramifications. We do not even know, *ex facie* the inquiry order, why the file may not be accessed.
>
> 22. The embargoing and denial of access to the court file underlying the appointment of the second respondent and the inquiry order . . .'

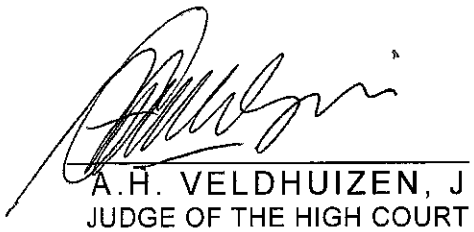
[13] It is common cause that the first respondent has, subsequent to the granting of the inquiry application, refused to grant the first applicant access to the court file underlying the application. The first applicant refers to the preservation

application and the steps taken in this application and concludes 'The stark reality of the matter is that a secret application has now been made to bolster a case which was commenced on an *ex parte* basis with no notice to the respondents.' The first applicant further states that the inquiry, at least notionally, has the potential to bolster the state's case in his criminal trial.

[14] It is important to note that Davis J did not appoint applicant's officer, Elle-Sarah Rossato as the sole judge of what information may or may not be made available to an applicant. The court's jurisdiction to decide such a request or to review a decision is not ousted. The applicants' application is not limited to any specific documents. They seek an order giving them general access to the court file. It is true that it is contended that they are not able to identify any documents while they do not know what the court file contains. In my view they should, at least, attempt to do so even if it is in broad terms. The file after all may contain information regarding a person or persons whose information is protected by the provisions of the Income Tax Act.

[15] However the answer to the applicants' argument is twofold: firstly their attack on the constitutionality of the provision turns on the interpretation of the section and not on the contents of the court file; and secondly the interpretation contented for has no prospect of being upheld. In consequence their application for access to the court file also cannot succeed.

[16] In the result applicants' application is dismissed with costs. The applicants who are before this court will be liable jointly and severally for the respondents costs and such costs are to include the costs of two counsel.



A.H. VELDHUIZEN, J
JUDGE OF THE HIGH COURT