IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 31842/2016 & 40732/2017

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED:

21 October 2018
Date Signature:

In the matter between:

GOLD KID TRADING CC **Applicant**

and

THE COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICES **Respondent**

JUDGMENT: LEAVE TO APPEAL

MOLAHLEHI J:

[1] The applicant seeks leave to appeal against the judgment of this court made on 19 July 2018 in which its application to review the decision of the South African Revenue Service (SARS) was stuck of the roll.

[2] In that case, the court whilst accepting that it had jurisdiction to entertain the review it refused to do so on the ground that the applicant was still to exhaust the remedies provided for under the Tax Administration Act (the TAA). In this respect the court found that there was an appeal pending before the Tax Court.

[3] The other issue which was raised by the applicant concerned *res judicata.* This issue was raised in the context where Mokose AJ had granted the order that SARS should pay the VAT rebate to the applicant for the VAT returns it had already assessed. This arose from the reassessment which SARS had conducted for the same year. In interpreting that judgment the court found that it did not interdict SARS from excising its power of reassessment.

[4] The key aspect of the judgment was that whilst the court accepted that it had power to entertain the review application, it was of the view that in the context where the same matter was still pending before the Tax Court it was not appropriate to exercise its review powers. The court relied in this respect on the provisions of section 7 (2) of Promotion of Administration of Justice Act 3 of 2000.

[5] In the application for leave to appeal the applicant deals in details with the merits of the case. It, in this respect, talks about the details of each of the

claims it had raised against SARS. It contends that the court erred in relying on the provisions of sub-section 190(2) of the Tax Administration Act because that sub-section applies in a situation where SARS is conducting verification, inspection or audit or the refund in issue and not of another VAT period.

[6] Counsel for the applicant submitted that the approach adopted by the court is in conflict with the decision in Top Watch (Pty) ltd v SARS 2017 (4) SA 557 (GSJ).

[7] In my view, the issues dealt with by the court in that case are different to those dealt with in the present matter. The court in that case dealt with the merits of the claim and made a final determination of the dispute. In the present matter the merits of the dispute were not dealt with as the court simply refused to entertain the dispute pending the finalisation of the appeal. The essence of the judgment is that it held the parties to their internal legislative dispute resolution mechanism. This a mechanism which the legislature in its wisdom found quite clearly to be the appropriate manner of dealing with disputes related to tax disputes.

[8] The test to apply in an application for leave to appeal is governed by the provisions of section 17 of the Superior Courts Act, 10 of 2013, ("the Superior Courts Act") which provides:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that: (a) (i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments

on the matter under consideration;"

[9] Counsel for the applicant contended that the legislature in setting out the test for leave to appeal in section 17 of the Superior Courts Act did not intend to introduce a standard higher than the traditional test. He in this respect contended that the interpretation of the test by Bertelsman J The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 Others LCC14R/2014, (an unreported judgment of this Court delivered on 3 November 2014) was wrong.

[10] In that case Bertelsman J in dealing with the test for leave to appeal set out in section 17 of the Superior Courts Act said:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see **Van Heerden v Cronwright & Others** 1985 (2) SA 342 (T) at 343H**.** The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[11] The proposition that the Mont Chevaux is incorrect in its interpretation of the test for leave to appeal bears no merit when regard is had to the body of authorities that have followed that judgment. See Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others (19577/09) [2016] ZAGPPHC 489) There is no basis to find that

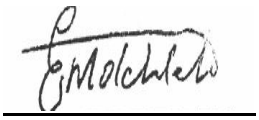
that judgment was so wrong such that this court would regard its as not bound by it.

[12] In my view, the applicant has clearly misconceived the essence of the judgment of this court. The attack is based on the merits of the review application and not the real reasons for the court arriving at the decision as it did. The court in exercising its discretion not to entertain the dispute did not make any determination as whether or not there are good grounds for the applicant's review application.

[13] In light of the above discussion I am of the view that the applicant has failed to make out a case for leave to appeal. Accordingly the application stands to fail.

Order

[14] In the premises the applicant's application for leave to appeal is dismissed with costs.



E MOLAHLEHI

Judge of the High Court

Gauteng Local Division,

Johannesburg

RESPONDENTS:

FOR THE APPLICANT: Adv. PF Louw SC with Adv. CJ Dreyer

INSTRUCTED BY: Pierre Retief Inc.

FOR THE RESPONDENT: Adv. AT Ncongwane SC with Adv. IP Ngobese

INSTRUCTED BY: The State Attorney

HEARD ON: 18 October 2018

DELIVERED ON: 21 November 2018