IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 33400/19

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

17/2/2020

C.E THOMPSON **DATE**

In the matter between:

Medtronic international **APPLICANT**

and

THE COMMISSIONER FOR

SOUTH AFRICAN REVENUE SERVICES **RESPONDENT**

Summary – record of review proceedings is still to be determined by relevance. Relevance is not dependant upon the pleaded issues in the initial review application. Relevance remains to be determined by the decision sought to be reviewed.

JUDGMENT

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[1] The Applicant was the victim of a fraud perpetrated upon it by one of its employees to the approximate tune of some R460 000 000,00. This fraud has culminated in a preservation order against the perpetrator and related entities in terms of Section 26 of the Prevention of Organised Crime Act.[1] An unfortunate effect of the fraud was that it placed the Applicant on the wrong side of the law *vis-à-vis* the respondent. In order to regularize its tax affairs, the Applicant applied for and was granted relief in terms of the Voluntary Disclosure Programme ("VDP") of the respondent as provided for in section 225 to 233 of the Tax Administration Act[2] ("the TAA"). As a result of the granted relief in terms of the VDP, the parties entered into a written voluntary disclosure agreement dated 14 June 2018 ("the agreement").

[2] Subsequent to entering into the agreement, the applicant applied to the respondent for a remission of interest as provided for in Section 39(7)(a)[3] of the Value Added Tax Act[4] as read with the respondent's Interpretation Note 61 dated 29 March

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[1] 121 of 1998

[2] 28 of 2011

[3] *"To the extent that the Commissioner is satisfied that the failure on the part of the person concerned or any other person under the control or acting on behalf of that person to make payment of the tax within the period for payment contemplated in subsection (1)(a), (2), (3), (4), (6) or (6A) or on the date referred to in subsection (5), as the case may be—*

(a) (i) did, having regard to the output tax and input tax relating to the supply in respect of which interest is payable, not result in any financial loss (including any loss of interest) to the State; or

(ii) such person did not benefit financially (taking interest into account by not making such payment within the said period or on the said date, he may remit, in whole or in part, the interest payable in terms of this section; or. . ."

See, generally, Item 128 of Schedule 1 to the TAA as read with Section 272(2) of the TAA

[4] 89 of 1991

2011.[5] The request for the remission of interest liability was not acceded[6] to by the respondent. An objection was raised on behalf of the Applicant on 10 December 2018 to the refusal to accede to the request for remission of interest liability, which objection was refused on 25 March 2019 on the basis that ". . .*as the agreements entered into between the Commissioner and the respective Taxpayers remain in force, the Commissioner cannot consider the request for the remission of the interest levied.*"

[3] As a consequence of the aforesaid refusals, the Applicant launched review proceedings in terms of sections 6(2)(d), 6(2)(e)(iii), 6(2)(f)(ii), 6(2)(g) and 6(3) of the Promotion of Access to Justice Act[7] ("PAJA"), *alternatively* the principle of legality, the common law and section 33 of the Constitution of the Republic of South Africa Act[8] as read with Rule 53 of the Uniform Rules of Court ("the Rules"). Consequent upon the launching of the review application, the respondent's attorneys informed the applicant's attorneys on 6 June 2019 that the respondent had dispatched the record of proceedings ("the record") to the registrar of this court as contemplated by rule 53(1)(b) of the Rules. The applicant and its legal representatives, after having perused the record, formed the opinion that the record does not comply with rule 53(1)(b) of the Rules in that it "*failed to contain the record of the proceedings relevant to* [the respondent's] *decision sought to be reviewed and set aside by* [the applicant] *in the main application, such as internal memoranda, directives, policy documents, records of deliberations and minutes of meetings.*"

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[5] The interpretation note is some 8 pages in length and thus too lengthy to be reproduced as a footnote in this judgment. It is obtainable at https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-61%20-%20Remission%20Interest.pdf

[6] In the respondent's letter dated 1 November 2018 the relevant sentence reads "*Under the circumstances the Commissioner cannot accede to the request for the remission of interest liability. . .as reflected in the table of paragraph 6.1 of the VDP agreement.*"

[7] 3 of 2000

[8] 108 of 1997

[4] The respondent's attorneys informed the applicant's attorneys that he respondent is only "*in possession of emails and other internal correspondence with its legal advisors relating to the issue of remission of interest. The purposes served by such emails and other internal correspondence was to provide legal advice to our client on the disputed issue.*" As a result, the respondent asserted its right to claim legal professional privilege in relation to the advice it received from its legal advisors. The respondent further adopted the stance that the documents constitute the respondent's confidential information as contemplated by Section 68(1)(b) and/or 68(1)(e) of the TAA.[9]

[5] The deemed failure resulted in the applicant causing a rule 30A(1)[10] notice to be served upon the respondent, calling upon the respondent to dispatch, in compliance with rule 53(1)(b) of the Rules:

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[9] "***68 SARS confidential information and disclosure***

(1) SARS confidential information means information relevant to the administration of a tax Act that is-

. . .

(b) information subject to legal professional privilege vested in SARS;

. . .

(e) information related to the operations of SARS, including an opinion, advice, report, recommendation or an account of a consultation, discussion or deliberation that has occurred, if-

(i) the information was given, obtained or prepared by or for SARS for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; and

(ii) the disclosure of the information could reasonably be expected to frustrate the deliberative process in SARS or between SARS and other organs of state by-

(aa) inhibiting the candid communication of an opinion, advice, report or recommendation or conduct of a consultation, discussion or deliberation; or

(bb) frustrating the success of a policy or contemplated policy by the premature disclosure thereof;

. . ."

[10] "*Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other*

"1. *all records, including internal memoranda, directives, policy documents, records of deliberations, minutes of meetings and any other documents relating to its decision which are sought to be reviewed and set aside in this application; and*

2. *a detailed index of the documents sought to be excluded form the record of its discussions and such reasons as the respondent is required by law to give, or desires to make, to justify such exclusion."*

[6] The respondent did not respond to the rule 30A(1) notice. The respondent contends that due to the fact that the respondent had not failed to comply with the provisions of rule 53(1)(b) of the Rules, there was no need to remedy any alleged non-compliance. The respondent's stance in this regard gave rise to the present Rule 30A(1)(a) of the Rules application. The stance by the respondent gave rise to this Rule 30A(1)(a) application to compel compliance with the provisions of rule 53(1)(b) of the Rules.

[7] The applicant, fortified by the now *locus classicus*[11] of what should be contained in a review record, persisted with the fact that the respondent must comply with the provisions of rule 53(1)(b). The stance on behalf of the applicant in this regard, during argument was that the respondent elected to i. provide an initial record and ii. allege that various emails exist which it had excluded from the record for reasons of legal professional privilege and confidentiality, and as such the record should be amplified

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party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—

(a) that such rule, notice, request, order or direction be complied with; . . ."

[11] ***Helen Suzman Foundation v Judicial Services Commission*** 2018 (4) SA 1 (CC)

by the respondent as contemplated by rule 53(1)(b) as interpreted in the *Helen Suzman*-judgment. It was submitted on behalf of the applicant that it matters not that the respondent's decision is based on a question of law only. It was further submitted that I should "put on my record blinkers" and ignore the issue of whether the documents sought in terms of rule 30A will be relevant to the review application.

[8] The aforesaid submission is, no doubt, informed by the *dicta* in the *Helen Suzman*-judgment wherein the following was stated at para 25 "*The JSC submitted that relevance should be determined with reference to the pleaded case. I do not agree. Rule 53 envisages the possibility of a review applicant supplementing the papers, including the very cause of action, upon being furnished with the record. That much is plain from the fact that an applicant may supplement not only the affidavits, but also the notice of motion. That means an applicant may eadd to or subtract from the grounds of review. Then, if information could be excluded on the basis of being irrelevant to the pleaded case, this would negate a substantial part of the purpose of the rule 53 record. What must be disclosed is the information relevant to the impugned decision. Unsurprisingly, a review applicant may not have pleaded certain issues that bolster her or his challenge exactly because she or he was not aware of their existence.*"

[9] This approach by the applicant, in my view, is misguided. It is trite that "*irrelevance and privilege*" are the usual grounds upon which information is excluded from a review record.[12] What is relevant is not to be determined from the pleaded

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[12] ***Helen Suzman,*** *supra* at para [22]
"Irrelevance and privilege are the usual grounds from excluding information from the record."

case, but is determined from the "*decision sought to be reviewed.*"[13] It is this latter case that the respondent advanced. It bears mentioning that the *Helen Suzman*-judgment did not open up the proverbial stable doors for every conceivable item that may be in existence to be included in the review record. A court remains guided by that which is relevant, for it is only relevant evidence that is admissible.

[10] The applicant, in its rule 30A-application, stated the following, "*A copy of the notice of motion and founding affidavit (without annexures) in the main application is attached hereto as* ***"AK1"***." I was thus directed by the applicant to the reviewable dispute by reference to the founding affidavit in the main review application. The main review application sets out the reviewable decision as follows:

> "*Due to* [the respondent's] *incorrect interpretation of the legal question,* [the respondent] *has to date not considered, adjudicated or decided* ***on the merits*** *of* [the applicant's] *request for remission of interest."*[14]

[11] On this score the respondent admits that no decision on the merits have been taken. As a matter of fact, the respondent states in its answering affidavit that "*central to the review is a single legal question: whether section 39(7)(a) of the VAT Act may even be considered in circumstances where a taxpayer has committed to paying outstanding interest in terms of a VDP agreement.*" In line with the *Helen Suzman*-

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[13] ***Helen Suzman***, *supra* at para [26]
"It is helpful to point out that the rule 53 procedure differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, ***relevance is assessed as it relates to the decision sought to be reviewed****, not the case pleaded in the founding affidavit."* [***emphasis added***]

[14] ***Emphasis added***

judgment that the decision to be reviewed is determinable of the relevance of documentation to be included in a record, the respondent contends that "*nothing turns on what is contained in the disputed documents which – for the purposes of the review – are simply irrelevant.*" Pursuant to this, in the respondent's heads of argument the legal question is further refined to "*whether the Commissioner may even consider a request for the remission of interest in terms of section 39(7)(a) of the VAT Act once a taxpayer has agreed to pay such interest in terms of a voluntary disclose agreement contemplated by section 230*[15] *of the TAA.*"

[12] The formal concession is then made by the respondent that "*if* [the respondent's] *interpretation of the law is correct, the main application must be dismissed. But if* [the respondent] *has erred in this regard, then the impugned decisions ought to be reviewed and set aside, with the matter being remitted to enable the Commissioner to consider the request for remission of interest. In such circumstances, the basis upon and/or the manner in which the impugned decisions were taken would not matter.*"

[13] The respondent, for all intents and purposes conceded that if the decisions taken are wrong, such decisions constitutes material errors of law and, on its own,

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[15] "***230 Voluntary disclosure agreement***

The approval by a senior SARS official of a voluntary disclosure application and relief granted under section 229, must be evidenced by a written agreement between SARS and the qualifying person who is liable for the outstanding tax debt in the prescribed format and must include details on-

(a) the material facts of the 'default' on which the voluntary disclosure relief is based;
(b) the amount payable by the person, which amount must separately reflect the understatement penalty payable;
(c) the arrangements and dates for payment; and
(d) relevant undertakings by the parties."

justify a review and setting aside of the impugned decisions on the facts as established by this case.[16]

[14] The respondent's decision to refuse to event consider the merits of the remission of interest request is based solely on the respondent's interpretation of the VAT Act as read with the TAA due to the existence of the agreement. The decision sought to be reviewed is the interpretation accorded to the respondent on an issue of law.

[15] It is trite law that interpretation is a matter for the court.[17] As the review court will not be asked to enquire about facts or determine whether the Commissioner had exercised some discretion unreasonably or irrationally. This is so as the Commissioner has not exercised any discretion as yet.

[16] A final aspect requires consideration. Authority exists whereby evidence as to the prior and consistent interpretation of a statutory provision by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation accorded to it by those responsible for the

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[16] ***Democratic Nursing Organisation of South Africa (DENOSA) obo Du Toit and Another v Western Cape Department of Health and others*** [2016] JOL 36183 (LAC); (2016) 37 ILJ 1819 (LAC) at para [22]
"To recap, Navsa AJ said in Sidumo at para 105 that the review powers in terms of s 145 'must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair'. Given that the section must be interpreted to be in compliance with the Constitution, it would appear that the concept of error of law is relevant to the review of an arbitrator's decision within the context of the factual matrix as presented in the present dispute; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in Sidumo, justify a review and setting aside of the award depending on the facts as established in the particular case."

[17] ***KMPG Chartered Accountants (SA) v Securefin Ltd and Another*** 2009 (4) SA 399 (SCA) at para [39]
"Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) Phipson on Evidence (16 ed 2005) paras 33 - 64)."

administration of the legislation.[18] For ease of reference I will refer to this as "the *Bosch*-principle".

[17] In this regard the respondent has drawn its lines of engagement with the applicant. The respondent has made it clear that the documentation is irrelevant. This includes that an email exchange between employees of the respondent relating to the request for remission of interest by another taxpayer following the conclusion of a VDP agreement. By stating that the respondent considers the prior opinions and/or viewpoints to be irrelevant, the respondent has, in my view, clearly and unequivocally indicated that it does not intend to rely on the *Bosch*-principle.

[18] I have had sight of the documentation as I requested the respondent to make same available to me.[19] Having regard thereto that the applicant may very well seek to rely on the *Bosch*-principle I mention that nothing in the documentation will enable the applicant to rely on the *Bosch*-principle in order to establish relevance to the review proceedings. As a matter of fact, nothing in the documentation, in so far the *Bosch*-principle is involved, will assist the applicant to establish any prior interpretation of the relevant legislation in the manner that the applicant seeks to interpret it.

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[18] ***Commissioner, South African Revenue Services v Bosch*** [2014] ZASCA 171; 2015 (2) SA 174 (SCA) at para [18]
"There is authority that in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation. This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question. As such it would be a valuable pointer to the correct interpretation."

[19] This is in line with the dicta ***Mohamed v President of the Republic of South Africa and Others*** 2001 (2) SA 145 (C) at 1151A
"This is a procedural step which the Court has the inherent power to follow in order to determine whether the claim to privilege is justified."

[19] In light thereof that I must determine the relevance of the documentation sought to be included in the record based on the decision sought to be reviewed, and in light of the respondent not intending on relying on the *Bosch*-principle, I am of the view that the respondent is correct in its contention that the documentation sought is irrelevant and need not form part of the Rule 53(1)(b) record. In light of this finding, I need not address nor make any findings on the issues of the legal professional privilege claimed, the persons in respect of whom such legal professional privilege is claimed or confidentiality as contemplated by section 68(1)(e) of the TAA.

[20] This brings me to the issue of costs. Much of the dispute could have been avoided had the respondent, in its initial letter of 1 November 2018 clearly and unequivocally stated that it is statutorily precluded from even considering the request for the remission of interest and as such the respondent is refusing to even consider the merits of the remission of interest request. Instead it chose to create confusion by stating that "*the Commissioner cannot accede to the request for the remission of interest liability. . .*" That the aforesaid created a confusion in the mind of the applicant's legal representatives are clear as the objection noted on 10 December 2018 did not deal with whether the Commissioner could or could not consider a request for remission of interest, but rather whether the applicant benefitted financially.

[21] However, in the respondent's reply on 25 March 2019 brought clarity to the matter. In it the respondent unequivocally stated that "*under the circumstances as the agreements entered into between the Commissioner and the respective Taxpayers remain in force, the Commissioner* ***cannot*** consider the request for the remission of

interest levied."[20] After receipt of this letter the applicant's legal representatives were fully aware that the refusal to consider the remission of interest request was based on a question of law. This much is clear from the wording of the letter of 24 April 2019 where the applicant's legal representatives, in their request for a withdrawal of the Commissioner's decision, enters upon a discourse of the relevant legislative provisions that, in the opinion of the applicant's legal representatives, would permit the Commissioner to consider the request for the remission of interest.

[22] As already pointed out in paragraph 10 of this judgment, the applicant was aware thereof that the respondent based its refusal to consider the request for the remission of interest on a legal issue, or otherwise stated, on the interpretation of a legislative provision. The applicant, on its own version, was aware that the respondent did not base the refusal to consider the remission of interests on facts whereby it exercised a discretion against the applicant.

[23] However, after receipt of the letter of 19 June 2019 by the applicant's legal representatives, the respondent's legal representatives did not take the direct line approach of the documentation not being relevant, but sought to rely on issues of legal professional privilege and confidentiality. Why the respondent's legal representatives sought to conflate the issue is not understood.

[24] Moreover, why the respondent chose to deal, at length, with the issues of legal professional privilege as its main argument and only raise the relevancy issue as almost a backstop is equally mind-baffling. What is, however, even more baffling is the

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[20] ***My emphasis***

applicant's denial that central to the review is the single legal question as to whether the remission of interest request could even be considered. This denial I do not understand, especially in light of the positive averment made by the applicant in the founding affidavit that no decision on the merits have been made and that the respondent had incorrectly interpreted the leqal question.

[25] As much as the respondent had created confusion, the respondent was successful on a point it raised in its answering affidavit, which point, in turn, was based on a stance the respondent had adopted prior to the litigation commencing. The applicant, in turn, should have realised that its entire review hinges on a question of interpretation of legislation, which interpretation is the duty of the court and that no record to the extent that the applicant seeks is necessary for the prosecution and even the successful prosecution of its review..

[26] Therefore, in exercising my discretion on the issue of costs,[21] I see no reason to depart from the general principle that costs are to follow suit.[22]

[27] In the premises I make the following order:

1. The application in terms of Rule 30A dated 23 August 2019 is dismissed

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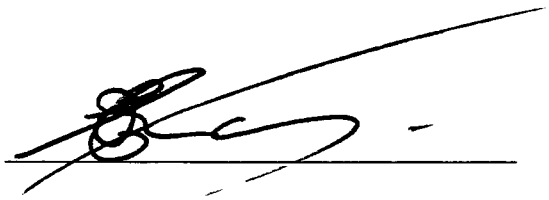
[21] *Merber v Merber* 1949 (1) SA 446 (A) at 453

[22] ***Jojwana v Regional Court Magistrate and Another*** (5435/17) [2018] ZAECMHC 54 (54); 2019 (6) SA 524 (ECM) 11 September 2018 at para [31]

with costs.



C E THOMPSON

Acting Judge

Gauteng Division, Pretoria