leREPUBLIC OF SOUTH AFRICA

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

Case No: 26244/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

Mhlema 11/12/2020
SIGNATURE DATE

In the matter between:

Case number: 26244/2015

In the matter between:

CART BLANCHE MARKETING CC **1st Applicant**

CBM HOT EXPRESS CC **2nd Applicant**

MICHELLE JENNIFER AIREY **3rd Applicant**

and

COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE **Respondent**

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 11 December 2020.

JUDGMENT

INGRID OPPERMAN J

[1] This is an application for leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order delivered by this Court on 31 August 2020. This judgment should be read with the one delivered on 31 August 2020 ('*the judgment*').

[2] The parties agreed that no oral argument would be required and that the application could be decided with reference to the heads of argument filed in respect of the application for leave to appeal only. I exercised my discretion in favour of this mode of hearing.

[3] The judgment is founded on two broad basis ie whether the decision is reviewable under the principle of legality and if so, whether the decision was lawful.

[4] The lawfulness finding was made in the alternative to the reviewability finding and on the basis that the latter was wrong. In order for the Applicants to be successful with an appeal the appeal court would have to find that both the reviewability and lawfulness findings were wrong. For purposes of this application (which was emphasised in the heads of argument) the Commissioner accepted that there was a reasonable possibility of the appeal court finding that the reviewability finding were wrong. The Commissioner argued that the question to be answered in this application would then be limited to whether there is a reasonable prospect of success in respect of the lawfulness finding.

[5] In the decision of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*[1], Wallis JA observed that a court should not grant leave to appeal, and indeed is under a duty not to do so, where the threshold which warrants such leave, has not been cleared by an applicant in an application for leave to appeal. In paragraph [24] he held as follows:

> "[24] For those reasons the court below was correct to dismiss the challenge to the arbitrator's award and the appeal must fail. I should however mention that the learned acting judge did not give any reasons for granting leave to appeal. This is unfortunate as it left us in the dark as to her reasons for thinking that it enjoyed reasonable prospects of success. Clearly it did not. Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and, as has been demonstrated, the appeal was bound to fail on the facts. **The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit**. It should in this case have been deployed by refusing leave to appeal." (emphasis added)

[6] It has been suggested that the legislature has deemed it appropriate to raise the bar by providing in section 17 of the Superior Courts Act 10 of 2013 ('*the Superior Courts Act*') that what an applicant in an application for leave to appeal should show is that the appeal '*would* ' have reasonable prospects of success not '*might* '. It has also been suggested that the legislature did no such thing and in fact simply restated the test, which had application prior to the amendment. I will assume without deciding, and for purposes of this application only, and in favour of the applicants, that the lower test has application.

[7] Prior to following the approach suggested by the Commissioner, it is necessary to comment on some aspects raised by the applicants in their application for leave to appeal relating to the reviewability issue.

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[1] 2013 (6) SA 520 (SCA)

[8] The applicants contend in para 7 of the application for leave to appeal that according to this court's interpretation of the statute '*a decision to select a taxpayer for audit will* ***under no circumstances*** *be reviewable at a similar point in time that the applicants sought to review.*' The criticisms levelled in paras 6, 7 and 8 of the application for leave to appeal totally disregard the comments contained in the concluding paragraphs of that section of the judgment which provides:

> '[82] **I agree** with the view expressed by CR Jansen AJ in the discovery application judgment at para [17]:
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> > '....**I accept that the instances where a court will interfere** with such decision will be 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)
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> [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.'

[9] I was not persuaded by the labrynthine logic of the arguments presented and I remain unmoved. The object was to find out if the taxpayers had taxes to pay, not to exert pressure on someone else.

[10] The applicants sought the setting aside of the assessments if they were successful in reviewing the decision to audit. The judgment accepted that the decision to audit and the raising of assessments are distinct acts. It was the applicants who linked the two in seeking that the remedy for the successful review of the decision to audit, should be the setting aside of the assessments. It should be remembered that after the decision was taken to audit nothing was done by the taxpayers. They did not co-operate with preparing for the audit. No direct prejudice flowed from the decision to audit. The parties continued in a position of stalemate until the Commissioner raised additional assessments, which on the applicants' version (accepted by the Court) was subject to a distinct and separate dispute resolution machanism under Chapter 9.

[11] It is quite extraordinary that the applicants should contend that the court raised the issue of ripeness *mero motu*. This principle was referred to by name in paras 42 and 43 of the Commissioner's heads of argument dated 5 November 2019, which were prepared long before the matter was allocated to me for hearing. In para 43 the following appears: '*Based on the above we submit that a decision in terms of section 40 would not have the requisite ripeness to be subjected to judicial review.*'

[12] The case made out in the founding affidavit was one based on administrative action as contemplated by PAJA. The notion that the decision to audit constituted administrative action was abandoned at the hearing as the decision to audit admittedly does not meet the requisite threshold to qualify as administrative action. The abandonment of plainly meritless arguments that had nonetheless been

seriously raised in the early stages of the matter underscores the impression that it is the objective of the taxpayers to avoid the additional assessments and the attack on the decision to audit is but one of the many efforts directed at this goal. To grant leave to appeal where the prospects are so slim would be to burden an appeal court without the legal threshold for doing so having been cleared.

[13] It was always the Commissioner's case that the decision to audit does not adversely affect the rights of a compliant taxpayer and it does not have external legal effect. In para 35.2 of the 5 November 2019 heads of argument it submits *'that the absence of a "direct external legal effect" could also be equated to, or even be interpreted as, referring to an absence of the necessary* ***"ripeness"*** *to be challenged.'*

[14] In relation to the lawfulness issue, it needs emphasising that the mere fact that it was necessary for Ms Balios to introduce a report of such magnitude, not to prove tax compliance, but to explain why the Commissioner's *prima facie* interpretation of the VAT and income tax returns was flawed, demonstrates that, objectively adjudged, the evidence justified a decision to further investigate ie to conduct an audit. If such a convoluted and long explanation is needed the Commissioner surely erred appropriately on the side of caution by determining to conduct the audit. A degree of practicality is expected of the Commissioner and long academic debates are not conducive to the proper discharge of the Commissioner's legislated mandate which at the end of the day is owed to the people of the country.

[15] The applicants have not disputed the Commissioner consistently argued that Ms Balios' evidence was irrelevant because it does not detract from the fact that a discrepancy existed between the income tax return and the VAT returns completed by the applicants. This, so the argument ran, in and of itself justified the decision to

audit. During argument and in debate with the court, this relevancy point was developed to include inadmissibility due to the scope of the evidence and that the extent of the evidence exceeded the bounds of what ought properly to be contained in a replying affidavit. The court is duty bound to determine matters on admissible evidence only and should raise this during the hearing with the parties.

[16] It is important not to forget that the task of the court was not to decide on the correctness of the decision of the Commissioner to conduct the audit, but merely whether the decision to conduct the audit on the taxpayer was rational and reasonable. The difference between a 'correct' decision and one which is rational and reasonable was explained in the judgment of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*.[2] I remain satisfied that the Commissioner's decision to audit was rational and reasonable.

[17] Finally, the mere fact that a dispute includes issues that may be of wider significance does not necessarily mean that leave to appeal should be granted; the prospects of success in the appeal remain paramount. This was emphatically stated by the Supreme Court of Appeal in the matter of *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others*:[3]

> 'That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.'

[18] This matter raises interesting points of law but in the end I am unable to conclude that the applicants have passed the threshold of what is required for

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[2] 2004 (4) SA 490 (CC), at [45] to [48]

[3] 2016 (3) SA 317 (SCA), at [24]

purposes of an application of this nature. The prospects of success simply do not pass muster.

[19] I accordingly make the following order:

The application for leave to appeal is refused with costs, including the costs of two counsel where so employed.

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

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 submission of heads of argument: 5 and 6 November 2020
Date of Judgment: 11 December 2020