HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A168/2020

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 8 NOVEMBER 2022

SIGNATURE

In the matter between:

HAB PERSONNEL SERVICES CC Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Summary:

The appellant is a taxpayer. In this court, the taxpayer unsuccessfully appealed a judgment from the Tax Court. In that court, the taxpayer's appeal against a decision of the Commissioner of SARS was also unsuccessful. The

Commissioner had refused an objection by the taxpayer against increased tax assessments and the imposition of penalties and interest were dismissed.

At the heart of the matter is whether two individuals, each trading as sole proprietorships, were indeed independent contractors or rather employees of the taxpayer. SARS had determined that remuneration paid to the individuals had attracted PAYE and SDL obligations for the taxpayer. As these tax debts had not been declared nor paid, increased assessments were raised which also resulted in the imposition of penalties and interest.

On appeal, it was found that the taxpayer had failed to discharge the onus upon it and that the assessments had correctly been issued. The appeal was dismissed with costs.

ORDER

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

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] This is an appeal in terms of section 132(2)(a) of the Tax Administration Act (the TAA)[1]. In terms of this section a taxpayer may, without leave, appeal against a decision of the Tax Court[2].

[2] The appellant, HAB Personnel Service CC is such a taxpayer and on 9 November 2019 the Tax Court, per Vally J sitting with two assessors, dismissed the taxpayer's appeal to that Court and found that the sole proprietorships of two individuals had not been proven to be independent sub-contractors of the taxpayer.

[3] The refusal of the taxpayer's appeal to the Tax Court meant that the Commissioner for the South African Revenue Service (SARS) had been found to have been correct in having refused an objection by the taxpayer against an audit finding which has determined that in respect of remuneration paid to these two individuals "Pay As You Earn" (PAYE)[3] and skills development levies[4] (SDL) had been payable by the taxpayer. The result was an underdeclaration in respect of these tax debts. As consequence, this attracted penalties and interest on the outstanding amounts became due.

The SARS audit findings and assessments

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[1] Act 55 of 1962.

[2] Section 133 reads as follows:

> *"(1) the taxpayer or SARS may in the manner provided for in this Act appeal against a decision of the Tax Court under section 129 and 130.*
>
> *(2) an appeal against the decision of the Tax Court lies –*
>
> *(a) to the full bench of the Provincial Division of the High Court which has jurisdiction in the area in which the Tax Court sitting is held; or*
>
> *(b) to the Supreme Court of Appeal, without an intermediate appeal to the Provincial Division, if –*
>
> *(i) the president f the Tax Court had granted leave under section 135; or*
>
> *(ii) the appeal was heard by the Tax Court constituted under Section 118(3)".*

[3] As determined by of section 95 of the TAA

[4] A provided for in section 3 of the Skills Development Act 9 of 1998 (the SDL Act).

[4] On 23 March 2015 SARS issued a letter of finalization of audit. In it, SARS detailed the taxpayer's business plan. It was to render construction services for clients at sites "allocated" to the taxpayer. For this purpose, the taxpayer employed a general manager a technical advisor and a full-time workforce of 600 employees.

[5] A Mr Mc Dermid, trading as Kriel Business Solutions (KBS) performed services for the taxpayer for the 2011 tax year at sites or premises belonging to or allocated to the taxpayer (the taxpayer premises), utilizing the taxpayer's employees. For the tax years 2012 and 2013, the situation changed. For those years KBS' services were performed at Mr Mc Dermid's house where KBS utilised five employees who were not employees of the taxpayer. For these latter years, SARS regarded KBS as an independent contractor, but for the 2011 tax year "observed" Mr Mc Dermid to be an employee of the taxpayer, working under the supervision of the taxpayer and at premises and hours stipulated by the taxpayer. The taxpayer was therefore assessed to have become obliged to have deducted PAYE taxes and SDL levies in respect of remuneration paid to Mr Mc Dermid, which in turn had to have been paid over to SARS.

[6] A second person, Mr Aslett, trading as JFJ Construction (JFJ) was also "observed" to have an employer/employee relationship with the taxpayer. Although JFJ performed construction work, it was done under the supervision of the taxpayer, at taxpayer premises and with use of the taxpayer's employees. JFJ had no employees of its own but reimbursed the taxpayer for the use of its employees. SARS was of the view that Mr Aslett was not an independent contractor who fell outside the exclusion of the definition of remuneration "*of amounts paid to a person for services rendered in the course of a trade carried*

on by him independently"[5] (more about this exclusion later). Accordingly the taxpayer was assessed as wrongly not having withheld PAYE and SDL deductions in respect of remuneration paid to Mr Aslett and of failing to pay any such deductions to SARS. This again, resulted in underdeclaration, penalties being imposed and interest becoming payable.

The taxpayer's objections

[7] On 19 August 2015, the taxpayer objected to the additional assessments issued as a result of SARS' audit findings on the following grounds:

- Mr Mc Dermid must also be considered to be an independent contractor for the 2011 tax year as he has met the requirements relating to premises and supervision.

- In respect of JFJ, SARS should have distinguished between services rendered by Mr Aslett in his capacity as a technical advisor and his capacity as independent contractor. PAYE had been deducted from remuneration payable to Mr Aslett for services rendered as a technical advisor. New documents were for the first time produced, indicating that Mr Aslett had more than three employees, purportedly separate from the taxpayer's employees.

[8] SARS disallowed the taxpayer's objections and found that they lacked factual support. SARS was also not persuaded by a "letter of understanding" between the taxpayer and JFJ which had been annexed to the taxpayer's objection. In terms of this letter, the taxpayer had "seconded" some of its employees to JFJ. JFJ was then, in terms of the letter "*responsible for the*

[5] The exclusion from the definition of "remuneration" is contained in para 1 of part I of the Fourth Schedule to the Income Tax Act 58 of 1962 (the ITA) at (ii) and is more fully detailed hereinlater.

operational costs (costs of labour, raw materials and equipment) except for payroll costs of employees ... seconded to JFJ for the applicable works".

[9] Aggrieved by the disallowance of its objections, the taxpayer lodged an appeal to the Tax Court on 17 November 2015.

Proceedings before the Tax Court

[10] In the Tax Court the additional assessments in respect of fringe benefits regarding the private use of company vehicles, which was a further consequence of the SARS audit, were conceded by the taxpayer as being correct.

[11] The taxpayer also conceded that Mr Mc Dermid and Mr Aslett were both employees of the taxpayer and, although not formally directors, sat on its board as senior personnel. The taxpayer's case was however that, in addition hereto, the two gentlemen also rendered services to the taxpayer in their capacities as independent contractors as sole proprietors.

[12] The court a quo found that the taxpayer and Messrs Mc Dermid and Aslett "*... could not produce a document that coherently explained all or even some of the relationships [between them]. The documents they produced were so incoherent that they raised numerous questions. Some of those questions were posed to them when they each testified, but none of them were able to enlighten the court as to what the true nature of the relationships was. Instead, they were evasive in their answers. The evidence of Mr Mc Dermid and Mr Aslett was also argumentative. None of their evidence was really elucidatory. I have no doubt that none of their witnesses were candid with this court*".

[13] The Tax Court, per Vally J, sitting with two assessors, consequently dismissed the taxpayer's appeal.

The grounds of appeal to this Court

[14] The taxpayer relied on multiple grounds of appeal but principally the focus was that the Tax Court "*should have found that the evidence of the witnesses of [the taxpayer] was credible and that KBS and JFJ operated as sole proprietors under Messrs Mc Dermid and Aslett, respectively. KBS and JFJ entered into sub-contracting agreements with [the taxpayer] whilst Messrs Mc Dermid and Aslett were also employed by [the taxpayer]. The contradictions in the evidence of Messrs Mc Dermid and Aslett relate to the manner in which JFJ recovered its fees and not to the relationship between them, their businesses and [the taxpayer]*[6]".

[15] It was conceded by the taxpayer that, for purposes of the appeal, it was necessary to determine whether KBS and JFJ qualified as an independent contractors for purposes of the exclusion from "remuneration" defined in the Fourth Schedule to the ITA. The taxpayer submitted that this had been proven on a balance of probabilities.

The nature of an appeal against a decision by the Tax Court

[16] In terms of section 133(2)(a) of the TAA, the taxpayer had an automatic right of appeal to this full court. No leave to appeal was required and no evaluation had therefore been performed in respect of the question as to whether the abovementioned grounds of appeal had a reasonable prospect of success or not.

[17] Contrary to the position where a "wide appeal" in certain tax matters amounts to a re-hearing of all the issues[7], an appeal in terms of the TAA against a decision by a Tax Court as court of first instance is "*... subject to the same*

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[6] Quoted from the taxpayer's Heads of Argument in this court.

[7] Such as in terms of Section 47(9)(e) of the Customs and Excise Act 91 of 1964, dealt with in *Cell C (Pty) Ltd v CSARS* 2022 (4) SA 183 (GP).

principles as appeals from a High Court. It follow[s] that [a] full court is bound by the factual findings of the Tax Court unless by material misdirection or the full court was convinced that they were wrong[8]".

[18] The other grounds for interfering with the decision of a "special court" such as the Tax Court is that a court of appeal will only interfere in issues of the exercise of a discretion if the special court "*did not bring an unbiased judgment to bear on the question or did not act for substantial reasons or exercised its discretion capriciously or upon a wrong principle*"[9].

[19] It is further trite that a court of appeal's powers of interference with findings of fact by a trial court are limited[10].

[20] Findings of fact by the court of first instance can only be overturned by a court of appeal if they are shown to be wrong in view of the evidence which was before the court a quo[11].

[21] Where the findings of fact are based on inferences drawn from the evidence or from an evaluation of the versions of various witnesses (contradictory or otherwise), some of the principles "which should guide an appellate court"[12] have been set out in *R v Dhlumayo and Another* 1948 (2) SA 677 (A) as follows: "*The trial judge has advantages – which the appellate court cannot have – in seeing and hearing the witness and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overloaded. Consequently the appellant court is very reluctant to upset the findings of the trial*

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[8] *CSARS v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA) at [19].
[9] *CIR v Da Costa* 1985 (3) SA 768 (A) at 775 D-G.
[10] *S v Francis* 1991(1) SARC 198 (A) at 204 C-E.
[11] *S v Naidoo* 2003 (1) SACR 347 (SCA) at para 26.
[12] Southwood, Essential Judicial Reasoning, Lexis Nexis, 2015 at 57.

judge .... Even in drawing inferences, the trial judge may be in a better position than the appellant court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial .... Where there has been no misdirection of fact by the trial judge, the presumption is that his conclusion is correct, the appellate court will only reverse it where it is convinced that it is wrong".

Evaluation

[22] The taxpayer's version, or rather the explanations and documents on which it sought to rely, evolved and were added to as matters progressed. When SARS decided to embark on an audit, it had very little information in support of the taxpayer's "independent contractor" version. When Ms Moitse from SARS, together with a colleague, conducted an interview with the taxpayer, then represented by Mr Mc Dermid as a 49% shareholder thereof, a questionnaire was completed and some documents were furnished to SARS. These did not convince SARS, who then reached the conclusion set out in paragraphs 5 and 6 above. When objections were raised against this by the taxpayer, a few further documents were submitted and when the matter came on appeal, suddenly a host of "invoices" issued by JFJ were produced in support of the taxpayer's contention that JFJ was an independent contractor. Very little was offered by way of explanation as to why all relevant documentation were not submitted up front. In addition, when discrepancies arose, various explanations were tendered: the taxpayer blamed his previous attorneys, Mr Dermid lost recollection of some facts and Mr Aslett claimed that even SARS' counsel would not be able to remember facts of eight years ago. So far the "atmosphere" of the trial in which the Tax Court was "steeped". The total record comprises of just under 2000 pages, pre-trial documents and discoveries included.

[23] From the evidence the following picture emerged: Mr Dermid had retained 49% of the shareholding of the taxpayer and retained a seat on its board, but with no voting rights. These rights were held and exercised by Mr Sindane and Ms N. M. Mazibuko. Lastmentioned two persons did not testify at the trial.

[24] From the evidence it emerged further that the taxpayer had secured the allocation of construction work for Eskom which it performed at Eskom sites. For this purpose, it employed ± 600 employees. Mr Mc Dermid was at all relevant times employed as the General Manager and "business advisor". Mr Aslett was employed as a "technical advisor" but also oversaw or managed the construction work. "Payroll services" was performed for the taxpayer's workforce by Mr Mc Dermid, his daughter-in-law or by KBS employees, from time to time.

[25] Mr Mc Dermid claimed that the taxpayer had concluded sub-contractor agreements with him and Mr Aslett, but it appeared that, save for the "letter of understanding" referred to in paragraph 8 above, these agreements were oral agreements, based on mutual trust. Mr Mc Dermid could not explain why some of his references to the existence of such agreements pre-dated the taxpayer's incorporation. He could also not explain how he could claim to be an independent contractor to the taxpayer when his written contract of employment with the taxpayer expressly precluded him from doing so or from being involved in any other "business" or "undertaking".

[26] The "letter of understanding" was a one-page document dated 1 October 2007. In his interview with Ms Moitse during the SARS audit, Mr Mc Dermid had denied the existence of such a written contract yet, at the proceedings before the tax court, there it was. It was expressly relied on by Mr Aslett but, as pointed out by the Tax Court, it appeared to have been crafted with the payroll functions

in mind and was not otherwise conclusive, due to its highly ambiguous wording. It read as follows:

> "*It is hereby agreed that JFJ Construction enters into an agreement with [the appellant], whereby JFJ will be responsible to execute all construction type works and other services, as deemed necessary on behalf of [the appellant], on an as and when required basis.*
>
> *It is further agreed that JFJ will be responsible for all related expenses applicable to the works/services, plus payroll costs of the employees that [the appellant] pays on behalf of JFJ for the applicable work – in this instance [the appellant] will deduct all the salary related payments from the agreed amount [sic] payable for the works. It is also agreed that [the appellant] will be paid a Management Fee as agreed to from time to time, based on the contract value for the management of the works/services. JFJ will therefore be responsible for the total operation costs of the applicable works that include the payroll costs and management fee, where applicable.*
>
> *It is further noted that any of the parties may terminate this agreement at any stage due to default [sic] by any of the parties, or by manual agreement due to circumstances changes of any of the parties*".

[27] Of all the employees of either the taxpayer or JFJ only two employment contracts were produced (other than that of Mr Mc Dermid and Mr Aslett). These were also not disclosed during the audit or objection stages, but only at the hearing of the appeal in the Tax Court. The first one was for a period of four

months (1 March 2012 to 31 May 2012) in respect of a Mr Combrink, who testified, and the second one was in similar terms in respect of a Mr Bukwana, who did not testify. Mr Combrink alleged that he was employed by the taxpayer "on behalf of JFJ". He claims to have been paid by JFJ, but could not explain documents indicating the contrary, in particular his IRP 5 certificates issued to him by the taxpayer.

[28] The more substantial part of the taxpayer's objection and, consequently of its case at the trial, concerned the issues relating to Mr Aslett, trading as JFJ. Mr Aslett conceded that he was an employee of the taxpayer during the relevant years. He, however alleged, that in respect of the work performed by him on the Eskom construction sites for the taxpayer, 40% would be as employee and 60% as independent contractor. He explained this in cross-examination as follows: there is a difference between managing and supervising. Managing is when you tell someone what must be done and supervision is when you tell someone how to do a job. He testified that although the taxpayer managed the contracts and had to account to Eskom, it did not have the expertise to "supervise the sites" and therefore had to contract Mr Aslett (or JFJ) to do so. These answers given in cross-examination make no sense: if Mr Aslett, while possessing the necessary expertise to supervise, was employed by the taxpayer, why would he then not as employee perform the necessary supervision? This concern had been raised by SARS at the audit stage already. If, as Mr Aslett contended, JFJ was contracted as an independent contractor to do the supervision, why then was Mr Aslett not paid a salary from JFJ? Mr Aslett conceded he did not draw any salary from JFJ but could offer no explanation. Furthermore, all the work that Mr Aslett did on the Eskom contracts secured by the taxpayer, was done on Eskom sites "allocated" to the taxpayer, using the taxpayer's employees. Much was made by the taxpayer and Mr Aslett of the fact that Mr Aslett had invoiced the taxpayer for work done on these sites. These invoices included references to labour and

raw material. In respect of the actual labour used however, the evidence produced on behalf of the taxpayer by Messrs Mc Dermid and Aslett became muddled. All the PAYE payments in respect of the labour force were deducted from their salaries by the taxpayer and paid to SARS. Only the "net" salaries were alleged paid to Mr Aslett who then paid the labourers. Mr Aslett's claim that the taxpayer was performing this payroll function as "agent" of JFJ does not hold water: JFJ was not registered as an employer, didn't pay the PAYE to SARS and neither did it issue any of the employees with IRP 5 certificates. Insofar as Mr Aslett claimed that JFJ had its own workforce, no evidence was produced to substantiate this. In respect of VAT payments or PAYE (or SDL) payments, Mr Aslett's explanation for the absence thereof was simply that JFJ was not tax compliant.

[29] Not only did the Tax Court find that there were numerous contradictions between the evolved versions of the taxpayer, Mr Mc Dermid and Mr Aslett, both amongst themselves and as the matter had progressed through the stages from audit to assessment to objection and to the hearing of evidence by the Tax Court, but the taxpayer seems to have conceded this before us. In heads of argument delivered on behalf of the taxpayer on appeal, one finds the following: "*As regards the credibility of the witnesses that testified for [the taxpayer] it is submitted that they were honest and credible although there were discrepancies in the evidence of Mr Mc Dermid and Mr Aslett regarding the payment of salaries and the recovery of employees tax ...*".

[30] Apart for the fact that the discrepancies (as conceded, if only in part) detracted from the credibility of the witnesses, the taxpayer nevertheless argued that, seeing that SARS had received PAYE in respect of all the employees, irrespective of which version is to be believed regarding who employed them, no harm was done. The astounding argument is then made out as follows in the Heads of Argument: "... *even if the witnesses for [the taxpayer] were not credible*

in all respects, SARS was not entitled to include the fees that the taxpayer paid to JFJ in the income of Mr Aslett as it is common cause that SARS received all the PAYE and SDL in respect of salaries that were paid to the persons that rendered the service on behalf of [the taxpayer]whether such persons were employees of [the taxpayer] as contended by SARS or employees of JFJ as contended by [the taxpayer]".

[31] For payments to an "independent contractor" to qualify as being excluded from the definition of "remuneration" for purposes of the obligation to pay PAYE, the elements of the exclusion, including its deeming provisions, had to have been satisfied. For sake of clarity, the wording of the exclusion is produced here. It provides as follows: "*remuneration means any amount of income which is paid ... to any person by way of any salary ... wage ... bonus, gratuity, commission, fee [or] emolument ... whether in cash or otherwise ... whether or not in respect of services rendered ... but not including ... (ii) any amount paid or payable in respect of services rendered ... in the course of any trade carried on by him independently ... provided that, for purposes of this paragraph, a person shall not be deemed to carry on a trade independently as aforesaid if the services are require to be performed mainly at the premises of the person by whom such amount is paid or payable or of the person to whom such services were or are to be rendered and the person who rendered the service is subject to the control or supervision of any other person as to the manner in which his or her duties are performed .... Provided further that a person will be deemed to be carrying a trade independently as aforesaid if he throughout the year of assessment employ three or more employees who are on a full time basis engaged in the business of such person rendering any such services ...*".

[32] One must also bear in mind that, in evaluating the correctness of a taxpayer's return, the taxpayer bears the onus. The taxpayer submitted in written

argument before us that the taxpayer has "... *proved on a balance of probabilities that the fees that it had paid to KBS and JFJ did not constitute remuneration for employees tax purposes*".

[33] I am of the contrary view. The only evidence on which one can safely rely is that the taxpayer under the general management of Mr Mc Dermid (with or without Mr Sangeni and Ms Mazibuko) had secured contracts from Eskom to perform construction work at Eskom sites, that both Mr Mc Dermid and Mr Aslett had been in the employ of the taxpayer at all relevant times during the performance of the work required by Eskom, that the taxpayer had 600 other employees who performed the required work at the sites, the taxpayer was the only one who received payment from Eskom and who saw to the management of payment functions, had paid the employees as a registered employer and had deducted and paid over PAYE and SDL levies and had made payments to Mr Mc Dermid and Mr Aslett. Prior to 2012, Mr Mc Dermid had performed the payroll functions which KBS later performed from his house with a separate workforce.

[34] I agree with the Tax Court that the contrary evidence, such as it was, that the payments to Messrs Mc Dermid and Aslett fell within the exclusion of the definition of "remuneration", was fraught with contradictions, lacked corroboration and was reliant on witnesses with doubtful credibility. The version of the taxpayer therefore lacked the required probabilities necessary to succeed. I do not find that the Tax Court has committed any misdirection which warrants interference by this Court.

[35] I therefore find that SARS was correct to have assessed the taxpayer as it had, based on its final audit findings and that the Tax Court has correctly not upheld the appeal against the Commissioner's refusal of the taxpayer's objection to the assessments.

[36] Should the above be the case, the taxpayer argued that it should still not have been found to have underdeclared its tax liability and that the underdeclaration penalties should not have been imposed. I disagree, the one follows upon the other. The argument advanced that the taxpayer had taken "reasonable care" is not supported by the piecemeal production of whatever corroborative evidence the taxpayer had attempted to produce as the matter progressed. Any reliance placed on Mr Aslett (or JFJ) regarding "reasonable care" in tax matters was equally misplaced. By his own admission the alleged independent contractor had never been tax compliant during the relevant period. The further allegation that JFJ had for the tax years in question three or more employees independent from the taxpayer, was rightly rejected by the Tax court and no "reasonable care" had been taken in respect of any recordkeeping in support of this alleged fact. The same applies to KBS.

[37] The argument that the consequential understatement was not "substantial" and qualifies for the lesser 10% penalty contemplated in section 221 of the TAA is also without substance. The amounts involved are substantial. If one only has regard to the invoiced amounts, that alone exceeded R70 million.

[38] There is also no cogent reason why interest should not be payable on the unpaid assessed amounts.

[39] Lastly the taxpayer argued that, should its appeal fail, it should neither be ordered to pay the costs of the appeal nor of the proceedings before the Tax Court. I find no cogent reason to depart from the general rule that costs should follow the event.

Order

[40] I would therefore propose the following order:

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

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree.

M. P. N MBONGWE
Judge of the High Court
Gauteng Division, Pretoria

I agree and it so ordered.

V. V TLHAPI
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 19 January 2022

Judgment delivered: ..8.. November 2022

APPEARANCES:

For the Appellant:	Adv J Truter
Attorney for the Appellant:	Van heerden Schoeman Attorneys, c/o Christos Coetzee, Pretoria
For the Respondent:	Adv K. D Magano together with Adv S. T Seshoka
Attorney for the Respondent:	State Attorney, Pretoria