IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Holderness, AJ)

[Not Reportable]

Case Number: 2560/2016

In the matter between:

HYDIE JASMIEN WILLIAMS Applicant

And

MINISTER OF POLICE First respondent

CAPTAIN WEITZ (CAPE TOWN POLICE STATION) Second respondent

SARS (CAPE TOWN) Third respondent

COMMISSIONER OF SOUTH AFRICAN REVENUE

SERVICES (CAPE TOWN) Fourth respondent

DIRECTOR OF PUBLIC PROSECUTIONS

(CAPE TOWN) Fifth respondent

JUDGMENT

HOLDERNESS, AJ

INTRODUCTION

[1] Two issues arise in this matter. Firstly, whether the alleged failure by the second and third respondents (hereafter referred to collectively as "SARS") to notify the applicant of her rights arising from a post-audit assessment, including her right to object, suspended her obligation to pay her personal tax debt. Secondly, whether the applicant, on the facts presented, was in fact notified of her rights, and the monies were validly transferred by the South African Police Services ("SAPS") to SARS in terms of section 179 of the Tax Administration Act 28 of 2011 ("the TA Act").

RELIEF SOUGHT AND CONDUCT OF THE MATTER

[2] The final relief sought by the applicant in this matter is framed as follows:

"The applicant intends to make an application...for an order in the following terms:

1. *That the matter be heard as a matter of urgency and that the Applicant's failure to comply with the time limits, forms and procedures prescribed by the Uniform rules of Court be condoned.*

2. *Directing Respondents to release the money to the amount of about R960,00 or the actual amount seized on or about 25 October 2013 at […] H. Road,*

Parow the residency of applicant to allow her to maintain a living and to pay for her legal fees;

3. That such funds be paid directly to the Trust Account of Mate Attorneys being 0035402113.

4. Such further and / or alternative relief;

5. Costs."

[2] The matter was initially enrolled for hearing on 18 February 2016, and was postponed to 18 March 2016, and thereafter to 26 April 2016.

[3] On 26 April 2016 the matter was argued and the parties were directed to address the Court on two issues, urgency and whether there was a dispute of fact on the papers.

[4] According to counsel for the respondents, the merits of the matter were not dealt with during the hearing on 26 April 2016. The respondents argued that the matter was not urgent and if it was found that it was urgent, such urgency was self-created. In response to the second issue raised, it was argued that there were no disputes of facts which could not be resolved on the papers.

[5] After hearing argument, the Court *mero motu* referred the matter for the hearing of oral evidence on the following issues:

"The right of the applicant to the funds that were seized by the Fourth Respondent from the South African Police Services SAP 13/6100/2013.

The right of lack thereof of Third and Fourth Respondents to seize such funds from First Respondent taking into account S179 of Tax Administration Act 28 of 2011 and S20, read with Section 30, 31 of the Criminal Procedure Act 51 of 1977."

[6] The parties agreed to abandon the court order referring the matter to oral evidence, and to proceed on the papers as they stood. In so doing the applicant must, of course, have accepted that as she was seeking final relief, the matter would be approached based on the well-established principle set forth in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[1]

FACTUAL BACKGROUND

[7] The two issues outlined above arise from the following facts.

[8] The applicant is a registered tax practitioner.

[9] In October 2013, the second respondent, executing a search warrant, searched the applicant's business and residential premises, and seized two safes and various documents.

[1] 1984 (3) SA 623 (A) at 634E-635A

[10] It is common cause that the search and seizure was lawfully executed.

[11] The safes were subsequently opened in the applicant's presence, and were found to contain cash sums of money in South African Rands. The applicant counted the money in the presence an employee of the third respondent, her attorney and the second defendant, Captain Weitz of SAPS ("Weitz").

[12] The first safe contained an amount of R861,850, and the second safe contained the sum of R60,000. It is common cause that the second amount of R60,000 was returned to the applicant's attorney on the same day.

[13] On 22 November 2013 the applicant and her husband were arrested and charged with *inter alia* 1,656 counts of fraud, relating to the submission of tax returns by the applicant on behalf of her clients in which she allegedly claimed false amounts in respect of medical expenses, with the intention of improperly obtaining refunds from SARS.

[14] According to the charge sheet, the applicant charged a fee of R300 and/or 10% when the amount of the refund to the taxpayer exceeded R5 000.00. All fees were paid in cash.

[15] The applicant was released on bail, subject to the condition that she was "*prohibited from conducting any illegal business in respect of submission of any tax return to SARS."*

[16] SARS subsequently discovered that the applicant may have submitted further false information to SARS, in respect of income tax returns submitted by her on behalf of taxpayers. On 14 July 2014 the applicant was, once again, arrested on charges of fraud.

[17] A protracted bail application ensued in respect of the new charges against the applicant. She was released on bail a second time, subject to stricter bail conditions, prohibiting her from *inter alia* providing any services as a practitioner or submitting any returns on behalf of any taxpayer, either directly or indirectly.

[18] Considering the nature of the charges pending against the applicant and her conduct after she was released for the first time on bail, SARS became increasingly suspicious regarding the accuracy of the figures submitted by her in her 2013 personal tax assessment, and proceeded to conduct an audit in respect of her tax affairs.

[19] In her 2013 personal tax assessment, the applicant recorded her turnover as R900,000, but reflected a loss of R378,553. The applicant included in this assessment "Cost of Sales" in the total amount of R562,609. In addition to the cost of sales, the applicant claimed expenses in the sum of R383,753.

[20] Based on the declared loss, the applicant did not pay any income tax for the 2013 financial year.

[21] The applicant's audit was conducted by Charl Haynes ("Haynes"), an audit specialist in the employ of SARS. Haynes communicated with the applicant during the audit process, and afforded her numerous opportunities to submit relevant financial documentation, and to engage with him regarding the assessment and any penalties to be imposed.

[22] Notwithstanding the fact that she is a tax practitioner, the applicant furthermore engaged the services of a certain Mr. Mogamat Fryddie ("Fryddie") to assist her with her tax matters, prior to the completion of the audit by SARS.

[23] On 28 October 2014 Haynes addressed an email to the applicant recording that she had failed to comply with certain requests made by him, and requesting her to provide the required information without delay.

[24] The applicant provided Haynes with the requested financial documentation, and on 30 October 2014 addressed an email to him, as follows:

> *"I have received the calculation in respect of the 2013 year of assessment. I hereby would like to explain where the amounts claimed in original submission come from. In fact I instructed my assistant to submit the tax return 2013 having provided the excel sheet where I captured all expenses from 2012 to 2013 but some of the expenses fall in the year 2014 and my assistant made a mistake of submitting the total expenses as a cost of sales not understanding exactly what it meant."*

[25] On 4 November 2014 the applicant addressed an email to Haynes setting out her further submissions regarding the understatement penalties which SARS intended imposing on her.

[26] In short, the applicant stated that it was never her intention to submit incorrect figures to SARS, that the "cost of sales" claimed was a misunderstanding, and that:

"monies given to my close family was a misunderstanding, also the donations claimed was monies given to my close family that I did not keep receipts or proofs and which could be considered as private expenses.

[27] Pertinently, the applicant went on to state the following:

"This is also to deeply and sincerely apologize for my recklessness and my ignorance which I will overcome henceforth by getting a professional assistance from my accountant before I submit any figures to SARS in the future.

[28] These statements are relevant for two reasons. Firstly, they demonstrate that the applicant admitted that she had misstated her expenses. Secondly, as a tax practitioner, one would have expected the applicant to have been capable of preparing her own personal tax return, and, at the very least understanding the meaning of "cost of sales". Considering the magnitude of the so-called "error", the applicant's explanation, to my mind, does not bear scrutiny.

[29] On 9 December 2014 SARS finalised the audit. SARS imposed an understatement penalty of 150% in terms of sections 222 and 223 of the TA Act, as it was found that there was intentional tax evasion by the applicant in claiming fictitious expenses.

[30] It was noted, in the finalisation of audit document, that, based on the revised financial statements presented by the applicant, she in fact earned a net income of R733,390, as opposed to the declared loss of R379,334. These figures were audited and the applicant's net

income was further increased to R862,462. In summary, the adjusted "gross income" was R1,241,796, and an understatement penalty of R501,204.33 was imposed.

[31] In conclusion the applicant was advised in writing, on the last page of the letter of finalisation of audit, that should she have any queries relating to the audit she should address them to Haynes directly, or could contact the call centre.

[32] On 15 December 2014 SARS issued an updated ITA 34 assessment for the 2013 year of assessment, reflecting an amount owing of R845 335.44 ("the second assessment").

[33] It is common cause that the applicant never objected to the second assessment.

[34] The applicant states, in her affidavit in reply, that if she had the right to object to this assessment, she should have been informed of such right. She states, in somewhat vague terms, that after receiving the assessment she contacted the call centre and was advised that a decision had already been taken, but was not informed of her right to object.

[35] The applicant was informed *inter alia* of the following in the body of the second Notice of Assessment:

> "*Below you will find the amounts of income included and deductions allowed in calculating this assessment. It is very important that you check these amounts to ensure they are correct and they reflect all your taxable income and allowable deductions for the year.*

If you are of the view that the assessment contains a processing, calculation or other error, you should submit a revised return.

If you are unsure as to how the assessment was concluded or the reasons for any of the adjustments made, you may write a letter requesting SARS to provide further information as to how the assessment was concluded. This letter must be delivered to your nearest SARS branch within 30 days of this date of assessment or sent via registered mail to the address at the top of this notice.

If you are aggrieved by this assessment, you may submit a Notice of Objection (NOO) using the form available from eFiling or your nearest branch to you or by calling 0800 00 SARS (7277). You have 30 days from the date of assessment in which to do this.

NOTE: Your obligation to pay any amount due is not suspended by any objection or appeal. However, SARS will consider a motivated application for the suspension of payment pending the finalisation of an objection or appeal as stipulated in the Tax Administration Act." **(emphasis added)**

[36] The applicant did not allege that she exercised any of the rights available to her as set out in the second Notice of Assessment. On the papers as they stand, the application did not object to or appeal against the outcome of the assessment, nor did she make application for suspension of payment pending an objection or appeal.

[37] It is noteworthy that the applicant does not state why she did not exercise any such right, nor why she did not contact Haynes directly, as she was entitled to do. The applicant furthermore did not state at what stage she contacted the call centre.

[38] Pertinently, the applicant does not state that she would have objected to the assessment following the final audit had she been informed of her right to do so. Moreover, the applicant does not state what the basis of her objection would be. Nowhere in her papers does the applicant dispute the figures used by SARS in the final audit. In fact, she appears, from the correspondence which I have referred to above, to admit the revised calculations.

[39] On 11 February 2015 SARS issued a "final notification of outstanding debt" for an amount of R851 246.87.

[40] On 19 February 2015 SARS issued a notice in terms of section 179 of the TA Act to the first and / or second respondents, and on 25 March 2015 the funds seized from the applicant by the SAPS were paid over to SARS.

[41] It is clear, from the chronology of events, that the 30-day period within which the applicant was required to either submit a revised return, request reasons for adjustments made or how the assessment was concluded, or to file an objection to the assessment, lapsed on 15 January 2015 (30 days of the date of assessment), and that the demand for payment and subsequent filing of a section 179 notice were not premature.

[42] If the applicant could show that she never received the notice or did not receive it timeously, this may have been a ground for condonation for the late filing of a letter

requesting reasons or a notice of objection, but not for the return of the funds which were lawfully paid over to SARS.

FACTS NOT PLACED IN DISPUTE

[43] The applicant made no mention of the assessment of her personal tax assessment, or of the audit, and the outstanding income tax and penalties due in her founding affidavit.

[44] She stated, somewhat disingenuously in the context of the background to this matter, that the funds were taken from SAP13 to SARS and that "*she was never informed of the reason for this move".*

[45] The applicant fails to make any mention whatsoever of the audit

[46] The applicant sets out her financial circumstances in detail in her founding affidavit, including judgments taken against her and her personal liabilities, and urgent need to access the funds to pay legal costs as she does not have faith in the legal aid attorney appointed to represent her to defend the criminal charges pending against her.

[47] It is significant that the applicant does not state that the seizure of the money by SAPS was unlawful, and does not make mention of the transfer of the money by SAPS to SARS pursuant to the section 179 notice issued by SARS.

[48] The high-water mark of the applicant's case appears to be the allegation that "*no court of law has ruled that the money no longer belongs to me*", and "*I have also had a*

deeper look at the charge sheet provided to me and discovered that there is no charge relating to the money seized in my house by second respondent."

[49] This may be a basis for the return of the funds if they were not required in the criminal investigation or proceedings, however the transfer of the funds to SARS to satisfy the applicant's undisputed personal tax liability is a complete defence to the applicant's claim to vindicate the funds.

[50] The applicant further concedes that there may have been valid reasons to seize the funds during the investigation but as she has not been charged with acquiring the funds through a commission of a crime, she should not lose the money.

[51] Detailed answering affidavits were filed on behalf of SAPS and SARS, setting out the full background leading up to the transfer of the funds by the SAPS to SARS. A number of crucial, and at times adverse, allegations by the respondents have not been replied to by the applicant at all, and therefore must be accepted as being correct.

[52] The affidavit deposed to by Jessica McClusky ("McClusky") on behalf of SARS runs to 83 paragraphs. In her replying affidavit, the applicant purports to deal which each of the answering affidavits filed on behalf of the respondents in turn, however she does not reply *seriatim* to any of the paragraphs in McClusky's affidavit from paragraph 43 onwards, and has not adopted the usual precautionary (albeit generally unhelpful) measure of a general denial of all allegations not specifically dealt with or replied to.

[53] The applicant *inter alia* does not deny that:

53.1 She was aware of the audit and the final demand for payment of the tax debt, but failed to act thereon

53.2 In terms of section 179 of the TA Act SARS is entitled to obtain the monies;

53.3 In terms of the relevant statutory provisions and by operation of law, the monies were lawfully paid over to SARS in terms of section 179 of the TA Act to discharge the debt owing by the applicant to the *fiscus;*

53.4 The monies were obtained in terms of the TA Act and in the circumstances judicial intervention was not necessary;

53.5 Prior to the application, the applicant never objected to the seizure of the monies in question; and

53.6 The monies forming the subject matter of the application were seized by SARS from the SAPS to discharge the applicant's personal tax liability, which is unrelated to the pending criminal charges.

[54] To my mind the failure by the applicant to make out a case in her founding affidavit for a final order, and to join issue regarding the above allegations, is fatal to the final relief sought.

RELEVANT LEGISLATIVE PROVISIONS

Section 31 of the Criminal Procedure Act 51 of 1977 ("The CPA")

[55] In the applicant's heads of argument it is submitted that the "*bone of contention is whether SAPS acted lawfully in failing to notify applicant or establishing whether was* (sic) *aware of the section 179 Notice prior to releasing applicant's funds from SAP 13 to SARS."*

[56] The applicant refers to several provisions in both the Criminal Procedure Act 51 of 1977 ("The CPA") and the TA Act.

[57] I will only deal with the provisions which are relevant to the relief sought in the present matter.

[58] Section 31(1)(a) of the CPA, which sets out how seized property is dealt with, states as follows:

> ***31 Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings***
>
> *(1)(a) If no criminal proceedings are instituted in connection with any article referred to in section 30 (c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person*

may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.

[59] As the monies are no longer in the possession of the SAPS, who in terms of the section 179 Notice were obliged to hand the monies over to SARS, the provisions of the CPA do not assist the applicant and it is not necessary to deal with this aspect any further.

Section 179 of the TA Act

[60] Section 179 of the TA Act ("Section 179") has undergone two amendments since it was first enacted, firstly by the Tax Administration Laws Amendment Act No. 39 of 2013 *("the TAL Act 39 of 2013")* and later by the Tax Administration Laws Amendment Act No. 23 of 2015 *("the TAL Act 23 of 2015").*

[61] The TAL Act 39 of 2013 was assented to on 14 January 2014, but only commenced on 16 January 2014.

[62] The TAL Act 23 of 2015 was assented to on 24 December 2015 and commenced on 8 January 2016.

[63] The audit, the second assessment and the section 179 notice were all issued before 8 January 2016, therefore the section as it read prior to the 2015 amendment applies.

[64] The section read as follows:

> *"A senior SARS official may by notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer's tax debt.*

[65] The applicant has failed to show that the section 179 notice was premature, or that it was not lawfully issued in accordance with the relevant provisions set forth in section 179 as it stood at the time the notice was issued.

[66] The applicant's argument that section 31 of the CPA takes precedence over section 179 of the TAA to my mind is misguided.

[67] The SAPS was in possession of the funds, but on receipt of a valid and enforceable notice to hand over such funds, was duty bound to transfer the monies to SARS. Section 179 of the TA Act is peremptory.

[68] Notwithstanding the applicant's argument to the contrary, there was no duty or obligation on the Second Respondent personally or the SAPS to bring the TA Act notice to the applicant's attention, and the applicant had no right to '*negotiate with SARS post-audit'.*

[69] Pertinently the applicant annexed the second ITA34 to her replying affidavit, therefore she cannot dispute receiving it.

[70] Lastly, as this is not a judicial review, the applicant's reliance on the Promotion of Administrative Justice Act 3 of 2000 is misplaced.

[71] As it is common cause that the seizure by SAPS was lawful, the only basis upon which the applicant is entitled to the return of the funds, is to show that transfer of monies from SAPS to SARS is invalid or unlawful and falls to be set aside. Applicant failed to do so and therefore the application must fail.

CONCLUSION

[72] In all the circumstances, I am satisfied that the monies were lawfully paid over by SAPS to SARS, in terms of section 179 of the TA Act, in discharge of the tax debt of the applicant.

[73] Accordingly, I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the First, Second, Third, Fourth and Fifth Respondents.

HOLDERNESS, AJ
ACTING JUDGE OF
THE HIGH COURT

APPEARANCES

For the Applicant:	Adv T Twalo
Instructed by:	Matte Attorneys
For the Respondent(s):	Adv R Williams SC
Instructed by:	Office of the State Attorney

Date(s) of Hearing: 21 November 2016

Judgment delivered on: 1 February 2017