IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – Port Elizabeth

Case no: 561/2016
Case Heard: 14/04/2016
Date Delivered: 05/05/2016

In the matter between:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES APPLICANT

and

JULIAN BROWN RESPONDENT

JUDGMENT

SMITH J:

Introduction

[1] The applicant launched proceedings on a semi-urgent basis for an order, *inter alia,* directing the respondent to comply with section 46(4) of the Tax Administration Act, 28 of 2011 ("the Act") by submitting his response to a Lifestyle Questionnaire ("the questionnaire") served on him on 19 October 2015.

[2] The applicant is the Commissioner for the South African Revenue Services. The founding affidavit was deposed to by one Keith Hendrickse, a Senior Manager in the National Projects Department for the Western Cape Region of the South African Revenue Services ("SARS"). Hendrickse averred that he had been duly authorised by the applicant in terms of section 11(1) of the Act to institute the proceedings.

[3] The respondent is Julian Brown, an adult male residing at 7 Rhone Place, Lorraine, Port Elizabeth. It is common cause that the respondent is not a registered taxpayer, nor has he ever submitted any tax returns. He opposes the application on the ground that he has shown just cause for his refusal to respond to the questionnaire.

Points *in limine*: urgency and Hendrickse's authority

[4] Before I deal with the merits of the application, I must first consider the two points *in limine* taken on behalf of the respondent, namely that the applicant has failed to establish sufficient urgency to justify the truncation of the time periods prescribed in the Uniform Rules of Court; and that Hendrickse has not established that he had been properly authorised to institute the proceedings.

[5] Regarding the issue of urgency, the following facts are relevant. The application was launched on 23 February 2016 and the papers were served on the respondent on the same day. The notice of motion called upon the respondent to file notice to oppose, if any, at or before 16h30

on 2 March 2016, and answering affidavits on or before 12h00 on Friday 11 March 2016.

[6] The notice of motion further stated that if no such notice to oppose were filed, the matter would be enrolled on an unopposed basis on Tuesday 29 March 2016, otherwise it would be enrolled for hearing on an opposed basis on 31 March 2016.

[7] It is common cause that the parties subsequently agreed that the matter would be enrolled for hearing on 14 April 2016, in order to allow the respondent more time to file his answering affidavit.

[8] The respondent filed his notice to oppose on 2 March 2016 and his answering affidavit on 18 March 2016, some 18 days after the application papers were served on him. The applicant's replying affidavit was filed and served on 7 April 2016.

[9] When I gave directives for the enrolment of the matter in terms the Practice Rules, I requested counsel to prepare written heads of argument for the assistance of the court. I stated, however, that the heads of argument may be handed up during argument. The applicant's heads were nevertheless served on the respondent's attorneys at 16h24 on Friday 8 April 2016.

[10] In his founding affidavit Hendrickse relied on the following grounds for his contention that the matter was semi-urgent:

(a) the object and purpose of the Act is to facilitate the swift investigation of taxpayers' tax affairs and to this end, to empower SARS to gather relevant information to enable it to enforce compliance with tax legislation;

(b) if the respondent were to be allowed to defer his response to the questionnaire over an extended period of time pending the hearing of this application in the normal course, the effective and efficient tax administration of the respondent's affairs would be undermined and the fiscus would be prejudiced; and

(c) if the matter is to be heard in the normal course and placed on the standard opposed motion roll, many months may pass before it will be heard.

[11] Mr *Williams*, who together with Mr *Erasmus*, appeared for the respondent, submitted that the applicant failed to establish a factual basis for the assertion that SARS will suffer prejudice if the matter is to be enrolled in the ordinary course. He argued furthermore that the respondent has been prejudiced by the fact that the applicant's replying affidavit, which for the first time averred that the respondent is not a registered taxpayer and has not been submitting tax returns, has only been filed four days before the hearing. He accordingly submitted that the matter should be struck off the roll, with costs.

[12] It is trite that an applicant who wants to have a matter enrolled and heard as one of urgency in terms of the Uniform Rules of Court, must satisfy the court that the extent of the modification or relaxation of the Rules is not any greater than the exigencies of the case demand. (*Caledon Street Restaurant CC v D'Aveira* [1998] JOL 1832 (SE)).

[13] It must have been abundantly evident from the foregoing that the extent of the deviation, if any, from the time periods prescribed by the Court Rules, is negligible. In fact, the respondent had longer to file his answering affidavit than he would ordinarily have been allowed if the matter were enrolled in the ordinary course. The respondent's complaint regarding the allegations in respect of his status as taxpayer is also a red herring. As mentioned before, those averments (which are contended to constitute new matter) are in fact common cause.

[14] Unsurprisingly therefore, the respondent has not been able to show any prejudice resulting from the enrolment and hearing of the matter on a semi-urgent basis. In my view the applicant has been more than reasonable in specifying the extent of the truncation of the time limits in his notice of motion, and has in the event been amenable to agree to further opportunity for the respondent to file his answering papers. I am accordingly of the view that the extent of the modification of the Rules was justified by the circumstances of the case and the factual bases provided in Hendrickse's founding affidavit. This point *in limine* can accordingly not be upheld.

[15] The respondent also challenged Hendrickse's authority to institute the proceedings. In reply to Hendrikse's assertion that he had been authorised in terms of section 11(1) of the Act, he denied any knowledge of that fact and put Hendrickse to the proof thereof.

[16] In response to that assertion Hendrikse annexed a document to his replying affidavit which he contended was proof of his authority to institute the proceedings. That document, which is titled "AUTHORITY TO EXERCISE POWERS AND DUTIES REQUIRED BY THE TAX ADMINISTATION ACT, NO 28 of 2011, AND TO BE EXERCISED BY A SENIOR SARS OFFICIAL", includes a declaration by the applicant that he authorises:

> "…under the powers granted to me in terms of section 6(3) of the Tax Administration Act, no 28 of 2011 ("the Act") SARS officials occupying the posts designated in **"Annexure A"** to exercise the powers and duties in respect of the sections of the Act in the corresponding entry of the first column of the annexure."
>
> The signature on the document is illegible and appears to be preceded by the word "*for".*

[17] The annexure to the document, which appears to have been accidentally truncated during copying, was subsequently (with the leave of the court) substituted for a proper copy. The heading of the substituted annexure reads as follows:

"AUTHORITY TO INSTITUTE OR DEFEND CIVIL PROCEEDINGS ON BEHALF OF THE COMMISSIONER IN TERMS OF SECTION 11(1)OF THE TAX ADMINISTRATION ACT, NO 28 of 2011."

The document is dated 19 October 2012 and is unsigned.

[18] In respect of "Dispute Resolution" the following is stated therein:

"**Group Executive**
Senior Managers
Tax Court
High Court

Senior Specialist:
Revenue Litigation
High Court

Manager: Tax Court
Specialist:
Tax Court
High Court"

[19] The relevant portions of section 11 of the Act read as follows:

"**11 Legal Proceedings involving Commissioner**

(1) No SARS official may institute or defend civil proceedings on behalf of the Commissioner unless authorised to do so under this Act or by the Commissioner or by the person delegated by the Commissioner under section 6(2).

(2) For purposes of subsection (1), a SARS official who, on behalf of the Commissioner, institutes litigation, or performs acts which are relied upon by the Commissioner in litigation, is regarded as duly authorised until proven to the contrary."

[20] Mr *Erasmus* argued that the document, being nearly 4 years old, and, in his submission, of uncertain validity, was not signed by the Commissioner himself. It does therefore not comply with section 10(1)(b) of the Act and does accordingly not authorise Hendrickse to compel the completion of a generic Lifestyle Questionnaire.

[21] Section 11(2) of the Act provides that where a SARS official institutes legal action on behalf of the Commissioner, it must be presumed that that official has been duly authorised in terms of section 11(1), unless the contrary is proven. That section thus explicitly puts the onus on the party challenging the official's authority. And Ms *Williams SC*, who appeared for the applicant, correctly argued that section 11(1) does not require that the authority must be in writing, since it is not a delegation of the Commissioner's powers contemplated in terms of section 6. The provisions of subsections 10(a) and (b) of the Act, which require a delegation to be in writing and signed by the Commissioner before it becomes effective, are thus not of application. For the purpose of establishing whether or not Hendrickse had been duly authorized to institute the proceedings, the fact that the document may or may not have been signed by the Commissioner is accordingly of no consequence.

[22] The respondent has not established any factual basis for his assertion that Hendrickse has not been duly authorised. What he has

done was merely to disavow any knowledge of that fact and put Hendrickse to the proof thereof. Such an approach can never be sufficient to rebut a fact deemed by statute. In the event, it is abundantly clear from a reasonable reading of the document that the intention was indeed to authorise Senior Managers to institute legal proceedings on behalf on the Commissioner.

[23] Furthermore, in the absence of any evidence to the contrary, I am constrained to assume that the document constitutes a proper delegation of the Commissioner's powers under the Act. In terms of the legal principle *omnia praesumuntur rite esse acta* official acts are presumed to comply with the relevant statutory formalities, and the persons who performed them are presumed to have been duly authorized. I must accordingly assume that whoever signed the document on behalf of the Commissioner had been duly authorized to do so. That presumption can only be rebutted by proof on a preponderance of probabilities and not by a bald denial of the nature proffered by the respondent in this case. I am accordingly satisfied that the document constitutes a proper delegation of the Commissioner's powers in terms of section 6(3), read with section 10 of the Act, and that Hendricse was accordingly duly authorized to issue the questionnaire and to institute these proceedings. This point *in limine* must accordingly also fail. I now turn to deal with the merits of the application.

The facts

[24] SARS delivered the questionnaire to the respondent on 19 October 2015 and he was expected to return the completed questionnaire to the SARS offices at 22 Hans Strydom Avenue, Cape Town, within 21 business days. The letter accompanying the questionnaire was signed by Hendrikse and one Mbuyisela Mayezana, an Operational Specialist. The letter also stated, *inter alia*, that the period of investigation is the 2011 to 2015 tax years; that SARS was in the process of reviewing his tax file; and that the information was requested in terms of section 46(1) of the Act.

[25] The questionnaire comprises some 26 pages, and the first page draws the taxpayer's attention to the provisions of section 72(1) of the Act. That section provides that a taxpayer may not refuse to complete and file a return on the basis that to do so might incriminate him or her. The information sought from the respondent relates, *inter alia*, to his and his spouse's personal particulars and circumstances; personal and private investments and assets; properties owned by him and his spouse; income received during the period under review; and expenses.

[26] On the same day SARS also caused a letter to be served on the respondent wherein he was given notice that:

(a) SARS intended to commence an investigation into his tax affairs; and

(b) the investigation was based on confidential and statutorily protected third party information which suggests that certain income had not been disclosed; that expenses had been incorrectly claimed for tax purposes; and that declarations made to SARS by other taxpayers suggest a tax risk.

[27] The respondent's attorneys Strombeck Pieterse Attorneys ("SPA") replied to the above-mentioned letter on 5 November 2015. In addition to reminding SARS of its statutory obligations towards taxpayers, they stated that they had been instructed to fully cooperate with SARS in respect of *"any lawful audit, gathering of information or questionnaire, investigations and/or order".* They, however, required confirmation that SARS will keep the respondent informed of the progress and findings of any audits, and that he will be given reasonable opportunity to respond to the findings. They also required the following information before the respondent would reply to the questionnaire:

(a) in terms of which sections of which law the respondent was obliged to submit the relevant material;

(b) if this is for the administration of any tax law, the relevant subsection of that definition in section 3(2) of the Act, must be quoted, supported by the underlying facts and circumstances that make the enquiry foreseeably relevant with the reasonable specificity as required by the Act;

(c) adequate reasons for the questionnaire, investigation and audit and why it is being conducted, including the underlying risk analysis for the industry the taxpayer is in, on which this audit is based; and

(d) copies of the SARS id's and letters of authority issued to the SARS assessors, as well as the line manager involved in the matter.

[28] They also stated that the respondent will submit a formal request for the abovementioned information under the Promotion of Access to Information Act, 2 of 2000 ("PAIA"). A copy of the request was annexed to the letter.

[29] SARS replied to that letter on 9 November 2015, reminding SPA about the respondent's statutory obligation to pay the prescribed fee, and stating that the request would not be processed until such time that the fee had been paid.

[30] On 10 December 2015, the attorneys appointed to act on behalf of SARS, Joubert Galpin Searle ("JGS") wrote to SPA stating, *inter alia,* that it was impermissible for the respondent to make his response to the questionnaire conditional upon the furnishing of the information requested in terms of the PAIA. They also reminded them of the respondent's statutory obligation to pay the standard prescribed fee of R35 (unless he

earned less than R14 7120), and that unless that amount was paid by 15 December 2015, SARS would accept the failure as "*an abandonment"* of the request under PAIA.

[32] JGS again wrote to SPA on 21 December 2015 pointing out that the respondent is under a statutory obligation, in terms of section 46(1) of the Act, to respond to the questionnaire, and that a failure to do so by 15 January 2016 would result in SARS seeking "*appropriate remedy against the respondent together with a punitive costs order".*

[33] On 11 February 2016 JGS wrote to SPA stating that since the prescribed fee had not been paid by the stipulated date, namely 15 December 2015, SARS will assume that his PAIA request had been abandoned. SPA responded on the same day, claimed that they had already replied to the previous correspondence on 25 February and annexed a copy of that letter. In that letter SPA stated that: the request to submit the questionnaire constituted administrative action and is subject to the principle of legality; the respondent has just cause not to respond to the request; because the requested information has not been provided the respondent was entitled to assume that the exercise of the power in terms of section 46 of the Act has not been properly authorised and he was therefore entitled to ignore the request; SARS is obliged to give reasons for its decision to issue the questionnaire; and that a new PAIA application would be submitted requesting "*new and additional*

information"; and pending the outcome of the complaint to the Tax Ombudsman, any action taken by SARS would be premature.

[34] Pursuant to that letter SPA again submitted a request for information under PAIA on 25 January 2016, enclosing proof of payment and requesting the following information:

(a) copies of all participating SARS official id's and letters of authority giving them the express authority to request the lifestyle questionnaire;

(b) a complete copy of the information-gathering file of the SARS officials pertaining to the selection of the taxpayer as target for a lifestyle questionnaire;

(c) minutes of any internal SARS meetings identifying a reason why the taxpayer was selected as a lifestyle questionnaire target;

(d) a copy of the internal audit manual of SARS regulating (within SARS) the procedures to be followed by SARS officials in initiating any information request from taxpayers;

(e) any and all information identifying why the taxpayer was selected for a Lifestyle Questionnaire by virtue of information obtained from third parties – without disclosing the identity of the third parties; and

(f) any and all internal information manuals regulating the initiation of the lifestyle questionnaire imposed on taxpayers.

[35] On 15 February 2016 JGS again wrote to SPA and, although denying that they ever received the letter of 25 January 2015, nevertheless responded to the assertions contained therein, and in addition stated that unless the completed questionnaire was returned to SARS on 22 February 2016, they would seek "appropriate relief".

[36] It is common cause that the respondent failed to submit the completed questionnaire, and has in fact asserted his constitutional and statutory right to comply only once the information requested in terms of PAIA had been provided by SARS.

[37] SARS responded to the second request for information in terms of PAIA on 10 February 2016, granting the request for copies of the identification cards, but refusing access to the remainder of the records and information. That request was refused on the basis that the disclosure of the information would "*jeopardise the effectiveness of SARS auditing procedures and methods used by SARS to identify taxpayers*", and could frustrate the deliberative process in SARS by inhibiting candid communication of opinions, advise and reports. The respondent thereafter lodged an internal appeal on 16 March 2016 which was dismissed on 5 April 2016 for the same reasons.

The applicant's contentions

[28] The applicant contends that:

(a) the provisions of section 46 of the Act are peremptory, and where a taxpayer is required to submit "relevant material" to SARS under that section, he or she "*must submit the relevant material to SARS at the place and within the time specified in the request"*;

(b) the information which the respondent is required to provide by virtue of the questionnaire constitute "*relevant material"* as defined by section 1 of the Act. That section defines relevant material as "*any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of the Tax Act as referred to in section 3"*;

(c) insofar as section 46 provides that SARS may only require a taxpayer to submit relevant material "*for purposes of the administration of a tax Act in relation to a taxpayer",* the stated objective of the questionnaire is clearly covered by the definition of the term "administration of a tax Act". That definition includes the obtaining of information in relation to "(a) *(i) anything that may affect the liability of a person for tax in respect of a previous, current or future tax period; (ii) a taxable*

event; or (iii) the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act";

(d) in as much as the respondent would have been entitled to reasons for the delivery of the questionnaire, those reasons provided by SARS are sufficient for purposes of the Act. SARS is precluded by the provisions of chapter 6 of the Act from providing the further particularity requested by the respondent since it would offend the general prohibition against disclosure of "SARS confidential information". Section 68 defines "confidential information" as, *inter alia,* "information that was supplied in confidence by a third party to SARS the disclosure of which could be reasonably expected to prejudice the future supply of similar information, or information from the same source"; and

(e) even though he contends that the decision to issue the questionnaire does not constitute administrative action, the applicant has in any event established a sound basis for that decision. The information provided to SARS by the third parties, coupled with the fact that the respondent has not registered as a taxpayer or submitted tax returns, constitute a rational and

justifiable basis for the request in terms of section 46 of the Act.

The respondent's contentions

[38] In addition to raising the abovementioned points in *limine* and asserting that the applicant failed to establish the prerequisite for an interdict, the respondent contends that:

(a) the request for him to complete a Lifestyle Questionnaire is an unlawful "fishing expedition" which infringes on his constitutional and statutory rights;

(c) he is, by virtue of section 33 of the Constitution and the provisions of the Promotion of Administrative Justice Act, 3 of 2000, ("PAJA"), or the principle of legality, entitled to expect fair, reasonable and lawful conduct on the part of SARS.;

(d) he is furthermore entitled to protection of his dignity and privacy in terms of sections 10 and 14 of the Constitution, and not to be subjected to any form of harassment or unnecessary invasive conduct by SARS;

(e) the applicant has failed to provide substantive justification for the deviation from the above-mentioned constitutional provisions, and the questionnaire thus constitutes an infringement of his fundamental constitutional rights set out in the Bill of Rights;

(f) SARS is required to be transparent in its dealings with him in respect of information held by it, and he is accordingly not under any obligation to respond to the questionnaire until such time as his internal appeal had been finalized or, the Tax Ombudsman has ruled on his complaint;

(g) until such time as the applicant provides him with adequate reasons for the decision to issue the questionnaire, he is not obliged to respond to it. Although he is not interested in the names of persons who may have provided information to the applicant, he is entitled to details of those allegations in order to have a fair opportunity to address them. In the absence of the requested information, the reasons provided by the applicant are vague and arbitrary; and

(h) the information sought in the questionnaire is not specific, but general and wide ranging. The questionnaire is thus arbitrary and capricious, and the information sought therein is not "relevant material" as required in terms of section 46 of the Act. The applicant has thus failed to satisfy the jurisdictional requirements necessary to that section.

Discussion

[39] There can be little doubt, having regard to the "language used in the light of ordinary rules of grammar and syntax, the context in which the provision appears and the apparent purpose of the Act", that the

provisions of section 46 are peremptory. The explicit and unambiguous wording of the section simply does not allow for any other interpretation. (*Natal Joint Municipal Pension Fund v Endumeni Munucipality* [2012] 2 All SA 262 (SCA), at paragraph 18)

[40] It is in my view similarly manifest that the information sought in the questionnaire constitutes “relevant material” since it pertains to the respondent’s assets, liabilities and expenses. Furthermore, the questionnaire could hardly have been more specific regarding the information which the respondent is required to provide, and I am accordingly satisfied that adequate specificity has been provided as required by the Act.

[41] There can also be little doubt that the issuing of the questionnaire was done in the course of the “administration of a tax Act” since the information sought therein manifestly relate to “the liability of a person or persons for tax in respect of a previous, current or future tax year.” (section 3(a)(i).

[42] I am accordingly of the view that the applicant has established all the requisite jurisdictional facts mentioned in section 46. The respondent’s contention that the issuing of the questionnaire was a “fishing expedition” is thus untenable. The questionnaire was issued against the background of information to the effect that there may have

been non-disclosure of relevant information by the respondent, coupled with the fact that he did not register as a taxpayer or submit tax returns. In my view these factors constituted a sound basis for the issuing of the questionnaire and cannot by any stretch of the imagination be regarded as “a fishing expedition”.

[43] Mr *Erasmus* argued that the provisions of the Act do not authorise SARS to enforce a section 46 request by virtue of a mandatory interdict. According to him the only remedy available to SARS in such a case is that provided for in section 234 of the Act. That section makes it a criminal offence for any person to wilfully and “*without just cause”* furnish, produce or make available any information document or thing, excluding information requested under section 46(8). SARS was thus constrained to institute criminal charges against the respondent instead of moving court for a mandatory interdict, or so he argued.

[44] He argued furthermore that the only types of litigation authorised by the Act are those referred to in section 12, read with sections 50 to 58 of the Act, which provides for *ex parte* proceedings to institute inquiries; applications for search and seizure warrants provided for in sections 59 to 60 of the Act; proceedings relating to dispute resolution mentioned in Chapter 9; filing of civil judgments for tax debts (sections 172 and 176); institution of sequestration, liquidation or winding up proceedings (sections 177 and 178); recovery of debts from other persons (section

184); and recovery of taxes on behalf of foreign governments (section 185 and 186).

[45] In my view this argument is not supportable. The above-mentioned proceedings all have some unusual or *sui generis* elements, and are clearly intended to bestow upon SARS extraordinary powers in order to facilitate the efficient and expeditious collection of taxes. The right to institute civil action to enforce compliance with a request for relevant material, on the other hand, is ancillary to the powers bestowed on SARS in relation to the administration of a tax Act, including the power to request relevant material in terms of section 46 of the Act. That remedy is accordingly available to SARS in terms of the common law and does not require specific statutory sanction. There is nothing in the Act that suggests the contrary; neither has Mr *Erasmus* been able to refer me to any authority in support of his contention.

[46] In respect of the respondent's contention that the decision to issue the questionnaire constitutes administrative action, Mr *Erasmus* made the following submissions. He argued that the request is an invasion of the taxpayer's privacy in that he or she is compelled to produce confidential information to a SARS official. A failure to comply with such a request renders the taxpayer liable to criminal prosecution. That decision is also not subject to the normal appeal processes in terms of the Act and a taxpayer must accordingly be furnished with adequate reasons in terms of

PAJA. The applicant has failed to provide such reasons and the decision is accordingly subject to judicial review. He submitted in addition, that until such time as the reasons had been provided and the tax ombudsman ruled on his complaint, the respondent has shown just cause for his failure to furnish the requested information.

[47] Administrative action is defined by the PAJA as: “any decision or failure to take a decision by an organ of state (i) exercising a power in terms of the Constitution or a Provincial Constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person and which has a direct, external legal effect.”

[48] The test to determine whether or not a decision constitutes administrative action has been explained as follows by Oliver JA in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA), at paragraph 34:

(a) Administrative Law is an incident of the separation of powers under which courts regulate and control the exercise of public power by other branches of government;

(b) the question relevant to section 33 of the Constitution is not whether the action is performed by a member of the executive arm of government, but whether the task itself is

administrative or not, and the answer to this is to be found by an analysis of the nature of the power being exercised; and

(c) what fall to be considered in this regard are, *inter alia,* the source of the power exercised, the nature of such power, the subject matter, whether it involves the exercise of a public duty, and how closely it is related, on the one hand, to policy matters which are not administrative, and on the hand, to the implementation of legislation, which is.

[49] In *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another 2010 (5) SA 457 (SCA)*, at paragraph 39, Nugent JA said the following regarding the meaning of the term public in nature:

> "Powers or functions that are public in nature, in the ordinary meaning of the word, contemplate that it pertains to the people as whole or that they are exercised or performed by on behalf of the community as a whole. (or at least a group or class of the public as a whole) which is pre-eminently the terrain of government."

[50] Ms *Williams* has in my view correctly pointed out that the request for information in terms of section 46 is a preliminary investigation by SARS which may or may not lead to a more formal audit or inquiry under the Act. It is only when SARS has been placed in possession of the requested information that it will be able to determine whether or not there are

indeed grounds for a further inquiry or an audit. It is at that stage that the principles of administrative justice must be observed.

[51] The request can accordingly not adversely affect any of the respondent's rights. In the event, our courts have found that an investigation of this nature does not constitute administrative action. In *Competition Commission v Yara (SA) (Pty) Ltd and Others* 2013 (6) SA 404 (SCA) the Supreme Court of Appeal (per Brand JA) held that the initiation of a complaint by the Competition Commission or a private person in terms of the Competition Act, 89 of 1998 is a preliminary step that does not affect a person's rights, and the Commission was thus not obliged to engage with a suspect on the question of whether its suspicions are justified. The learned judge held, at paragraph 24, that "*[t]he principles of administrative justice are observed in the referral and the hearing before the tribunal. That is when the suspect firm becomes entitled to put its case*".

[52] In the event, in my view, the applicant has provided sound reasons for its decision to issue the questionnaire. The third party information, which suggests that there may not have been full disclosure of income by the respondent, coupled with the fact that he has not registered as a taxpayer or submitted tax returns, constitute a rational basis for the issuing of the questionnaire. The respondent's contention that the

applicant has failed to observe the principle of legality can accordingly also not be upheld.

[53] Insofar as the respondent contends that he is entitled to the additional information sought in his second PAIA request, I am satisfied that the applicant's objection to the disclosure of the information on the basis that it constitutes "SARS confidential information", protected in terms of section 68 of the Act, is justified under the circumstances. Even though the respondent contends that he does not require the applicant to name names, Ms *Williams* has correctly argued that it would be relatively easy for him to infer the identities of the third parties if the additional particularity sought in his second PAIA request is disclosed.

[54] Insofar as the respondent's right to privacy, guaranteed in terms of section 14 of the Constitution, may have been infringed by the issuing of the questionnaire, I am satisfied that the provisions of section 46 of the Act constitute a justifiable limitation to that right as envisaged in section 36 of the Constitution. In the event, there has not been any challenge to the constitutionality of that section.

[55] Mr *Erasmus* also argued that the information sought by SARS does not relate to his business affairs, but is personal information which is protected in terms of his constitutional right to privacy. This argument is also untenable. All that SARS is required to show is that the information sought is "relevant material" necessary for the administration of a tax Act.

For the reasons mentioned above, the information sought by virtue of the questionnaire is manifestly relevant for that purpose.

[56] As mentioned above, the respondent's internal appeal against the refusal to provide the additional information sought in his second PAIA request, had been dismissed. And for the reasons stated above, his contention that that refusal constitutes just cause for his own failure to respond to the questionnaire accordingly has no merit. So too is his contention that he is not obliged to respond until such time as the Tax Ombudsman has ruled on his complaint. He has also not been able to establish any legal basis for the latter contention.

[57] I am accordingly of the view that the applicant has established a clear right and a reasonable apprehension of harm. I am also satisfied that he has no other satisfactory remedy available. Ms *Williams* has correctly argued that the other more invasive procedures, which were rather ironically suggested by the respondent, are not justified under the circumstances, neither would the institution of criminal proceedings assists SARS with its stated objective, namely the expeditious acquisition of the relevant material. In the event the respondent cannot prescribe to SARS which legal remedy it must pursue.

[58] I am accordingly of the view that the application must succeed.

Order

[59] In the result the following order issues:

1. The respondent is directed to comply with section 46 of the Tax Administration Act, 28 of 2011, by submitting his response to the Lifestyle Questionnaire, a copy of which is appended to the founding affidavit, within two weeks of the granting of this order.
2. If the respondent fails to submit his response to the Lifestyle Questionnaires as aforesaid, either timeously or at all, the applicant may apply on the same papers, duly amplified if necessary, on 48 hours written notice the respondent, for an order in the following terms:
   2.1 that the respondent be held in contempt of court;
   3.2 committing the respondent to imprisonment until such time as he complies with the court order.
3. The respondent is ordered to pay the applicant's tax costs of suit on the party and party scale, such costs to include the costs attendant upon the employment of two counsel.

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J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Williams SC
Assisted by	:	Advocate Witten
Attorney for the Applicant	:	Joubert Galpin and Searl 173 Cape Road Port Elizabeth Ref: Mr M C Botha/pw/SOU12/0003
Counsel for the Respondent	:	Advocate Erasmus
Assisted by	:	Advocate Williams
Attorney for the Respondent	:	Strombeck Peterse Attorneys 7 Bird Street Port Elizabeth Ref: SWPP/Lw/SW0636
Date Heard	:	14 April 2016
Date Delivered	:	05 May 2016