<u>IN THE HIGH COURT OF SOUTH AFRICA,</u>
<u>FREE STATE DIVISION, BLOEMFONTEIN</u>

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal Case Number: 5492/2021

In the matter between: -

KETSISE MOTLOUNG — **First Applicant**

REATLEHILE DEVELOPMENT CC — **Second Applicant**

and

COMMISSIONER: SOUTH AFRICAN REVENUE SERVICE — **First Respondent**

MINISTER OF FINANCE — **Second Respondent**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — **Third Respondent**

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — **Fourth Respondent**

<u>CORAM:</u>	**MBHELE, DJP**
<u>HEARD ON:</u>	14 APRIL 2023
<u>DELIVERED ON:</u>	23 JUNE 2023

[1] This is an application for leave to appeal against my judgment that was delivered on 21 November 2022, in which I dismissed the applicants' application to declare sections 235 and 222 of the Tax Administration Act 28 of 2011 unconstitutional.

[2] The grounds on which leave to appeal is sought are listed extensively in the application and to avoid prolixity I shall not repeat same herein. The grounds are mainly a rehash of what was argued before me and dealt with in the judgment. I will also not repeat some of the issues that were dealt with in the judgment.

[3] Applications for leave to appeal are regulated by Section 17(1) of the Superior Courts Act 10 of 2013 (SCA). It reads as follows:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
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> (a) (i) the appeal would have a reasonable prospect of success; or
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> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
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> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
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> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[4] The court hearing the application for leave to appeal must satisfy itself that there is a real prospect of success. The Act places a heavy onus on the applicant to show why another court would come to a different conclusion. It is no longer about the applicant having an arguable case, it must be clear at the time of granting leave to appeal that prospects of success are real and not fanciful.

[5] Section 17(1)(a)(i) has not only raised the bar for applications for leave to appeal but also fettered the Judge's discretion when considering such

applications. Leave to appeal may only be given when the Judge or Judges are of the opinion that the appeal would have a reasonable prospect of success. The word "only" is indicative of the fact that this section limits the Judge's discretion to grant leave to appeal. The Judge's discretion is circumscribed because he or she may not grant leave to appeal based on a reason other than the one mentioned in it. Considerations such as an applicant, for leave to appeal, having an arguable case or that there is a possibility of success on appeal are irrelevant.[1]

[6] Central to the applicants' application for leave to appeal is that I erred in finding that the understatement penalty constitutes an administrative penalty. The applicants submitted that **Pather And Another v Financial Services Board And Others**[2] is not applicable in the circumstances of this case. The applicants further submitted that the court did not dispose of all the issues when it did not deal with section 223 in its final analysis.

[7] The applicants further contended that the definition of 'accused' in section 35 (3) of the constitution extends to civil proceedings. They find support for their argument from **Grayston Technology Investment Pty (Ltd) and Another v The State** [3] where Spilg, J remarked as follows in relation to double jeopardy and civil or administrative tribunals penalties:

"124 An issue of double jeopardy might have arisen. However, the evidence before the court did not indicate what administrative penalties were imposed, nor could they be determined because the interest portion of the judgment debts was not disclosed. In addition, the issue was not ventilated as both parties accepted that the suspended sentences would not change. This case should therefore not be regarded as finding that double jeopardy may not have arisen. In brief the issue of double jeopardy may have arisen by reason of the following.

125. There would appear to be a constitutional safeguard against double jeopardy irrespective of whether the forum empowered to impose the sanction is a criminal court, a civil court or an administrative tribunal. Section 35(3)(m) of the Constitution gives expression to a fundamental

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[1]School Governing Body Grey College, Bloemfontein v Scheepers and Others (South African Teachers Union Intervening) (2612/2018) [2019] ZAFSHC 25 (17 January 2019) at par. 4, also Mothuloe Incorporated Attorneys v The Law Society of the Northern Province 2017 JDR 533 (SCA) at para 18.

[2] Pather And Another v Financial Services Board And Other 2018 (1) SA 161 (SCA)
"Accordingly, for all of the reasons given, I take the view that proceedings before the EC do not lie within the criminal sphere and cannot be classified as being criminal in nature. The court below was accordingly correct in holding that the EC, when imposing administrative penalties 'decidedly remains administrative'. Its conclusion in this regard is consistent with decisions in this country by the Competition Appeal Court, Tax Court and Labour Court."

[3] Grayston Technology Investment (Pty) Ltd v S [2016] 4 All SA 908 GJ at paragraph 124 - 125

principle which transcends the confines of purely criminal procedure. The provisions of that section are illustrative of the broader concept which underpins the plea of *autrefois convict* and *acquit,* and also *res judicata*; nl, ". . . *die eenvoudige feit dat dit weersinwekkend is vir ons gevoel van billikheid en regverdigheid,* dat . . . die *gestrafte vir die tweede maal* . . . *weens dieselfde misdaad vervolg sou word*" *R v Manasewitz* 1933 (AD) 165 at 177."

[8] I do not agree with the view expressed in **Grayston** above. The rights protected in Section 35 of the constitution only accrue to an accused person, being a person facing criminal prosecution or someone called upon to answer a criminal charge. See **Nel v Le Roux NO and Others**[4] . The section is aimed at protecting an individual's right to liberty. It guarantees protection against unlawful and arbitrary arrest and detention. A taxpayer upon whom additional tax is levied is not an accused person within the meaning of section 35(3) of the Constitution, there is no question of him being tried for an offence or of the proceedings culminating in a conviction with a concomitant criminal record. There is no likelihood of the taxpayer being sentenced to a term of imprisonment or of being deprived of his liberty[5].

[9] In the case of **Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v the Competition Commissioner and Another**[6] the Competition Appeal Court, in considering an argument similar to that in the present matter, said the following:

> 'The rights set out in section 35(3) of the Constitution are reserved for those people who have been charged in criminal matters and who are likely to be sentenced to a term of imprisonment. It is the imprisonment aspect, which deprives a charged or accused person, of his liberty, which is sought to be protected by the entrenchment of the rights, set

[4] Nel v Le Roux and Another 1996 (4) BCLR 592 (CC) para 11.

[5] TC Case no: 11641 [2006] ZATC 6 (4 December 2006) The appellant was challenging payment of an additional tax in terms of section 76(1) of The Income Tax Act 58 of 1962 after he was convicted and fined in the magistrate court for the same transgression. The appellant argued that imposition of additional payment infringed upon his rights in terms of section 35 (3) (m) of the Constitution. The court found as follows: Additional tax in terms of section 76(1)(a) of the Act is a penalty of an administrative nature which cannot be equated with a fine imposed by a criminal court. It is collected via the machinery of assessment and its main purpose is to ensure the accuracy of returns.

[6] Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v the Competition Commissioner and Another 2005 (6) BCLR 613 (CAC).

> out in section 35(3). It is thus the threat of imprisonment which triggers off the rights set out in section 35(3).'

[10] The applicants' argument that the imposition of an understatement penalty for intentional tax evasion constitutes a form of criminal punishment is without basis and falls to be rejected. In view of the above the argument that **Pather** is not applicable to this matter is unsubstantiated and misplaced.

[11] In **Federal Commissioner of Taxes v Trantwein**[7] Evatt J in dealing with the imposition of penalty for intentional evasion of tax said:

> "The object of the section is to impose a heavy penalty so as to ensure the accuracy of returns, upon which the whole income tax system of the Commonwealth is based. The penalty is imposed 'by way of additional tax' but as I endeavoured to point out in Richardson's case, although the penalty is collected via the machinery of assessment, the section is definitely a penal provision."

[12] An understatement penalty, like the penalty dealt with in **TC Case no: 11641/ 2006** above and prescribed in section 75 and 76 of the Income Tax Act 58 of 1962, is a penalty of an administrative nature. The penalty was imposed by an administrative body after an assessment and audit were done. Its purpose is to ensure effectiveness of the tax administration system.

[13] Section 208 of the Act defines Administrative noncompliance penalty or penalty as follows:

> **'administrative non-compliance penalty'** or **'penalty'** means a "penalty" imposed by SARS accordance with this Chapter or a tax Act other than this Act, and excludes an understatement penalty referred to in Chapter 16.'

Section 210 provides as follows:

'**210. Non-compliance subject to penalty**

(1) If SARS is satisfied that non-compliance by a person referred to in subsection (2) exists, SARS must impose the appropriate 'penalty' in accordance with the Table in section 211.

[7] Federal Commissioner of Taxes v Trantwein, 4 A.T.D. 92 at p. 96

(2) Non-compliance is failure to comply with an obligation that is imposed by or under a tax Act and is listed in a public notice issued by the Commissioner, other than—

(a) the failure to pay tax subject to a percentage based penalty under Part C;

(b) non-compliance in respect of which an understatement penalty under Chapter 16 has been imposed; or

(c) the failure to disclose information subject to a reportable arrangement penalty under section 212.

[14] A closer look at section 208 and 210 of the Act shows that an understatement penalty is not the only penalty that is excluded in Part B of the Act. Section 210 excludes the penalty levied under Part C, a reportable arrangement penalty under section 212 as well as an understatement penalty when dealing with administrative non- compliance penalty. The mere fact that the aforementioned categories are excluded from Part B of the Act does not mean that they are not administrative penalties for the purposes of tax administration.

[15] It is clear that the Act creates various forms of administrative penalties which are subjected to different regimes. The exclusion of understatement penalties from Section 208 does not make them criminal in nature.

[16] Section 223 of the TAA only serves as a tool to determine the understatement penalty percentage. The most serious transgression is intentional tax evasion which carries an understatement penalty of 150%. Section 223 serves as a guideline for the imposition of an appropriate penalty fitting the severity of the offending conduct. It does not alter the nature of the understatement penalties.

[17] Having considered the merits of the application for leave to appeal, I am not persuaded that there are reasonable prospects of success on appeal. The applicants contend that I erred in granting a costs order against them and that they ought to have been afforded the protection of **Biowatch**[8] rule. The **Biowatch** principle was articulated as follows:

[8] Biowatch Trust v Registrar Genetic Resources and Others (CCT 80 / 08) [2009] ZACC 14; 2009(6) SA 232 (CC)

> 'If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way the responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door'.

[18] The starting point in constitutional litigation is that an unsuccessful private litigant in proceedings against the State ordinarily ought not to be ordered to pay costs. Biowatch has not stripped the court off its discretion to award costs. Biowatch serves as a guide for awarding of costs in constitutional litigation. The rule is not unqualified. The court in Biowatch further held:

> '[24] At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.
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> [25] Merely labeling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in *Affordable Medicines*. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication. The converse is also true, namely, that when departing from the general rule a court should set out reasons that are carefully articulated and convincing. This would not only be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future.'[9]

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[9] Biowatch Trust v Registrar Genetic Resources and Others (CCT 80 / 08) [2009] ZACC 14; 2009(6) SA 232 (CC)

[19] I have no doubt that Biowatch rule is aimed at protecting litigants who approached court to enforce a right that is guaranteed in a constitution. In ***Motala v Master, North Gauteng High Court, Pretoria***[10] the Supreme Court of Appeal remarked that *Biowatch* principle does not constitute a licence to litigate with impunity against the State. In **Lawyers for Human Rights v Minister in the Presidency and Others:**[11]

> '[The *Biowatch* rule], of course, does not mean risk-free constitutional litigation. The court, in its discretion, might order costs, *Biowatch* said, if the constitutional grounds of attack are frivolous or vexatious - or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs. The High Court controls its process. It does so with a measure of flexibility. So a court must consider the "character of the litigation and [the litigant's] conduct in pursuit of it", even where the litigant seeks to assert constitutional rights.'

[20] The applicants are delinquent tax payers on whom SARS has imposed 150% understatement penalty on both Income Tax and VAT for intentional tax evasion. At the time of hearing this matter they had not as yet paid the penalty imposed. They approached court claiming that there is no authoritative South African case law that deals with the issue at hand. They were made aware of the existing authorities which are relevant to the issue and directly on point. There is no genuine constitutional issue raised by the applicants. **Biowatch** was not aimed at protecting litigants who bring frivolous and vexatious issues to court. The **Biowatch** protection is available to litigants who are raising genuine constitutional issues. Furthermore the applicants did not seek protection from **Biowatch** in any of their papers.

[21] Having concluded that none of the grounds of appeal enjoy reasonable prospects of success, whether taken singly or cumulatively, the application for leave to appeal must fail. I, therefore. make the following order

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[10] *Motala v Master, North Gauteng High Court* [2019] ZASCA 60; 2019 (6) SA 68 (SCA) para 98.
[11] *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) para 18.

Order

1. Application for leave to appeal is dismissed with costs

N.M. MBHELE, DJP

Appearances:

For the 1st & 2nd Applicants:	Adv.MB Mojaki & Adv J Nkhahle Instructed by Modisenyane Attorneys Bloemfontein
For the 1st & 2nd Respondents:	Adv.G Marcus SC, Adv K Tsatsawane SC & Adv E Mkhawane Instructed by Claude Reid Attorneys Bloemfontein