IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA

CASE NO: CA36/2018
DATE HEARD: 13/08/2018
DATE DELIVERED: 17/08/2018

In the matter between

FIKILE NTAYIYA **APPELLANT**

and

SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The appellant, as applicant in the court *a quo*, sought an order reviewing and setting aside the respondent's tax assessment for the tax years 2008 to 2013. He further sought an order that annual financial statements (the AFS) prepared by his tax consultants be accepted as correct. At the hearing the respondent raised two points in *limine*, namely non-compliance with the provisions of ss 11(4) and 11(5) of the Tax Administration Act 28 of 2011 (the Act). These sub-sections provide:

> "(4) Unless the court otherwise directs, no legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of at least one week of the applicant's intention to institute legal proceedings.

> (5) The notice or any process by which the legal proceedings referred to in subsection (4) are instituted, must be served at the address specified by the Commissioner by public notice."

[2] It is common cause that the appellant did not comply with these provisions. The court *a quo* (Laing AJ) was prepared to adopt a wide interpretation of s11(4) and took the position that it was competent for a court to direct that one week's notice need not be given, after proceedings had already been launched. The court *a quo* was further of the view that a condonation application should be brought by an applicant who had not complied with s11(5).

[3] The court *a quo* declined to grant condonation to the appellant for his non-compliance with the subsections and dismissed the application with costs. This appeal lies against that decision, with the leave of the court *a quo*. The court *a quo* was of the view that there were no prospects of success in the appeal but granted leave in terms of s 17 (1) (a) (ii) of the Superior Courts Act 10 of 2013 which provides:

> "17.(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
> *(a)* (i) ……………………..
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

The compelling reason was, according to the judgment, the interpretation of ss 11 (4) and 11(5) of the Act. We did not take issue with the court *a quo*'s interpretation and our approach in this appeal is whether or not the court *a quo* was correct in not granting condonation for non-compliance with those subsections.

Background

[4] The appellant is a practising attorney. He instructed his previous tax consultants, MNG Business Consultants (MNG), to prepare tax returns for the years 2008 to 2013. These returns included the AFS for those years. Nil returns were submitted and during 2014 an official of the respondent notified the appellant that the AFS were incorrect. The appellant was allowed to correct the AFS. MNG prepared a second set of AFS and the respondent audited MNG's assessment of the applicant's tax liability. The respondent's auditor, Ms Karin van Niekerk, added together amounts deposited in the applicant's business and private bank accounts and compared the total with the income recorded in the AFS. She concluded that the applicant had grossly understated his income and imposed penalties in terms of s 222 of the Act for intentional tax evasion, at the rate of 150%, as provided for in s 223 of the Act. The appellant's total tax liability for those years was assessed in the sum of some R3.6 million.

[5] The appellant instructed new tax consultants, Apac, who lodged an objection to the assessment. This objection was partially allowed, based on the revised AFS which were submitted with the objection. A new set of taxable profits was accepted. The applicant was advised of his right to appeal the respondent's decision on the objection. An appeal by the appellant was lodged but was out of time.

[6] The appellant then requested a reduced assessment in terms of s 93(1)(d) and s 93(1)(e) of the Act which provide:

“**93 Reduced assessments**

(1) SARS may make a reduced assessment if-

…..

(a) …..

(b) …..

(c) …..

(d) SARS is satisfied that there is a readily apparent undisputed error in the assessment by-
   (i) SARS; or
   (ii) the taxpayer in a return; or

(e) a senior SARS official is satisfied that an assessment was based on-
   (i) the failure to submit a return or submission of an incorrect return by a third party under section 26 or by an employer under a tax Act;
   (ii) a processing error by SARS; or
   (iii) a return fraudulently submitted by a person not authorised by the taxpayer.”

This request was declined by the respondent. In its letter to the appellant setting out the grounds for not granting the request, the respondent concluded by saying:

> “Should you wish to pursue this matter further, you should seek legal advice with regards to legal remedies available, which may include a Review Application to the High Court”.

The application

[7] In response to the points in *limine* the applicant stated in his replying affidavit that he had interpreted the concluding sentence of the respondent’s letter as consent to proceed with the application without giving notice. In his application for condonation he stated that he is unfamiliar with the law relating to tax administration and was not aware of the provisions of the Act. He repeated that he interpreted the respondent’s letter as consent to the institution of legal proceedings and maintained that the respondent had not suffered prejudice as a result of the non-compliance with the Act.

[8] The applicant's criticism of the assessment was based on a number of grounds. Chief among these was that the assessment was based on the original incorrect AFS, which according to the applicant the respondent had agreed were incorrect. The applicant was initially not aware that the AFS were incorrect. There was therefore, so he maintained, an undisputed error warranting a reduced assessment. The bank statements relied upon by the respondent had included amounts which had been paid to creditors, including counsel, but these amounts had been included in his gross income. In particular amounts paid to the applicant by the State were all taken as gross income whereas counsel had been paid from these amounts. Value Added Tax had also been included in the gross income. The respondent never provided a full explanation regarding the calculation of the penalties and further should not have imposed the harshest penalty. The applicant said he trusted his former tax consultants and was misled by them in submitting nil returns. The applicant pointed out that although the objection was partially allowed, this did not result in a reduced assessment.

The court a *quo*'s judgment

[9] In considering whether or not to grant condonation, the court *a quo* referred to the judgment in *Van Wyk v Unitas Hospital and Anothe*r (Open Democratic Advice Centre as *amicus curiae*) 2008 (2) SA 472 (CC) at paragraph [20] where the following was said:

> "This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent

> and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[10] It is apposite in this regard also to refer to what was stated in *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC) at paragraph [3]:

"This Court has held than application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."

[11] The court *a quo* was of the view that the applicant's explanation for non-compliance with the Act was inadequate. The applicant, as an attorney, should have consulted the applicable legislation and ensured that he complied with procedural requirements. The court *a q*uo was further of the view that the concluding sentence of the respondent's letter (see paragraph [6] above) could not be construed as a waiver of the applicant's obligation to give notice.

[12] The court *a quo* did not agree that there was no prejudice to the respondent as a result of the non-compliance. It was of the view that a week's notice would have given the respondent an opportunity to investigate the matter further and to decide how to resolve the dispute, thereby avoiding litigation at the public's expense. Similarly, service at the correct address would have allowed the respondent to explore a dispute resolution process.

[13] The court *a quo* also dealt with the prospects of success in deciding whether or not to grant condonation. It was of the view that the applicant had not explicitly stated the grounds of review as provided for in s 6(2) of the Promotion of Administrative Justice Act 3 of 2000. It further stated that the fundamental difficulty which it had with the application was that the errors on which the assessment was allegedly based were far from clear. For example precise details of income received in his bank account (presumably from the State) and what was paid to counsel were not given, nor did the applicant say how Ms van Niekerk should have interpreted and applied such information in reaching her assessment. Further, the applicant did not explain which accounting or legal principles were applicable in determining the assessment and in what respect Ms van Niekerk infringed these principles.

[14] The court *a quo* therefore concluded that the applicant failed to provide a factual and legal basis in order to convince the court that there was a prospect of success in the review application. The court *a quo* was further of the view that there was no prospect of success in the application for an order that the new AFS should be accepted. It said that the applicant failed to establish a factual and legal basis upon which to assert that these AFS were correct and should be accepted in place of those prepared by MNG.

Discussion

[15] In my view the court *a quo* misdirected itself with regard to the question of prejudice to the respondent. The applicant's difficulties with the assessment had been extensively addressed by way of the notice of objection, the request for a

reduced assessment, and other communications. The respondent in my view indicated that it could not take the matter any further when it suggested a review to the High Court. In setting out the points in *limine* in the answering affidavit, Ms van Niekerk did not mention that the respondent would have investigated the matter further had there been compliance with the Act. She merely said that the application was not properly before the court. While the applicant's interpretation of the concluding sentence of the respondent's letter was at best somewhat strained, his assertion that he was not aware of the procedural provisions of the Act cannot be discounted, even though he should have consulted the Act before launching the application.

[16] As far as the prospects of success are concerned, it is so that precise details of what should not have been included in gross income were lacking. On the other hand, in my view it may be said that the contention that the assessment was based on the incorrect AFS was not squarely addressed by the respondent, particularly in the light of the acceptance of new taxable profits. Although the respondent referred to s 222 and s 223 of the Act when dealing with the penalties imposed, the shortfall on which the 150% was imposed was not fully explained. A shortfall is described in s 222(3)(a) of the Act as the difference between the amount of tax properly chargeable and the amount of tax which would have been chargeable if the understatement had been accepted. Again this is important in the light of the contention that the assessment was based on the incorrect AFS. Further the applicant's complaint about the percentage penalty selected by the respondent merits at least some consideration. These are all matters which should be fully ventilated, in the interests of justice.

[17] In my view it cannot be said that there are no prospects of success and I bear in mind what was said in *Brummer* (*supra*) that the prospect of success is not the only factor to be considered. The matter is of great importance to the respondent, given the very large amount of the assessment. As the court *a quo* said in its judgment in the application for leave to appeal, "the case at hand could result in the Applicant's financial ruin".

[18] For the above reasons I am of the view that the court *a quo* should have granted condonation and proceeded to hear the application on the merits. With regard to the costs of the condonation application, while the appellant was seeking an indulgence, I am of the view that it would be fair to order that each party should pay their own costs occasioned by the opposition to that application.

[19] The order of the court *a quo* in the application for leave to appeal was as follows:

> "(a) leave to appeal is granted to a full court of this Division, subject to the condition that the appeal be limited to:
>
> (i) A determination of whether the court *a quo* ought to have granted condonation of the Applicant's non-compliance with sub-sections 11 (4) and (5) of the TAA; and
>
> (ii) In the event that the court of appeal determines that condonation ought to have been granted, whether the court *a quo* ought to have granted to the Applicant the relief that he sought;
>
> (b) costs in the application for leave are those in the appeal."

[20] I am of the view that the second limitation is not appropriate. The court *a quo* only considered the merits of the application in relation to the prospect of success, which is a factor to be taken into account in deciding whether or not to grant condonation. The merits of the application were not adjudicated. The court *a quo* specifically stated that a finding for the respondent on the points in *limine* would be dispositive of the application and upheld the points in *limine*. In that case it is appropriate to refer the matter for a hearing on the merits.

[21] Lastly, in its judgment the court *a quo* referred to the possibility of a referral of the matter to an alternative dispute resolution process and said that this option had not been properly investigated. It stated as follows:

> "The process underpins the provisions of sub-sections 11 (4) and 11 (5) of the [Tax Administration Act] as already discussed. Without intending to make any pronouncement upon whether or not an alternative dispute resolution process is still available to the Applicant, it would be in the interests of both parties to investigate such possibility by considering the dispute settlement provisions contained in Part F of Chapter 9 of the [Tax Administration Act], read with the rules promulgated under section 103, prescribing the procedures for alternative dispute resolution."

[22] This suggestion has obviously not been taken up, but, again without being prescriptive, it is a suggestion which is worth consideration by the parties.

[23] The following order will issue:

[23.1] The appeal is upheld with costs.

[23.2] The order of the court *a quo* is set aside and substituted with the following order:

"The application for condonation is granted. Each party is to pay their own costs occasioned by the opposition to the application for condonation."

[23.3] The matter is referred back to the court *a quo*, before a judge other than Laing AJ, for hearing on the merits of the application, on a date to be arranged with the Registrar.

J M ROBERSON
JUDGE OF THE HIGH COURT

LOWE, J:

I agree.

M J LOWE
JUDGE OF THE HIGH COURT

MLOMZALE, AJ:

I agree.

N MLOMZALE
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the Appellant: Adv S G Poswa, instructed by Zilwa Attorneys, Mthatha

For the Respondent: Adv S X Mapoma, State Attorney, Mthatha