

NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT. PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 10498/11

DATE:04/05/2012

IN THE MATTER BETWEEN

MARTIN FRASER WINGATE PEARSE

APPLICANT

AND

COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE

RESPONDENT

JUDGMENT

PRINSLOO. J

[1] In this review application the applicant seeks the reviewing and setting aside of decisions of the respondent to issue certain tax assessments and also to persist with and refuse to withdraw the assessments.

[2] There is also an application for condonation of the applicant's failure to institute this application within the time limits prescribed by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), alternatively an application to ' extend the prescribed period in terms of section 9(1) of PAJA.

[3] Before me, Ms Cane SC, assisted by Ms Boltar appeared for the applicant and Mr Snyman SC, assisted by Ms Naude, appeared for the respondent.

Introduction and background

[4] The respondent investigated the applicant's tax affairs, which culminated in a warrant for search and seizure in terms of section 74D of the Income Tax Act, Act 58 of 1962 ("the Income Tax Act") and section 57D of the Value Added Tax Act, Act 89 of 1991 ("the VAT Act") being issued during November 2004 by a judge of this court.

[5] The warrant for search and seizure was executed during April 2005 and documents, information and other articles were seized in terms thereof.

[6] As a result of a so-called "capital reconciliation" performed by the respondent and his officials, it was concluded that the respondent had grossly understated his taxable income for the years 1998 to 2005.

[7] On or about 18 April 2006 the respondent issued additional estimated income tax assessments in terms of section 79 of the Income Tax Act, read with sections 76, 78 and 89 quat thereof, for the applicant's 1998 to 2004 years of assessment.

[8] On or about 18 April 2006 the respondent raised an original estimated income tax assessment for the applicant in respect of his 2005 year of assessment in terms of section 77 of the Income Tax Act, read with sections 76 and 89 quat thereof.

[9] In terms of these assessments the applicant's additional tax liability for each year of assessment ("the relevant years", namely 1998 to 2005), including normal tax, additional tax, interest and penalties was fixed in certain amounts appearing on ' schedules supplied by the respondent and forming part of the record.

[10] These additional assessments issued in terms of the aforesaid statutory provisions in respect of the relevant years in April 2006 will be referred to in this judgment as "the 2006 assessments".

[11] On or about 2 May 2006, the applicant, as he was entitled to do. requested written reasons for the April 2006 assessments in terms of the relevant provisions of the Income Tax Act and rules, and on or about 15 May 2006 the respondent duly complied and provided such reasons.

[12] The applicant lodged an objection in terras of the provisions of section 81 of the Income Tax Act. read with rule 4 of the Tax Court rules, against the April 2006 assessments on or about 27 June 2006.

[13] On or about 26 March 2007, the respondent partially allowed and partially disallowed the applicant's objections and the applicant was duly notified about the respondent's decision in writing. Reduced assessments were issued to give effect to this decision in terms of section 81 of the Income Tax Act read with rule 5 of the Tax Court rules.

[14] These reduced assessments, issued on or about 26 March 2007, will be referred to in this judgment as "the 2007 assessments".

[15] On or about 1 August 2007 the applicant lodged an appeal against the partial disallowance of his objection in terms of section 83 of the Income Tax Act, read with rule 6 of the Tax Court rules.

[16] In his notice of appeal, the applicant indicated in respect of which of the grounds specified in his objection he was appealing and he also included new grounds not previously raised as part of his objection.

[17] The respondent considered himself duty bound to consider the new grounds and came to the conclusion that some of them are valid and should be allowed. In the result, the respondent issued further reduced assessments for the relevant years on or about 14 May 2008 (these will be referred to in this judgment as "the 2008 assessments") to give effect to the further reduction.

[18] The respondent was empowered to issue these further reduced assessments in terms of section 81 of the Income Tax Act, read with rule 5 of the Tax Court rules and/or section 83(1 C) of the Income Tax Act read with rule 23 of the Tax Court rules.

[19] In the meantime, namely on 31 May 2007, the applicant had submitted an application for amnesty in terms of the Small Business Tax Amnesty and Amendment of Taxation Laws Act, Act 9 of 2006 ("the SBTA Act") and the Second Small Business Tax Amnesty and Amendment of Taxation Laws Act, Act 10 of 2006 ("the Second SBTA Act").

In terms of the same legislation, the applicant also applied for the waiver of additional tax,

interest and penalties ("the waiver application").

[20] The new grounds raised for the first time in the applicant's aforesaid notice of appeal did not include a reference to the fact that the applicant had applied for amnesty.

[21] In terms of the 2006 assessments, the respondent taxed estimated undeclared income in the total amount of some R24.5 million and the applicant's total additional tax liability, including normal tax, additional tax, and section 89 interest and penalties was fixed at some R41,7 million. This tax liability was reduced, as described, in terms of the 2007 assessments and further reduced in the 2008 assessments to a tax liability including normal tax, additional tax, section 89 interest and penalties in an amount of R19 191 583,86,

[22] In raising the additional assessments, the reduced assessments and the further reduced assessments of May 2008, the respondent was duly carrying out the provisions of the Income Tax Act.

[23] In the meantime, the amnesty unit of the South African Revenue Service considered the applicant's application for amnesty and in a letter of 19 September 2008, the applicant was informed by SARS that "in terms of the Small Business Tax Amnesty Legislation, you are hereby advised that your application has been approved subject to receipt of full payment of the amnesty levy". There was an earlier letter bearing the same good tidings dated 21 February 2008 which, according to the applicant, was not brought to his attention.

[24] Due to various reasons, not relevant for purposes of this application, SARS, on or about 12 March 2009, caused a judgment, as contemplated in section 91(l)(b) of the Income Tax

Act to be entered against the applicant in respect of the outstanding assessed income tax liability.

[25] In March 2009, the applicant launched an urgent application in the South Gauteng High Court for interim interdictory relief restraining the respondent from collecting the tax due In respect of the additional, revised and reduced assessments referred to.

This urgent application was settled pending determination of the tax appeal (to which I have referred) against the assessments raised by the respondent for the relevant years. In terms of the settlement, the respondent would hold back recovery steps pending the outcome of the tax appeal and the applicant would make a certain interim payment. The applicant would also cede, in securhatem debiti his right, title and interest in and to his shareholdings and member's interest in some eleven close corporations who were also parties to this settlement agreement, which is part of the record.

[26] The tax appeal was set down for hearing on 19 November 2010, in the Tax Court.

[27] At a pre-trial conference, held on 13 September 2010. the applicant gave notice of his intention to raise three points in limine during the hearing of the tax appeal: these were, firstly, whether the tax amnesty granted to the applicant in terms of the SBT Act invalidates the assessments and renders the appeal academic.

secondly, whether the search and seizure referred to earlier was lawful and, thirdly, whether the applicant's constitutional rights as a taxpayer had been offended through the search and seizure operation.

[28] At the pre-trial conference, the respondent adopted the attitude that the Tax Court did not have jurisdiction to entertain these points in limine.

At a second pre-trial conference, held on 2 November 2010, the point taken on jurisdiction by the respondent was conceded and the applicant indicated that he would seek a postponement of the tax appeal so that he could argue the points in limine in a court with jurisdiction to entertain them.

[29] On 19 November 2010, the Tax Court made an order postponing the tax appeal sine die and directing the applicant (as appellant) to pay the wasted costs occasioned by the postponement. It was also ordered that the applicant was to launch his application for declaratory relief to the effect that the assessments in respect of the relevant years were invalid on the three points mentioned, on or before 15 February 2011.

The application, which is the one that is now under consideration, was duly launched on the appointed day, but the applicant only relies on the first of the three grounds, clearly abandoning the other two grounds.

[30] So much for the background of the case. I turn to an application to strike out launched by the applicant, as well as certain preliminary arguments which ought to be dealt with at the outset.

The application to strike out

[31] In an application in terms of rule 6(15) of the Uniform Rules of Court, the applicant seeks to strike out the first portion of the answering affidavit comprising paragraphgraphs 8 to 77.

This deals with "chronology and background".

[32] The only subparagraph not targeted for striking out in this section of the answering affidavit, are those recording the reducing assessed tax liability as the objections to the 2006, 2007 and 2008 assessments were partially allowed as the process unfolded.

[33] Rule 6(15) reads as follows:

"The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."

[34] It was submitted by counsel on behalf of the respondent, in opposing this application, that the evidence contained in this portion of the answering affidavit is relevant and needs to be taken into account in adjudicating the application.

[35] The portion targeted for striking out deals with the search and seizure operation which led to the various additional and increased assessments being raised by the respondent and his staff. Paragraphs 8 to 13 set out the circumstances in which the 2006 assessments were raised. Paragraph 14 explains the process adopted by the respondent to estimate the applicant's undeclared income. This must be relevant evidence and also important from the point of view of the applicant. Paragraphs 5 to 18 set out the basis of the 2006 assessments and introduce a schedule illustrating the financial implications of all the assessments raised, which contain material information and also introduce the respondent's reasons for the 2006 assessments. Paragraphs 19 to 27 provide the factual background regarding the objection

noted by the applicant against the 2006 assessments and describe the partial allowance and the basis for the 2007 reduced assessments. Paragraph 28 deals with the facts relating to the applicant's submission of the amnesty applications.

[36] The remainder of the paragraphs deal with inter alia the further facts provided by the applicant, the respondent's consideration thereof, the notice of appeal and the raising of the 2008 further reduced assessments. It provides the chronology leading up to the launching of this application.

[37] The annexures introduced by these paragraphs contain, inter alia, the information that was taken into account by the respondent in reaching the decision to raise the 2008 assessments.

[38] Most notably, the applicant, in the replying affidavit, refers to a series of annexures introduced by the paragraphs sought to be struck out.

[39] Some of the topics introduced by the portion of the affidavit sought to be struck out are dealt with in some detail in the heads of argument offered on behalf of the applicant. These include the 2006 assessments and the 2007 assessments.

[40] The only argument of note offered by the applicant in support of this striking out application is that all the allegations are "prejudicial as they deliberately seek to cast the applicant in an adverse light without in any way contributing to the determination of the issue. They are purely atmospheric and, unless struck out would cause unnecessary prolixity and costs ..."

[41] I cannot agree with these submissions of the applicant. In my view, and for the reasons mentioned, the particulars introduced by the paragraphs under attack are clearly relevant and important for purposes of adjudicating this application. I fail to see how the applicant can claim to be prejudiced by a useful, accurate, chronological summary of the background of the case leading up to the launching of the application.

[42] There is also nothing scandalous, vexatious or irrelevant [as intended by the wording of rule 6(15)] in the allegations and explanations contained in these paragraphs now under attack.

[43] In my view, there is no merit in the striking out application.

[44] The order that I make, which will be repeated at the end of this judgment, is that the application to strike out is dismissed with costs including the costs of two counsel.

Did the decisions taken by the respondent, now under attack in this review application- amount to "administrative action" as defined in PAJA?

[45] The relevant prayers in the notice of motion dealing with the relief sought read as follows:

"2. Reviewing and setting aside the decisions of the respondent to issue the assessments of 15 May 2008 and/or to persist with and refuse to withdraw the aforesaid assessments once amnesty had been granted to the applicant in terms of the Small Business Tax Amnesty and Amendment Act 9 of 2006 and the Second Small

Business Tax Amnesty and Amendment of Taxation of Laws Act 10 of 2006.

3. Alternatively, declaring the respondent's aforesaid decisions to be in conflict with the

constitutional principle of legality and' accordingly unconstitutional, unlawful and invalid."

[46] In terms of section 1 of PAJA "administrative action" means

"Any decision taken, or any failure to take a decision, by -

(a) an organ of state, when-

(i) ...

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct-external legal effect, but does not include - ..."

(Emphasis added.)

[47] The exclusions to be found in this definition are not relevant for present purposes.

[48] In terms of section 1 of PAJA, "organ of state" bears the same meaning assigned to it in section 239 of the Constitution.

[49] In terms of section 239 of the Constitution. Act 108 of 1996. "organ of state" means -

"(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution -

(i) exercising a power or performing a function 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, but does not include a court or a judicial officer;"

I am in respectful agreement with the submission made on behalf of the applicant that the

South African Revenue Service, as represented by the respondent is clearly "any other functionary or institution exercising a public power or performing a public function in terms of any legislation".

In the result, I am of the view that the respondent took the decisions now under attack in the review application as an organ of state as intended by the section 1 PAJA definition read with the section 239 definition in the Constitution. It follows that the decisions taken amounted to "administrative action" as defined in PAJA so that PAJA will find application for purposes of these review proceedings.

[51] Authority for this proposition can also be found in *Metcash Trading Ltd v Commissioner South African Revenue Service & Another* 2001 1 SA 1109 (CC) at 1130C-F and 1136F-G.

[52] The main thrust of the respondent's argument that the decisions under attack are not "administrative action" in the spirit of section 1 of PAJA, is based on the portion of the section 1 PAJA definition (emphasised above when quoting the definition) that administrative action involves a decision taken "which adversely affects the rights of any person and which has a direct, external legal effect, ..."

[53] The attitude of the respondent is expressed as follows in the opposing affidavit:

"I deny that the raising of the May 2008 further reduced assessments is administrative action within the meaning of section 1 of PAJA. The raising of these assessments is an action by SARS, which is to the benefit or in favour of the applicant."

[54] The argument, if I understand it correctly, is that where the 2008 assessments, and, for

that matter, also the 2007 assessments, significantly reduced the tax liability of the respondent as initially reflected in the 2006 assessments, the decision to raise the 2008 assessments cannot be said to "adversely affect the rights" of the respondent so that the decision cannot fall within the ambit of "administrative action" as intended by the section 1 PAJA definition.

[55] In countering this argument, I was referred by counsel for the applicant to the following passage from *Greys Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others* 2005 6 SA 313 (SCA) at paragraph [23]:

"While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on section 33 of the Constitution. Moreover, that literal construction would be inconsonant with section 3(1), which envisages that administrative action might or might not affect the rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

[56] In any event, it is argued on behalf of the applicant that the 2008 assessments also "adversely affect" the rights of the applicant, because their merits (the amount assessed) are also challenged in the tax appeal. This is apart from the challenge on the validity of the 2008 assessments which forms the subject of this review-application.

[57] In the circumstances I am satisfied that the respondent's decisions under attack in this application fall inside the ambit of "administrative action" as intended by PAJA so that this application is justiciable in terms of that Act.

The application to extend the prescribed period within which these proceedings could be instituted in terms of the requirements of PAJA alternatively an application for condonation for the late launching of the proceedings

[58] In terms of the provisions of section 7 of PAJA, the aggrieved person affected by the administrative action must institute the review application without unreasonable delay and not later than 180 days after the date on which he or she became aware of the administrative action or after the date on which he or she first exhausted relevant internal remedies available prior to launching a review application,

[59] In terms of section 9 this period of 180 days can be extended by agreement between the parties or by a court on application. The latter procedure was adopted in this matter. The relevant relief is sought in paragraph 1.1 of the notice of motion where the applicant asks for the period to be extended to the date when the application was launched, alternatively for condonation in terms of this court's inherent jurisdictional powers (paragraph 1.2 of the notice of motion).

[60] The submissions made by the applicant in support of his prayer for the relief contained in paragraph 1 of the notice of motion, can be summarised as follows: until the days leading up to the hearing of the tax appeal the applicant and his legal advisors were under the

impression that the question of the validity of the 2008 assessments in the face of the amnesty granted could be determined by the Tax Court. It is after the two legal teams entered into discussion on the subject that they came to the conclusion that this argument could not be raised before the Tax Court which did not have jurisdiction to rule on the matter. I already pointed out that the issues were debated in the September 2010 pre-trial conference and later in the November 2010 pre-trial conference, shortly before the scheduled hearing of 19 November 2010. Had the applicant known or been advised of this potential problem he would have instituted the application timeously and within the period prescribed in section 7(1) of PAJA.

[61] Moreover, the order of 19 November 2010, supra, to the effect that this application had to be launched in a court with jurisdiction to entertain the matter by not later than 15 February 2011, was made by agreement between the parties and the application was timeously launched in compliance with that order.

[62] In opposition to the applicant's quest to obtain this relief, the respondent argued that the applicant already raised the issue of attacking the assessments in the face of the amnesty that had been granted in the process of launching the urgent application in 2009. Accordingly, it was argued on behalf of the respondent that the application could have been launched earlier and timeously.

I consider this argument to be unconvincing in the circumstances. In my view the respondent does not have a legitimate answer to the fact that it was agreed before the Tax Court that this application could be launched by 15 February 2011 and to the fact that it was timeously done.

[63] In the result. I am of the view that the relief sought in prayer 1.1 of the notice of motion should be granted, and I order accordingly.

The essence of the dispute between the parties

[64] The origin of the dispute is to be found in the wording of section 10 of the SBTA Act, and, more particularly, section 10(c).

It is convenient to quote the relevant passages:

"10. Circumstances where tax amnesty relief does not apply. - The

Tax amnesty relief does not apply in respect of any amount of tax, levy, contribution, interest, penalty or additional tax, to the extent that it-

(a)...

(b) ...

(c) is payable by the applicant in terms of an assessment issued by the Commissioner before the submission of the application; or

(d) ..."

[65] The application for amnesty was lodged (submitted) on 31 May 2007. This was after the 2007 assessments were raised in March of that year but before the 2008 assessments were raised in May of 2008. There is some uncertainty, judging by the evidence, whether the amnesty application was submitted on 31 May 2007 or on 28 May 2007. Nothing turns on this because it is common cause that the amnesty application was submitted, as intended by the provisions of section 10(c) of the SBTA Act ("section 10(c)") before the 2008 assessments were raised.

[66] In the founding affidavit, tentative submissions are made to the effect that the date of promulgation of the amnesty legislation (in July 2006) is of relevance, but this is not the case, neither was any argument based on the date of promulgation pursued before me. Indeed, the persistent reference to the date of promulgation as being relevant to the enquiry, renders the founding affidavit confusing and flawed, although not fatally so.

[67] Although, somewhat surprisingly, the founding affidavit contains no reference to section 10(c), the basic argument is advanced that the 2008 assessments extend to certain taxes not previously "due" before the end of the 2006 income tax year of assessment, which taxes were covered by the scope of the amnesty granted in September 2008 (or perhaps in February 2008, as I previously explained, but this is not relevant for present purposes).

[68] In the replying affidavit, the applicant gets closer to the mark by specifically dealing with the provisions of section 10(c) and recognising that the issue for decision is whether the 2008 assessments include tax. interest, penalties or additional taxes not payable by the applicant in terms of assessments issued by the respondent before the submission of the amnesty application.

[69] In the replying affidavit, for the first time, the applicant makes mention of certain taxes which, according to him, were not raised in assessments issued before the amnesty application was lodged. I will return to this subject.

[70] In the opposing affidavit, the respondent emphatically denies that the income tax, additional tax. penalties and interest as raised in the 2008 assessments are covered by the scope of the amnesty granted.

The respondent submits that the 2008 assessments merely reduced the applicant's existing tax liabilities in respect of income tax. additional tax. penalties and interest in accordance with the partial allowance, supra, of the applicant's objections. The applicant only applied for amnesty in May 2007 and the assessments that were revised and reduced in 2007 and 2008 were raised as long ago as April 2006.

[71] The respondent acknowledged in the opposing affidavit that the applicant also applied for a waiver of penalties and interest and that such waiver (up to a maximum of R1 million) was granted to the applicant. It was submitted by the respondent that once the pending tax appeal has been finalised and if the Tax Court upholds the assessments or partially upholds the assessments, such waiver will be applied to the penalties and interest due by the applicant in respect of the assessments over the relevant years. This "acknowledgement" is contained in paragraph 101 of the opposing affidavit and in paragraph 157 it is repeated that the R1 million waiver will only be applied to the additional tax, penalties and interest still due after the pending tax appeal has been finalised.

In their heads of argument, counsel for the applicant argued that by these "acknowledgements" the respondent "conceded that he is seeking to hold the applicant liable for amounts of interest which the applicant is not liable to pay in terms of the Income Tax Act". It was submitted in the heads of argument on behalf of the applicant that based on this ground alone, the application should be granted and the respondent should be ordered to issue new assessments in respect of the relevant years. During the proceedings before me counsel for the applicant confirmed that I need not decide the argument relating to the waiver, such as it is. It was confirmed that this "issue" would be up for decision in the tax appeal. It

was argued, however, that because of these "concessions" the costs flowing from the waiver issue should be paid by the respondent. I see no acceptable basis for such a proposal. Inasmuch as it may indeed be a triable "issue" it will be dealt with in a tax appeal.

[7 2] In the opposing affidavit, the respondent denies the applicant's allegations that the 2006 assessments are not relevant to the present application as they "were replaced" by the subsequent assessments in 2007 and 2008. It was pointed out by the respondent, correctly in my view, that to the extent that the 2006 assessments were not reduced, the amounts remained assessed and due and the assessments were not altered. The 2006 assessments are relevant to this application. They are the assessments, revised and reduced by the 2007 and 2008 assessments and they form the basis of the pending tax appeal. The undeclared income that was subjected to the 2006 assessments, is still the same undeclared income subjected to tax in both the 2007 and 2008 assessments. The only purpose of the revised assessments in 2007 and 2008 was to reduce the estimated undeclared income in accordance with the partial allowance of the objections raised by the applicant. The basis upon which the assessments were originally raised remains intact. The taxes reflected in the assessments for the relevant years became due by the latest at the end of those years of assessment to which they related.

[73] In this regard, the applicant makes the following concession in the founding affidavit: "Although I dispute the correctness of the above assessments issued in April 2006, I do not dispute that certain taxes, penalties and interest were assessed by the respondent to be 'due' before the end of the 2006 income tax year of assessment before the promulgation of the amnesty legislation (as I have pointed out, this remark about promulgation is irrelevant) and as such are not covered by the scope of the tax amnesty or the waiver of penalties and

interest."

In the opposing affidavit, the respondent submits that this concession, namely that the taxes assessed with the 2006 assessments are neither covered by the provisions of the SBTA Act nor by the amnesty granted to the applicant, is fatal to the applicant's application. In my view, there is much to be said for this submission, given the provisions of section 10(c). although it is met with a denial in the replying affidavit.

[74] This same issue again rears its head later on in the founding affidavit (paragraph 22) where the applicant states that he lodged the amnesty application in respect of taxes not assessed by the respondent to be "due" before the 2006 income tax year of assessment together with the waiver application in respect of penalties and interest not assessed by the respondent to be due in respect of the years of assessment falling before the end of the 2006 income tax year of assessment.

In response to this, the respondent, in the opposing affidavit, repeats the earlier argument by stating:

"It is noted that the applicant admits that such application could only have been submitted in respect of tax liabilities due on income not previously assessed. In the result, the applicant's amnesty application did therefore not cover the taxes assessed with the April 2006 additional assessments. Since those assessments are the only assessments relevant for purposes of the tax appeal currently before the Tax Court, the applicant's application is factually flawed and legally untenable."

In the replying affidavit the applicant states that these remarks of the respondent shows "his

fundamental misunderstanding of the legal effect of the amnesty which was granted ..."

Given the provisions of section 10(c) to the effect that tax amnesty relief does not apply in respect of taxes payable in terms of an assessment issued by the Commissioner before the submission of the application, and given the respondent's compelling argument that the 2007 and 2008 assessments did not determine a new tax liability but only reduced the previously (2006) assessed and due liability, I am of the view that there is merit in the stance adopted by the respondent: on the applicant's own admission, his amnesty application only involved taxes not previously assessed. From this it follows that the taxes "previously assessed", as in the 2006 assessments, are not covered by the amnesty relief subsequently granted because of the provisions of section 10(c).

[75] In his comprehensive opposing affidavit, the respondent repeatedly denies that any taxes, penalties or interest were raised in the 2008 assessments that were not previously raised in the 2006 or 2007 assessments [the latter assessments also before the amnesty application was submitted as intended by section 10(c)]. The basis for the assessment did not change. It remained an estimate by SARS of the applicant's undeclared taxable income. Only the amount was reduced.

It was pointed out by counsel for the respondent that in appropriate cases the respondent is entitled to rely on estimated assessments. Section 78(1) of the Income Tax Act reads as follows:

"(1) In every case in which any person makes default in furnishing any return or information or the Commissioner is not satisfied with the return or information furnished by any person, the Commissioner may estimate either in whole or in part the taxable income in relation to which

the return or information is required."

[76] In this case, part of the applicant's estimated taxable income (grossly under declared by the applicant as 1 pointed out) as assessed by the respondent after the search and seizure operation, comprised "private and domestic expenses". These expenses were estimated by the respondent in respect of each of the eight relevant years on the strength of all the information available after the search and seizure exercise. For purposes of the 2007 assessment, also taking into account the objection lodged by the applicant against the 2006 assessments, the respondent[^] for example, calculated the total amount of expenses/taxable income in respect of "private and domestic expenses" in the amount of R2 634 865.00. Similar exercises were done with other alleged expenses/taxable income namely R3 905 245,00 in respect of "bank statement debit" and R720 528.00 in respect of "cash books". These exercises were all performed on the strength of powers vested in the respondent by the Income Tax Act. The three sources of expenses/taxable income were added together and the total amount of R7 260 639.00 was divided by eight (the number of relevant years) resulting in an estimated taxable income of R907 579,00 per annum. For practical considerations and, presumably, to reduce or eliminate the margin of error, this amount was reduced by some 12% resulting in a figure of an estimated R800 000.00 per annum taxable income. Of course, all this happened before the amnesty application was lodged in May 2007 so that the amnesty relief would not apply to this assessment.

[77] Although not being familiar with the details of the tax appeal that is pending, I assume that the merits of this assessment and the method of calculating the annual taxable income, will be an issue tabled for consideration by the Tax Court.

[78] As to the 2008 assessments, the respondent embarked on the same exercise except for

the fact that some of the figures arrived at in respect of each of the relevant years in respect of "private and domestic expenses/taxable income" were reduced in view of new information which came to hand primarily through the objections and new grounds of appeal advanced by the applicant. The same applies to the estimated figures in respect of "bank statement debit" and "cash books".

After the total amount was divided by eight (like in 2007) the annual estimated figure for taxable income came to R831 282,00. This time, the respondent reduced that figure by a discretionary 4% (approximately) still resulting in a total estimated taxable income of R800 000,00 per annum.

All this information appears from a somewhat elaborate (but helpful) exercise done by the applicant for purposes of compiling his replying affidavit. The figures I have mentioned are based on what is stated in the replying affidavit.

[79] Of course, the merits of this exercise and these calculations will come up for discussion, so I assume, during the course of the hearing of the tax appeal before the Tax Court.

[80] In my view, none of this can assist the applicant in persuading me that the estimated taxes exposed by these exercises were not payable by the applicant in terms of assessments issued by the respondent before the submission of the amnesty application as intended by the provisions of section 10(c). If anything, these exercises clearly exhibit, in my view, that the 2007 and 2008 assessments only represented reductions of the 2006 assessments as repeatedly stated in the opposing affidavit.

[81] On the question of altering or reducing (like in this case) assessments upon receipt of objections by the taxpayer, I was referred by counsel for the respondent to the provisions of section 81(4) of the Income Tax Act, which stipulate:

"(4) The Commissioner may on receipt of a notice of objection to an assessment alter the assessment or may disallow the objection and shall send to the taxpayer or his or her representative notice of such alteration or disallowance, and record therein any alteration or disallowance made in the assessment."

In this regard, the respondent points out in his opposing affidavit that he was entitled, and in fact duty bound, in terms of the aforesaid legislative provisions, to issue the 2007 assessments and later the 2008 assessments under circumstances where he was persuaded that his estimate in terms of the 2006 assessments were over-stated. This conduct appears to me to be in line with the powers vested in the respondent by the relevant legislation.

[82] I turn briefly to efforts by the applicant to single out certain evidence in the record, running into almost 400 pages, which may demonstrate items assessed in the 2008 assessments which were not assessed before the amnesty application was submitted as intended by the provisions of section 10(c).

[83] No details of such alleged items are disclosed in the founding affidavit. In paragraph 5 of the founding affidavit the applicant merely refers to annexures "FA7.1" to "FA7.5", being copies of schedules prepared by the respondent and attached to the 2008 assessments. It is alleged that these schedules confirm that taxes, penalties and interest not previously assessed to be "due" in the 2007 assessments were for the first time assessed to be "due" in the 2008 assessments.

[84] In a lengthy answer to these allegations, (paragraphs 132 to 150 of the answering affidavit) the respondent emphatically denies, repeatedly, that these allegations are correct.

[85] I have already dwelled on the stance adopted by the respondent on this subject, which is really the central issue of the case before me. but I add that his answer to the bold allegation contained in the founding affidavit can perhaps be summarised as follows: no taxes (or penalties and interest) were included in the 2008 assessments which were not already previously assessed in respect of the relevant years. The annexures referred to by the applicant are extracts of schedules that were used to estimate the applicant's undeclared income. It is clearly indicated in the respondent's statement of grounds of assessment that he used certain calculations to estimate the applicant's undeclared income. These calculations and the conclusions reached based thereon are. as I have already pointed out. the subject-matter of the pending tax appeal.

In the process of estimating the applicant's undeclared income (which was done by way of a capital reconciliation and a living expense estimation), a process was included by which the respondent took the information at his disposal, categorised it, analysed it and then based on those results, estimated the amount of income that the applicant had to have at his disposal. I have already referred to this when dealing with the estimate of R800 000,00 per annum taxable income, supra. As already briefly illustrated, one of these processes involved the analysis of the applicant's private and domestic expenses obtained from invoices, bank statements, cash books and other financial records. These were then grouped together, sorted in the various years of assessment and analysed. The annexures referred to in the founding affidavit are working papers of the SARS auditors used during the process of

calculation. The respondent also attaches to the opposing affidavit, as SARS 29, an extract from the SARS statement of grounds of assessment where the basis of estimation and the amounts were duly set out. These I have already alluded to.

Coupled with his repeated denial that any taxes, penalties or interest were raised in the 2008 assessments that were not previously raised in 2006 and 2007, the respondent points out that in the 2008 assessments, by their very nature, since they were reduced assessments, nothing made an appearance "for the first time" as alleged by the applicant, i

[86] In the replying affidavit, for the first time, some details are advanced in an effort to suggest the presence in the annexures "FA7.1" to "FA7.5" of "new taxes" and "new penalties and interest" not appearing in the earlier assessments before the amnesty application was submitted.

In my debate with the applicant's counsel during the hearing, it emerged that there were only two such items relied upon by the applicant:

(i) in "FA7.2", which is a working document relating to the 1998 financial year, there is reference of an insurance payment from the applicant's "LIB policies" in 1996 coming to some R145 000.00. The entry is made in the working papers that "The amount therefore received from this policy is from unexplained income. This amount has therefore been excluded." Counsel's argument, if I understood it correctly, was that "excluded" in this sense means excluded from earlier assessments so that it was now-included in the 2008 assessments "to boost the newly assessed taxable income".

(ii) The second item relied upon is found in the working papers of the 1999 financial year and refers to a miscellaneous entry in the applicant's cashbook of some R300 000,00. The entry in the working document, "FA7.3", is difficult to read but it states

"Details regarding this payment is unknown. The credit could be taxable income and therefore has been excluded ... (illegible)." The same argument was advanced by counsel, namely that "excluded" means that it was excluded from the earlier assessments and now "used to boost the taxable income", presumably as part of the 2008 assessments.

[87] I debated the submissions in some detail with Mr Snyman for the respondent. He argued strongly that there was no question of new items being introduced in the 2008 assessments. He referred me to "FA7.1", which is part of the working documents of the SARS auditors, and displays a- comparison between the old assessment (2007) and the new assessment (2008) of estimated private and domestic expenses of the applicant. If I understood the argument correctly, the two items relied upon by the applicant were part of the tax liability assessment reflected in the 2007 assessments, in the amount of some R22,8 million and also part of the reduced tax liability assessed in the amount of some R 19.19 million in the 2008 assessments. Included in these larger assessments, of course, is the calculation of R800 000,00 per annum taxable income flowing from the private and domestic expenses and other categorised items as already illustrated. The R800 000,00 estimate, of course, already formed part of the 2007 assessments which were issued before submission of the amnesty application and therefore not subject to the amnesty in terms of the provisions of section 10(c). The same applies to the unchanged estimate reflected in the 2008 assessments.

[88] Against this background, I was not persuaded by applicant's counsel, during their address in reply, that any newly assessed items in the 2008 assessments, which were not assessed before, had been shown to exist and to qualify for the amnesty relief as intended by section 10(c).

[89] It should be borne in mind that the two relatively insignificant items rather speculatively singled out on behalf of the applicant only form part of a larger estimate (R800 000,00 per annum estimated taxable income) validly made in terms of section 78 of the Income Tax Act and this estimate remained unchanged from the 2007 assessments to the 2008 assessments. The "merits" of the assessments will be debated during the tax appeal.

[90] In terms of the provisions of section 82 of the Income Tax Act. the burden of proof that any amount is exempt from or not liable to any tax chargeable or subject to any deduction, abatement or set off in terms of the Income Tax Act or to be disregarded or excluded "shall be upon the person claiming such exemption, non-liability, deduction, abatement or set off, or that such amount must be disregarded or excluded ..."

[91] In my view, the applicant failed to discharge this burden of proof for purposes of this review application by failing to show newly assessed items of tax reflected in the 2008 assessments in the light of the provisions of section 10(c).

[92] I add that an argument developed by the applicant in the face of an allegation by the respondent "that the assessed and not reduced amount has been running interest in terms of the Income Tax Act since the second due date of the April 2006 additional assessments" was not proceeded with before me and it was agreed by the parties that this argument, such as it is, will be ventilated in the tax appeal.

[93] Under all the circumstances, I have come to the conclusion that this application cannot succeed.

The order

[94] I make the following order:

1. The application to strike out is dismissed.
2. The application is dismissed.
3. The applicant is ordered to pay the costs which will include the costs flowing from the employment of two counsel.

WRC PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

10498-2011

HEARD ON: 15 FEBRUARY 2012

FOR THE APPLICANT: JENNY CANE SC ASSISTED BY JULIA BOLTAR

INSTRUCTED BY: ALAN ALLSHWANG & ASSOCIATES INCORPORATED

FOR THE RESPONDENT: H G A SNYMAN SC ASSISTED BY C NAUDE

INSTRUCTED BY: MAHLANGU INCORPORATED