



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: B2495/2023

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHERS JUDGES: YES
- (3) REVISED: NO

1 July 2025

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DATE

.....

SIGNATURE

In the matter between:

ANDRIES GREYVENSTEYN

APPLICANT

and

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

FIRST RESPONDENT

THE MINISTER OF FINANCE

SECOND RESPONDENT

THE SOUTH AFRICAN REVENUE SERVICE

THIRD RESPONDENT

GOLD KID TRADING (PTY) LTD

FOURTH RESPONDENT

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

AMIEN AJ

Introduction

[1] This is an application for leave to appeal to the Supreme Court of Appeal against the findings that I made on 12 February 2025 pertaining to sections 180 and 184(2) of the Tax Administration Act 28 of 2011 (TAA) and costs.

[2] The test for leave to appeal is set out in section 17(1)(a) of the Superior Courts Act 10 of 2013 as follows:

“Leave to appeal may only be granted where the judge or judges concerned are of the opinion that-

(a)

- (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

[3] The applicant is of the view that both grounds exist, in that the appeal would have a reasonable prospect of success and there is a compelling reason for the appeal to be heard.

[4] The issue for determination was whether sections 180, 184(2) and 186(3) of the TAA are constitutionally valid.

[5] I made the following orders:

[75.1] Sections 180, 184(2), and 186(3) of the Tax Administration Act 28 of 2011 are constitutionally valid.

[75.2] The application is dismissed with costs, including the costs of four counsel on scale C.

[6] The applicant accepts the order of constitutionality in respect of section 186(3) of the TAA but seeks leave to appeal the orders of constitutionality regarding sections 180 and 184(2) of the TAA, and the costs order against him.

[7] **Appeal against the order of constitutionality regarding sections 180 and 184(2) of the TAA**

[8] The applicant argued that sections 180 and 184(2) of the TAA are unconstitutional because they violate his section 34 right of the Constitution.

[9] Section 34 of the Constitution provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[10] The applicant contends that SARS’ determination of liability under the impugned provisions involves an adjudicative function, but that SARS is not an independent and impartial tribunal or forum to determine liability against the taxpayer. Furthermore, disputes arising from the impugned provisions cannot be adjudicated in the Tax Court. Consequently, the applicant claims that his section 34 constitutional right to access to court or to have his dispute resolved by another independent and impartial tribunal or forum is violated.

[11] I found that SARS’ actions under the impugned provisions are administrative in nature and reviewable in a court of law under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). As such, I concluded that the applicant’s right to

access to court under section 34 of the Constitution was not breached. The reasons for my findings and orders are set out in my judgment. I therefore do not see a need to repeat them here.

[12] The applicant argues that this court erred in deciding that SARS' actions under the impugned provisions are administrative in nature

[13] The applicant is of the view that the categorisation of SARS' liability as administrative versus adjudicative constitutes *res nova*.

[14] The applicant further claims that if SARS' actions are administrative in nature, as this court found it to be, then the High Court does not have any power to review its decisions thereby limiting the applicant's right to access to court.

[15] The applicant suggests that there "is a reasonable prospect that another court may conclude that the institution of review is not an adequate guarantee to the rights protected in section 34".

[16] **Appeal against the costs order**

[17] The applicant argues that my costs order against him is based on a wrong principle of law, because the general position arising from *Biowatch Trust v The Registrar of Genetic Resources (Biowatch)*¹ is that cost orders are *not usually* awarded in cases involving constitutional challenges.

[18] However, there are exceptions to the above general principle. The principle is not an unqualified position that applies in every constitutional challenge. At paragraph 24 of the *Biowatch* judgment, Sachs J. notes

"[T]he 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

¹ 2009 6 SA 232 (CC).

applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.”

- [19] The applicant correctly points out that I did not provide reasons for my costs order in my judgment. He also did not request reasons for the costs order after my judgment was delivered. Had he done so, I would have provided same.
- [20] The reasons for my costs order were two-fold: a) Having found the impugned provisions to be constitutionally valid, I did not see a constitutional issue to which the *Biowatch* case would apply; and b) I considered the conduct of the applicant to be an abuse of court process, for reasons which I set out hereunder.
- [21] During the application regarding the constitutionality of the impugned provisions, Mr Trengove SC acting for SARS, argued that the applicant had abused the court’s process by bringing a constitutional challenge against the impugned provisions. The reason for this was that a provisional preservation order was granted against the applicant by my learned brother Van Niekerk AJ on 28 February 2023. Instead of anticipating the final order on 24 hours’ notice, Mr Trengove SC suggested that the applicant brought the constitutional challenge to circumvent the judicial process and treat this court as an appeal court to overturn the provisional order. Nevertheless, Mr Trengove SC also indicated that SARS would not be asking for costs.
- [22] After reading the papers filed on record, hearing the arguments presented by counsel, and after considering the matter, I was persuaded that the applicant did not approach this court in good faith. I was, and still am, convinced that the applicant tried to use this court in a surreptitious attempt to bypass anticipating the final order on 24 hours’ notice.
- [23] In the hearing for leave to appeal, Mr Louw SC on more than one occasion pointed out to this court that an advocate of Mr Trengove SC’s calibre would not have forgone asking for costs if he thought there was a reasonable prospect of success in favour of a costs order on appeal. I have the greatest respect for

Mr Trengove SC, but this court is not bound by what counsel asks for regarding costs. This court has discretion to decide what is best in the interests of justice. And I am of the view that having brought the application in bad faith and having failed in the application, it was appropriate to make a costs order against the applicant. The conduct of the applicant amounted to an abuse of process, which justified an adverse costs order against him.

[24] In *Public Protector v South African Reserve Bank*,² the Constitutional Court found that where a party's conduct amounts to an abuse of court process, costs on an attorney and client scale are to be awarded. While this was a finding of the minority judgment, the Court in *Tjiroze v Appeal Board of the Financial Services Board*³ did not read the majority judgment as differing from the minority judgment.

[25] **Test for leave to appeal**

[26] As noted earlier in this judgment, section 17(1)(a) of the Superior Courts Act provides that leave to appeal may only be given if the appeal would have a reasonable prospect of success or there is a compelling reason for the appeal to be heard.

[27] Mr Louw SC argued that both bases in section 17(1) are complied with namely, the appeal would have a reasonable prospect of success *and* there is a compelling reason why leave to appeal should be granted. He argues that the compelling reason relates to the constitutionality of the impugned provisions, which are of public interest.

[28] Mr Louw SC formulates the test for section 17(1)(a)(i) as a reasonable prospect existing that another court *may* reach a different conclusion.

² [2019] ZACC 29 at para 8.

³ 2021 (1) BCLR 59 (CC) at para 23.

[29] However, the Supreme Court of Appeal makes it clear that the test is more stringent:⁴

“[L]eave to appeal, ... must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[30] The test for section 17(1)(a)(i) is therefore not whether there *may* be a reasonable prospect of success. As explained by Bertelsmann J in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*:⁵

“The use of the word “would” in the new statute indicates *a measure of certainty* that another court *will* differ from the court whose judgment is sought to be appealed against.” (my emphasis)

[31] The merits of the case are therefore decisive in determining whether the application for leave to appeal should succeed.

[32] As Mr Louw SC pointed out, the merits of this application for leave to appeal turn on the question whether SARS’ determination of liability is adjudicative or administrative in nature. This court found it to be administrative while the

⁴ MEC for Health, Eastern Cape v Mkhitha [2016] ZASCA 176 paras 16-17

⁵ LCC14R/2014 (unreported judgment of the Land Claims Court delivered on 3 November 2014) at para 6.

applicant maintains that it is adjudicative. The question is whether there is a reasonable prospect that another court could conclude that SARS' actions under the impugned provisions are adjudicative, which might then lead to a finding that the applicant's section 34 right is violated. In my view, there is a reasonable prospect that this could be an outcome of an appeal against my findings relating to the impugned provisions.

[33] While the above suffices to grant the application for leave to appeal in respect of sections 180 and 184(2) of the TAA, I think it is important to also consider the question whether a compelling reason exists for the appeal to be granted.⁶

[34] The applicant is of the view that this matter is of substantial public interest.

[35] In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*,⁷ the Supreme Court of Appeal found:

“A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive.”

[36] While I found that the impugned provisions are constitutionally valid based on already decided issues,⁸ I also find in this application that there is a reasonable prospect that another court could find differently based on the merits of the case. Should that happen, the impugned provisions could be found to be unconstitutional and invalid, in which case the matter would then be of public importance and a compelling reason would exist for the appeal to be heard.

[37] As a result, the application for leave to appeal is granted.

[38] Costs are costs in the appeal.

⁶ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para 2.

⁷ (Case no 982/18) [\[2020\] ZASCA 17](#) (25 March 2020) at para 2.

⁸ See for example *Metcash Trading v Commissioner, SARS* 2001 (1) SA 1109 (CC); *Barnard Labuschagne Inc v Commissioner, SARS* 2022 (5) SA 1 (CC).



W AMIEN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

APPEARANCES:

Counsel for the Applicant:	Adv PF Louw SC
Instructed by:	Kruger and Okes
Counsel for the First and Third Respondent:	Adv HGA Snyman SC
	Adv N Komar
Instructed by:	Van Zyl Le Roux and Hurter
	Attorneys
Counsel for the Second Respondent:	Adv M Sello SC
	Adv M Lekoane
Instructed by:	State Attorney Pretoria

CASE NO: B2495/2023

Date heard: 30 May 2025

Date of judgment:

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is **1 July 2025**.