

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT
PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case no: 12795/14

18/2/2014

In the matter of:

GRANT CHITTENDEN N.O

FIRST APPLICANT

KESTREL NETWORK SOLUTIONS (PTY) LTD

SECOND APPLICANT

And

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
03/03/2014	

**THE COMMISSIONER OF SOUTH
AFRICAN REVENUE SERVICES
COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

BAQWA J

- [1] This application arises from business rescue proceedings in respect of second applicant which commenced on 27 May 2013 and to which first applicant was appointed as business rescue practitioner on 30 May 2013.
- [2] At a subsequent creditors' meeting held on 23 August 2013 first respondent voted against the business rescue plan prepared and submitted by first applicant.
- [3] First applicant launched an application in terms of the provisions of section 153(1)(a)(ii) read with section 153(7) of the Companies Act number 71 of 2008 to have the first respondents vote set aside on the basis that the vote was inappropriate. That application is currently still pending.
- [4] The Department of Defence in the meanwhile sent a letter to second applicant notifying it that its tax clearance certificate is due to expire on 22 February 2014.
- [5] In response the applicants lodged a formal application for a new tax clearance certificate on or about the 5th of February which was refused by first respondent on 7 February 2014. Thereafter the present application was lodged by the applicants on 13 February 2014.
- [6] Counsel for the respondents submits and I accept that a decision on the issuance of a tax clearance certificate constitutes administrative action as contemplated by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Should applicants be dissatisfied with the commissioner's decision and wish to challenge same, they should launch review proceedings as provided for by section 8 of PAJA. Absent the institution of such proceedings, and pending the finalisation thereof, the decision remains in place and is of full force and effect.

A statement of the law in this regard in the judgment of the Supreme Court of Appeal in the matter of **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004(6) SA 222 SCA (at 242 B-C)** is apposite:

"The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

- [7] First respondent further submits and I accept that the issuing of a tax clearance certificate is governed by the provisions of the Tax Administration Act 28 of 2011 ("the TAAA"). Second applicant has an outstanding tax debt of just under R12 million which according to first respondent is not a debt as contemplated by section 167 and 204 of the TAA and has not been suspended in terms of section 164 thereof.

Respondent submits that neither the first respondent nor the court ought to order the issuance of a tax clearance certificate in these circumstances.

- [8] It has to be borne in mind that the relief sought by the applicants is not interim but final. Section 256(3) does not provide for the issuance of an interim or provisional tax certificate.

- [9] The two matters, namely the issuance of a tax certificate and first respondent's vote against first applicant's revised business plan should be

treated as two separate matters to be determined by different factual and legal considerations.

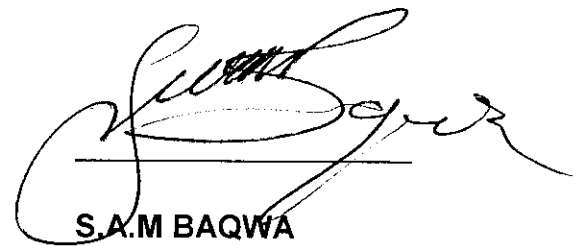
- [10] The fact is that section 256(3) does not provide for the issuance of an interim or provisional clearance certificate.
- [11] The consequence of granting the relief sought by the applicants would set a precedent that would negatively impact on first respondent's tax administration. Henceforth every tax payer whose application for a clearance certificate had been refused would simply be entitled to approach the court and without having to address the merits of the refusal obtain an order compelling the first respondent to issue him/her with the certificate.
- [12] Quite clearly that would cause chaos within the country and tax administration would come to a standstill. Yet, this is what the applicant in the present case seeks an order for.
- [13] The provisions of section 256(3) of the TAA are preemptory in that they allow the commissioner to issue a tax certificate "only if satisfied" that the requirements of the section are met.
- [14] The fact that a refusal of a tax clearance certificate is likely to cause the tax payer involved actual or impending harm does not entitle them to a **mandamus** compelling this court or the first respondent to issue such a certificate.
- [15] Applicants sought to have treated the tax clearance issue as a priority and addressed it from commencement of the business rescue proceedings. They

did not do so and only spring into action in this regard when they were notified of the pending expiry of their certificate. They did not take appropriate action for a period of about 8 months.

[16] In the circumstances I have come to the conclusion that the applicants have failed to make out a case. They have equally failed to make out a case for the relief sought.

[17] In the result, the following order is made.

The application is struck off the roll with costs.



S.A.M BAQWA

(JUDGE OF THE HIGH
COURT)