REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
…………………….	……………………….
DATE	SIGNATURE

CASE NO: SARS 1/2013

DATE: 13/8/2014

In the matter between:

JEN-CHIH HUANG **FIRST APPLICANT**

(Identity Number: 6007015393183)

SHOU-FANG HUANG (also known as Shou-Fang Cho) **SECOND APPLICANT**

(Identity Number: 6712070884188)

MPISI TRADING 74 (PTY) LTD **THIRD APPLICANTS**

(Registration Number: 2004/006499/07)

and

THE COMMISSIONER OF THE SOUTH AFRICAN

REVENUE SERVICES **RESPONDENT**

<u>IN RE</u>

THE COMMISSIONER OF THE SOUTH AFRICAN

REVENUE SERVICES **APPLICANT**

IN RE:

1. JEN-CHIH HUANG
   (Identity Number: 6007015393183)
2. SHOU-FANG HUANG (Also known as Shou-Fang Cho)
   (Identity Number: 6712070884188)
3. MPISI TRADING 74 (PTY) LTD
   (Registration Number: 2004/006499/2007)

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] This is an application for the reconsideration of a warrant for search and seizure issued by van der Merwe DJP in chambers in terms of the Tax Administration Act, 28 of 2011 (the Tax Administration Act). The application is pursuant to an *ex parte* application brought by SARS.

[2] I shall in this judgment, for convenience, use the terminology that is used by the parties in their respective heads of argument. I shall, therefore, refer in this judgment to the first applicant as "Mr Huang", the second applicant as "Mrs Huang", the third applicant as "Mpisi" and the respondent as "SARS". When I refer to the Huangs and Mpisi collectively I shall refer to them as the applicants. The application which led to the granting of the warrant shall be referred to as "the warrant application" or "the *ex parte* application" and the current application as "the reconsideration application".

[3] The applicants' answering affidavit was filed out of time, and before the commencement of the matter, the applicants' counsel applied for condonation for such late filing. SARS did not oppose the condonation application and I consequently granted an order condoning the late filing.

FACTUAL BACKGROUND

[4] On 18 April 2013 SARS brought an *ex parte* application against the applicants as respondents in that application. The *ex parte* application was launched in terms of s 59 and 60 of the Tax Administration Act for a search and seizure warrant and ancillary relief. The said *ex parte* application was heard and granted in chambers by van der Merwe DJP. The warrant authorised SARS *inter alia* to search the business premises of Mpisi and the residential premises of the Huangs and to seize documentation and relevant material. On 26 April 2013, the warrant was executed at the two premises and material which is alleged to be relevant was seized.

[5] It is common cause that subsequent to the warrant being executed, various discussions between the parties took place and correspondence was exchanged and meetings were held during which the appellants were provided with copies of the documentation seized during the execution of the warrant and the applicants were allowed to inspect certain of the originals and the electronic data storage equipment were returned to them. Pursuant to these exchanges between the parties, on 29 April 2013, the applicants demanded certain undertakings from SARS, *inter alia* that SARS should not take any further steps in terms of the warrant pending the matter being reconsidered; that SARS immediately return all computer server hard drives, personal computers and other relevant material; and that SARS should also not utilise the relevant material obtained as part of the warrant. When SARS refused to accede to the demands, the applicants approached this court for the relief as set out in the notice of motion of the reconsideration application.

[6] The warrant was issued on the strength of allegations that there are reasonable grounds to believe that the applicants (the respondents in the warrant application) have failed in one or more or all respects to comply with their duties in terms of the Income Tax Act 58 of 1962 (the Income Tax Act), the Value Added Tax Act 89 of 1991 (the VAT Act) and/or the Tax Administration Act, or on the basis that there are reasonable grounds to believe that any one or more of them committed certain offences in terms of the said Acts.

[7] The factual basis for the warrant application appears from the founding affidavit deposed to by Mr Humbulani Gene Ngwako Ravele (Ravele), the Chief Officer: Tax and Customs Enforcement; and the supporting affidavit of Ms Loraine van Esch (Esch), the manager, Tax and Customs Enforcement Investigations who was the project manager in respect of the verification process that was carried in connection with the tax affairs of the applicants.

[8] The reconsideration application is based on the submissions that the disputed search warrant was improperly obtained on one or more of the following bases:

8.1 the warrant application did not satisfy the requirements of an *ex parte* application in *inter alia* the following ways:

a. SARS did not act in good faith; and/or

b. SARS misled, alternatively improperly influenced the court's discretion in granting the search and seizure warrant; and/or

c. SARS was remiss in its duty to fully disclose all the material facts; and/or

d. SARS relied on selective evidence and misleading speculative conclusions based thereon.

8.2 the main application did not satisfy the requirements of the Tax Administration Act.

8.3 In essence the *ex parte* application was an abuse of the court process.

[9] SARS is opposing the reconsideration application and contends that the applicants have failed to make out a case in support of the relief they seek; and in the alternative moves for an order in terms of s 66 (4) of the Tax Administration Act that it (SARS) be authorised, in the interest of justice, to retain the original or copies of the relevant material seized.

APPLICABLE LEGISLATION

[10] The following provisions of the Tax Administration Act are in my view applicable in the application before me:

"S 59 **Application for warrant**

(1) A senior SARS official may, if necessary or relevant to administer a tax Act, authorise an application for a warrant under which SARS may enter a premises where relevant material is kept to search the premises and any person present on the premises and seize relevant material.

(2) SARS must apply *ex parte* to a judge for the warrant, which application must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

(3) . . .

S 60 **Issuance of a warrant**

(1) A judge or magistrate may issue the warrant referred to in section 59 (1) if satisfied that there are reasonable grounds to believe that –

(a) a person failed to comply with an obligation imposed under a tax Act or committed a tax offence; and

(b) relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.

(2) . . .

S 66 **Application for return of the seized relevant material or costs of damages**

(1) A person may request SARS to –

(a) return some or all of the seized material; and

(b) . . .

(2) If SARS refuse the request, the person may apply to a High Court for the return of the seized material or . . .

(3) The court may on good cause shown, make the order as it deems fit.

(4) If the court sets aside the warrant issued in terms of section 60 (1) or orders the return of the seized material, the court may nevertheless authorise SARS to retain the original or a copy of any relevant material in the interest of justice."

THE PROCEDURE

[11] Before I deal with the issue for determination, I must first deal with the issue of procedure which was raised by the applicants. Initially when the applicants launched the reconsideration application, they relied on the provisions of uniform rules 6 (11) or 6 (8) or 6 (12) *(c)*. SARS took issue with this approach in its answering affidavit, the argument being that the applicant relied in their application on a wrong procedure and

that the correct procedure that they ought to have used was in terms of s 66 of the Tax Administration Act. The applicants in their replying affidavit took the attitude that SARS reliance on the wrong procedure followed was technically without substance. From their heads of argument it now appears that the applicants have abandoned their reliance on uniform rules 6 (11) and 6 (8). The stance they now take is that the procedure under rule 6 (12) *(c)* and in terms s 66 of the Tax Administration Act, is the same.

[12] SARS submission that this matter should be decided in terms of s 66 of the Tax Administration Act has merit. S 66 (2) provides that any person, whose relevant material has been seized in terms of a warrant for search and seizure, if SARS refuses a request for the return thereof, may approach the court for a reconsideration of the warrant; and in terms of subsection (3) the court may, on good cause shown, make an order as it deems fit, which order, in my opinion, may also include that a warrant be set aside. Uniform rule 6 (12) *(c)* which the applicants seeks to rely on does not find application in the circumstances of this matter. The rule applies only where the application was brought to court on urgent basis and this was not the situation in this instance. The respondent has, however, accepted that the application is properly before the court since the difference between uniform rule 6 (12) *(c)* and s 66 of the Tax Administration Act is one of form and not substance. I accordingly will deal with the application as being properly before me in terms of s 66 of the Tax Administration Act.

THE ISSUES TO BE DETERMINED

[13] The applicants raise the following issues in their papers for determination:

13.1 Whether the warrant ought to be set aside on the basis of material non-disclosures and misrepresentations in the *ex parte* application brought by the respondent;

13.2 Whether the warrant ought to be set aside on the basis that the jurisdictional requirements of ss 59 and 60 of the Tax Administration Act were not satisfied in the *ex parte* application brought by the respondent;

13.3 Whether the warrant ought to be set aside on the basis that the *ex parte* application brought by the respondent constituted an abuse of process.

I shall therefore deal *in seriatim* with the issues raised.

MATERIAL NON-DISCLOSURE AND MISREPRESENTATION

[14] According to the applicants not all the material facts were disclosed to the judge hearing the warrant application; some of the facts provided were irrelevant, vexatious and at time spurious and were aimed to influence the judge to issue the warrant. The contention is that if the judge was provided with all the material disclosures and the correct information he would not have issued the warrant. The following submissions, amongst others, were made by the applicants:

14.1 Firstly, according to the applicants, the reference by both Ravele and van Esch of Mr Huang's imprisonment for murder in 1998 was vexatious, malicious and completely irrelevant in so far as this matter relates to allegations of income tax and VAT related offences, and was clearly meant to tarnish Mr Huang's reputation and influence the frame of mind of the judge reading the papers.

14.2 Secondly, the reliance by SARS on various media reports reflecting vague and immaterial assertions, which refer to a

motor vehicle parts business launched by Mr Huang and/or Mpisi and Mr Huang's ostensible involvement in mining related acquisitions, are to the applicants inappropriate, irrelevant and clearly done to taint Mr Huang in the eyes of the court. This according to the applicants shows SARS' intention to allude to the highly publicised failed business venture and that Mr Huang played a central role which contributed to the liquidation of the company.

14.3 Thirdly, SARS reference, in the warrant application, to the criminal investigations initiated by itself into Mpisi's alleged contravention of the Customs and Excise Act No 91 of 1964 (Customs Act) which relates to 111 containers, was incorrect because the charges were withdrawn. The contention is that the allegations and the implications thereof in the circumstances were misleading and unreasonably sensational; and at best they omitted to bring to the court's attention a highly material and relevant consideration that would likely have had an influence on the court's decision.

14.4 Fourthly, according to the applicants, SARS misled the court by cloaking Mpisi as a business specialising in the import and export of goods whilst in reality and with the full knowledge of SARS, Mpisi is in fact a clearing and forwarding agent. The contention is that this allegation was misleading to the judge.

14.5 Fifthly, SARS neglected to disclose that the applicants' tax affairs were by and large up to date at the date of the making of the decision to launch the application for a warrant.

14.6 Lastly, SARS having admitted that the activities of Mpisi as a clearing agent fall within the ambit of the Customs Act failed in its *ex parte* application to make mention of the distinction between the two Acts. This accordingly was a material non-

disclosure and was relevant to the judge considering the application.

[15] SARS in response to the submissions by the applicants contends that:

15.1 The disclosure of information in reference to the murder conviction of Mr Huang and the criminal charges against Mpisi was relevant in so far as it served as an introduction. According to SARS no malice was intended by the inclusion of this information nor was any conclusion drawn in this regard. It was in no way meant to influence the judge.

15.2 Although in its founding affidavit it described Mpisi as a powerful import and export business, it did also mention that Mpisi specialises in the forwarding services for mineral exports from Southern Africa to China. Van Esch also in her supporting affidavit mentioned that the largest portion of Mpisi's business relates to the import and export of goods and the clearing thereof. It is thus not true, according to SARS that it failed to disclose that Mpisi was a clearing and forwarding agent.

15.3 The information in the media reports was provided as background and nothing really turns on it. It was thus relevant for consideration for purposes of the warrant and no inappropriate comments were made.

[16] An *ex parte* application is a serious departure from the ordinary principles applicable to civil proceedings to seek an order in the absence of notice to the respondent party. As *per* normal court practice an *ex parte* procedure should be invoked only where there is good cause or reason for the procedure such as when the giving of notice would defeat the very object for which the order is sought. It is, therefore, our law that an applicant in an *ex parte* application bears a duty of utmost

good faith in placing before the court all the relevant material facts that might influence a court in coming to a decision. Only facts that are material and which are within the applicant's knowledge should be disclosed. See *Powell NO and Others v Van der Merwe NO and Others* [1]

[17] In this instance, SARS was enjoined by s 59 (2) of the Tax Administration Act to apply *ex parte* to a judge for the search and seizure warrant. It has been correctly said that this *ex parte* application is not a species unique to the Tax Administration Act but falls squarely within the confines of the *ex parte* application in terms of Uniform Rule 6 (4). SARS was therefore bound in terms of the rules of procedure to be *bona fide* in disclosing all the relevant material facts. Therefore, in this instance, when determining the issues raised in the reconsideration application, if it can be shown that SARS as an applicant in the *ex parte* application withheld material facts which might have influenced the court in coming to a decision, I will be entitled to reconsider and rescind the issued warrant, irrespective of whether the non-disclosure was wilful or *mala fide*.

[18] In my view, the applicants' submissions have no merit. It is said that in vast and complex cases, such as the present, there can be no crystal-clear distinction between facts which are material and those which are not. An applicant will as such have to make a judgment call as to which facts might influence the judicial officer in reaching its decision and which, although connected to the application, are not sufficiently relevant to justify inclusion. The test of materiality should also not be set at a level that renders it practically impossible for the state to comply with its duty of disclosure, or that will result in applications so large that they might swamp *ex parte* judges. See *Thint (Pty) Ltd and Zuma v National Director of Public Prosecutions* [2]

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[1] 2005 (5) SA 62 (SCA) para [42]

[2] 2009 (1) SA 1 (CC) para [102]

[19] Possibilities are that SARS may have not disclosed some facts which according to the applicants are material, however, in my opinion, the circumstances of this case are such that SARS had to choose from the vast information that was available which of the facts to include and which not to include. Van Esch also mentioned in her supporting affidavit that some of the facts were obtained from a sample of documents in SARS' possession. What was also material would have depended on the facts which were readily available to SARS at the time a decision was made to apply for the warrant.

[20] I am as a result, prepared to accept that reference to the murder conviction and the media reports served merely as introduction. This is in the same light in which the applicants in their founding affidavit mention the extensive and acrimonious history of disputes and litigation between Mr Haung and SARS. It is my view that the information from both parties served as introduction to give the judge a background to the case. I do not believe that a judge considering a warrant application would have been influenced by this information to grant the warrant.

[21] To my mind, Mpisi has been found to carry business as importer of goods in its own right and it is, therefore, not only operating a clearing and forwarding business. Firstly, in the words of Mr Huang in the reconsideration application, the applicants conceded that Mpisi does carry the business as an importer and exporter, though Mr Huang says it has done so on few occasions. Mr Huang mentions the time Mpisi rented some large screen television sets for the 2010 World Cup and when it bought machinery for its own use in 2011, 2012 and 2013. This, however, are not the only times. SARS in its evidence provided a list of other transactions, the value of which amounted to R10 million, which Mpisi was involved in as an importer. It is thus apparent from this list, which is compiled by SARS and based on information obtained from its electronic system, that besides the machinery which the appellants concedes to have imported, there are other goods which were imported by Mpisi. Although Mpisi's submission is that the machinery was exported for own use, however, SARS' evidence is that this machinery does not appear on Mpisi's financial statements which makes SARS

suspect that it was imported for resale. The issue made by the applicants that SARS's description of their business was also incorrect, does not assist them in any way. The evidence shows that the applicants do not deny that the description of Mpisi on SARS' System is the description provided by the applicants' representatives to SARS. They also do not deny that Mpisi's business is identified on the electronic CIPC search as 'retail, trade, except motor cycle repair of personal household goods'

[22] As regards the criminal charges disclosed in SARS' founding affidavit, SARS had only to disclose material facts within its knowledge. It is van Esch's submission that at the time she deposed to the supporting affidavit, she was not aware that the criminal charges against Mr Huang had been withdrawn. Her argument is that the allegations were made in the *bona fide* belief they were correct and has apologised for the oversight. It is so, that, what is in issue as regards these allegations is the objective effect thereof and not the subjective intention which with they were made; however, I am of the view that this information alone could not have influenced the judge to issue the warrant.

[23] The applicants' contention that SARS failed to disclose that Mpisi has no outstanding returns is to me not the issue here. The issue as I understand, it is not that the tax returns were not submitted, but that the submitted tax returns are suspect due to irregularities and inconsistencies therein which clearly indicate that incorrect disclosures were made to SARS in the returns submitted. This clearly indicates non-compliance with the obligations of the Income Tax Act and/or VAT Act and/or the Tax Administration Act and/or the committing offences in terms of the aforesaid Acts. In any event, SARS did disclose in the warrant application that Mpisi has no outstanding tax returns.

[24] The applicants' submission that SARS should have made mention of the distinction between the two Acts, namely the Tax Administration Act and the Customs Act, carries no weight. It is apparent from the proceedings in the warrant application that SARS relied entirely on the

Tax Administration Act. I will deal with this issue in detail later in my judgment.

[25] A lot was said about SARS' failure to make mention of the tax clearance certificates issued to Mpisi for the 2010, 2011, 2012 and 2013 financial years of assessment and the fact that none of the certificates were withdrawn. It is the applicants' contention that the information in regard to the said certificates ought to have been brought to the attention of the judge hearing the warrant application. SARS's argument appears to be that the tax clearance certificates were not mentioned due to the fact that they were issued at face value without any in depth investigations having been done. From the reading of van Esch's supporting affidavit it seems that she did not regard the tax clearance certificates and all the audits done by third party auditing professionals as material. To my mind, this was a judgment call which in the circumstances of this case van Esch had to make. She appears to have come to a conclusion that the certificates were not material to can influence the judicial officer in reaching his decision. She based her argument on the fact that Mpisi's financial statements where qualified opinions were provided were not available to her at the time. In my view, SARS should not be faulted for such none disclosure.

[26] As stated before, what is in issue here is whether SARS disclosed all the material facts within its knowledge; and those facts established reasonable grounds to believe that the applicants had failed to comply with or had committed offences under the tax Acts.

[27] Under these circumstances, my view is that the facts disclosed in the SARS' founding affidavit were sufficient.

ALLEGED FAILURE TO PLEAD SUFFICIENT JURISDICTIONAL FACTS

[28] The applicants' submission is that SARS did not establish the jurisdictional requirements of ss 59 and 60 of the Tax Administration Act in the *ex parte* application. According to the applicants, most of the allegations are not reasonable grounds as envisaged in the Tax Administration Act simply because the facts upon which the *ex parte* application was based were unduly contorted to artificially create an atmosphere of suspicion; and since the Tax Administration Act specifically excludes offences committed under the Customs Act, any offences committed as a clearing and forwarding agent, as in this instance, would be excluded as reasonable grounds justifying the granting of a search and seizure warrant. They contend that the reasonable grounds set out by SARS in the warrant application are easily disputable in that: a number of legislative provisions of the Income Tax Act, in terms of which the alleged offence are said to have been committed, have been repealed; and offences alleged to have been committed by the applicants have not been proved. According to the applicants proof is mandatory the absence thereof is fatal to the *ex parte* application.

[29] SARS on the other hand submits that its warrant application disclosed reasonable grounds to believe that all three applicants transgressed the VAT Act, the Income Tax Act and the Tax Administration Act. They further submit that it was not necessary for SARS to confirm or prove the commission of the offences since s 60 (1) of the Tax Administration Act merely requires reasonable grounds to believe that someone has committed a transgression and that evidence of the transgression is likely to be found on the premises sought to be searched. It was also not necessary to establish that the owner of the premises was the transgressor. In this case, for instance, it was sufficient to show reasonable grounds to believe that Mpisi has committed transgressions and that evidence of its transgressions are likely to be found on its own premises and at the residence of Mr and Mrs Huang. It was thus not necessary to establish reasonable grounds to believe that each of them has been guilty of one of the other transgression, so the argument goes.

[30] A warrant for search and seizure in terms of the Tax Administration Act is applied for in terms of s 59 of the said Act. However, before the warrant can be issued the requirements of s 60 (1) of the Tax Administration Act must be met.

[31] S 60 (1) of the Tax Administration Act requires that there must be

> "reasonable grounds to believe that –
>
> *(a)* a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and
>
> *(b)* relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence."

[32] Therefore, when considering whether a warrant should be set aside a court will determine, first, whether, on the record, the objective jurisdictional facts were present and secondly, whether the discretion was exercised judicially. For once the jurisdictional facts have been established the court is not obliged to issue the warrant – it must first exercise its discretion whether or not to grant the warrant. Such discretion must be properly exercised. It is thus a general requirement of the rule of law that any discretion must be exercised in good faith, rationally and not arbitrary.

[33] There are two jurisdictional facts which must be satisfied before a judge can issue a warrant for search and seizure. The judge issuing the warrant must have been satisfied that, firstly, there were reasonable grounds to believe that a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and, secondly, that there were reasonable grounds to believe that relevant material to be found on the premises specified may provide evidence of the failure to comply or the commission of the offence.

[34] If a court finds, when considering the setting aside of a warrant, that the jurisdictional facts were not present at the time of issuing the warrant, then a court will set aside the search warrant. If the jurisdictional facts were present, then a court will have to consider the exercise of the discretion by the judicial officer to issue the warrant. Such a court may, however, not interfere with the discretion simply because it would have reached a different conclusion to that reached by the judicial officer issuing the warrant. It may only set aside the warrant if it is persuaded that the discretion has not been exercised judicially, or flowed from a wrong appreciation of the facts or the law. See *Thint (Pty) Ltd and Zuma v National Director of Public Prosecutions* [3].

[35] My findings that there was no material non-disclosure on the part of SARS in the warrant application would ordinarily be dispositive of the applicants' claim. I am however of the view that it is still necessary for this court to satisfy itself whether, on the record, SARS established the jurisdictional requirements of s 60 (1) of the Tax Administration Act in its warrant application. S 60 (1) of the Tax Administration Act provides that a judge may issue the warrant if satisfied that the jurisdictional facts have been established. As a point of departure it should be assumed that the judge in the warrant application was satisfied that SARS had established the jurisdictional facts hence the issued warrant. And he was correct.

[37] It is my view that the relevant suspected offences and failure to comply with the tax Acts were duly set out in the warrant. The grounds on which SARS reasonably believed that the applicants committed offences and failed to comply in terms of the relevant tax Acts, which also satisfied the judge, are identifiable in the SARS founding affidavit as well.

[38] In regards to Mpisi, SARS referred to the returns submitted by Mpisi which, according to it, are suspect, due to irregularities and inconsistencies therein. This submission was based on the investigations

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[3] above para [91], [92] and [93]

done by van Esch in which she found blatant incorrect declarations made by Mpisi in the various bills of entry, large discrepancies between the declared turnovers for income and VAT purposes and the possible manipulation of VAT returns. For example:

38.1 invoices, bills of lading and other documentation show that there are large discrepancies between the customs value and the value on invoices issued, as a result, the incorrect disclosures were made to SARS in the returns submitted - the invoice issued by Shenzhen Haichenfa Trading Co Ltd to Mpisi referred to a value of $48, 081 .60 (USD) as compared to the customs value as declared to SARS of R18, 720;

38.2 no clearing agency fees were identified in the income tax returns submitted;

38.3 no mention was made of any opening and closing stock in the income tax returns submitted by Mpisi in respect of the import of certain commodities;

38.4 for the tax periods 2008, 2009, 2010, 2011 and 2012 turnover declared for income tax exceeds the declared turnover for VAT;

38.5 for three VAT periods, the input and output VAT were exactly the same amount, effectively giving a Rnil result;

38.6 the total value of bonds registered against the properties owned by Mpisi appeared not sufficient to could have financed them and gave an impression of being financed from undisclosed profits or income from other sources; and

38.7 there was no statements of assets and liabilities submitted with any of the income tax returns

[39] In respect of Mr Huang, SARS relied on the fact that Mr Huang as a taxpayer failed to submit income tax returns for the 2011 tax year and that he failed to declare all income received. Mr Huang's tax returns

show income received from Mpisi only, even though there is indication that a company by the name of Dongfeng Automobile (Pty) Ltd issued an IRP 5 for him for an amount of R673 181 in 2012.

[40] SARS also relied on the fact that, having calculated Mr Huang's declared income, such income would not have been sufficient to allow for the payment of the immovable property he bought or the immovable properties he bought together with Mrs Huang. According to SARS, with the income declared, Mr Huang would only have been able to finance the out of pocket expense relating to the acquisition of the immovable properties if he did not use any portion of his declared income for living expenses or if he had another source of income which he failed to declare.

[41] As for Mrs Huang, SARS relied on her failure to submit income tax returns for the 2009, 2010, 2011 and 2012 tax years and other income received. She was issued an IRP 5 certificate for an amount of R165 000 by City Shuffle, which she did not declare.

[42] The applicants deny these allegations, in particular, that there are irregularities and inconsistencies, in Mpisi's tax returns that indicate non-compliance with the obligations alleged or offences committed. Their argument is that the clearing agency fees are included in the audited financial statement under the item "revenue" in the income statement; the VAT in the declared turnover for VAT complained of was explained to SARS. The VAT amounts include both standard rated and zero-rated items which is why there would be discrepancies.

[43] The applicants' further submission is that SARS failed to set out the reasonable grounds that the relevant material as defined to be seized is likely to evidence the non-compliance. The documentation relied upon is out dated and historical and based on van Esch's own uncorroborated calculations. Except for the unduly vague submissions, SARS has failed to advance any reasonable grounds nor specified how and why any one or more of the seized articles may be relevant to a related offence or

non-compliance. In the absence of these submissions it cannot be said that the *ex parte* application was proper, so they argue.

[44] A judge may in accordance with s 60 of the Tax Administration Act issue a warrant if satisfied that there are reasonable grounds to believe that: a person failed to comply with an obligation imposed under a tax Act or committed a tax offence; and that relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.

[45] Whether such belief is reasonable is an objective question which will be answered on the facts before the court. The purpose of objective grounds is to enable the judicial officer to decide whether the case based upon the facts brought before it is a proper one upon which to exercise discretion and to issue a warrant to search. The judicial officer must, therefore, be satisfied that there are reasonable grounds to believe that: a person failed to comply with an obligation imposed under a tax Act or committed a tax offence. Similarly, for seizure of property on reasonable grounds to be justifiable, there should exist an objective set of facts which cause the officer to have the required belief. See *Highstead Entertainment (Pty) Ltd v Minister of Law and Order* [4]

[46] The Tax Administration Act allows for the granting of a search and seizure warrant merely on the suspicion that tax offences have been committed and that, reasonable grounds exist for the granting of such an order on an *ex parte* basis. SARS must also set out the reasonable grounds that the relevant material as defined to be seized is likely to evidence the non-compliance. That reasonable grounds must be established does not mean *prima facie* proof. What is of importance is that on the total picture presented by SARS in the warrant application, reasonable grounds to believe that the applicants had failed to comply with their obligations under the tax Acts or had committed offences under those Acts, were established.

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[4] 1994 (1) SA 387 (C) 393A

[47] In the same breath, I would hold that the submission by the applicants that the offences alleged to have been committed by the applicants should have been proven, does not have merit. It was not necessary for SARS to show that the applicants were guilty of the offences they are alleged to have committed. In determining the issues raised in the reconsideration application, the applicants are not expected to show that they are innocent of the transgressions of which they are suspect as their guilt or innocence is not in issue in this case.

[48] Was SARS supposed to have made the judge aware of other less intrusive measures? I do not think so.

The applicants' argue also that SARS could have used less invasive measures to obtain the material required. The applicants' contention is that the grounds relied on by SARS cannot be said to be reasonable if there were other less drastic means available to it which SARS failed to disclose to the judge.

[49] S 60 (1) of the Tax Administration Act merely requires of SARS to place information before a judge or magistrate hearing a warrant application. These facts or information establish reasonable grounds taken into account by the judge or magistrate when deciding whether it is appropriate to issue a search warrant. There is no obligation or any duty placed on SARS by the provisions of this section to prove that less invasive means should have been used to obtain the required material or to make the judicial officer aware of other less intrusive measures. It is the duty of a judicial officer hearing the matter to determine whether it is reasonable in the circumstances for SARS to seek a search warrant and not to employ other less invasive means and not of SARS.

[50] The applicants submit as well that the reconsideration application is based on the notion that the decision to issue the warrant by the court should be reconsidered in the light of several defects contained in SARS' *ex parte* application setting out the facts that were supposed to enable van der Merwe DJP to exercise his discretion to decide to grant or refuse

the request, as envisaged by s 60 of the Tax Administration Act. According to the applicants the warrant was obtained on the basis of material non-disclosure of facts by SARS. Their argument is that there were series of allegations and non-disclosures in the *ex parte* application that may have influenced the judge's decision to issue the warrant. My understanding is that the applicants' argument is that the judge in the warrant application did not properly apply his mind due to the facts presented to him in the papers filed by SARS.

[51] The decision of a court to issue a warrant involves the exercise of discretion, as is indicated by the phrase "a judge may issue a warrant" in s 60 of the Tax Administration Act. As already stated, the discretion comes into play once the jurisdictional facts have been established. Based on the facts or information at the disposal of the judge, he or she must be satisfied that there are reasonable grounds to believe that a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence.

[52] It is trite, that, the present court has a wide discretion to interfere with the decision of the judge in a warrant application if he or she did not apply his or her mind to the matter.[5] In this instance, having discarded the applicants' submissions of material non-disclosure, there are no grounds on which it could be said that the judge in the warrant application did not apply his mind to the matter, or did not exercise his discretion judicially. I have therefore to conclude that there was sufficient information before the judge to can properly exercise his discretion in forming his own opinion that it was lawful to issue the warrant. Having concluded as such, the judge's discretion cannot be interfered with.

[53] The applicants are correct to submit that the exercise of discretion required the judge hearing the application to consider s 14 of the Constitution (the right to privacy). It has also been held that where jurisdictional facts exists a court has the discretion to refuse the issuing of

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5 *Rajah v Chairperson: NW Gambling Board* [2006] 3 All SA 172 (T) at 178b

a warrant where a person's right to privacy outweighs the interests of justice. Therefore, for the effective protection of the right to privacy, the information on which reasonable grounds are based, thus authorising a constitutional search, may not in itself have been obtained in violation of s 14 of the Constitution. See *Van Der Merwe v Minister van Justisie en 'n Ander* [6] and *S v Cornelissen; Cornellison v Zeelie NO* [7].

[54] To the extent that SARS seized documentation falling outside the financial periods authorised in the warrant, which was specifically limited to financial periods ending on or after 1 March 2007, such documents must be returned to the applicants.

[55] The safeguards against unjustified interference with the right to privacy include prior judicial authorisation and an objective standard, that is, whether there are reasonable grounds to believe based on information under oath that an offence has been or is likely to be committed; that articles sought or seized may provide evidence of the commission of the offence and that the articles are likely to be on the premises. The essence of reasonable grounds is that they are objective and can be reviewed by a court. See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [8].

[56] It is common cause that in this instance there was prior judicial authorisation in that a judge was approached to grant the warrant. I have as well made a finding that the judge applied an objective test in deciding whether there are reasonable grounds to believe. This point does not have merit as well. There was in my view sufficient facts available to SARS to support its contention that there are reasonable grounds to believe that the applicants failed to comply with one or more of the obligations imposed under any of the tax Acts and that the applicants committed one or more tax offences.

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[6] 1995 (2) SACR 471 (O) at 486a –f

[7] 1994 (2) SACR 41 (W) 69i – 70f

[8] 2001 (1) SA 545 (CC) para [52] at 567B – D

[57] SARS' claim for a warrant was all encompassing and covered every eventuality. Its claim is couched in such a way that it covered every eventuality. It is stated in SARS founding affidavit that there are reasonable grounds to believe that the relevant taxpayers have failed "in one or more or all" respects to comply with their duties as identified, or committed "one or more or all" of the specified offences. SARS submission that s 60 (1) *(a)* and *(b)* does not require that a case should have been made out by SARS that the relevant taxpayer is a repeat offender or that there are numerous failures to comply with obligations and/or numerous offences committed or that these are serious, is correct. From the plain reading of the section, a single non-compliance or a single offence committed would suffice. What SARS is required to do is just to set out reasonable grounds in support of its contention that it has reason to believe and once the court reading the papers is so satisfied a warrant may be issued. In my view SARS managed to do just that. The applicants' claim stands to be dismissed. To the extent that it is alleged that some of the legislative provisions of the Income Tax Act have been repealed, it suffice to say that it was not necessary to establish all the offences and/or non-compliances.

ABUSE OF COURT PROCESS

[58] The applicants' submission on this point is that SARS has opportunistically manipulated and abused the legal process by launching an *ex parte* application under the guise of alleging various income tax and VAT related offences pertaining ostensibly to importing and exporting transactions. The contention is that the transgressions SARS relied on in its warrant application are not tax offences as envisaged in s 60 of the Tax Administration Act but Customs Act offences. According to the applicants, SARS failed to appreciate the import of s 4 of the Tax Administration Act which specifically excludes customs related offences from its operation. The applicants' contention is that on this basis any offences committed as a clearing and forwarding agent, as in this instance, would be excluded.

[59] SARS denies that the warrant application was an abuse of the court process. It submits that at all material times it acted within its powers and duties in terms of the Tax Administration Act. It concedes, however, that custom transgressions do not count in the circumstances of this case, but contends that offences with which Mpisi is suspected to have committed fall within the ambit of the Tax Administration Act. SARS agrees that Mpisi operates as forwarding and clearing agent but insists that Mpisi's business also involves export and import activities. Although Mpisi's business as a clearing and forwarding agent primarily falls under the Customs Act, Mpisi is still liable to pay income tax and VAT on the income it derives from such business. As a result since the verification of a taxpayer's affairs is in accordance with SARS's mandate to administer the tax Acts, the Tax Administration Act will be applicable. Therefore, the purpose and nature of the warrant application was to enforce the provisions of the tax Acts, namely, the Income Tax Act, the VAT Act and the Tax Administration Act and not the Customs Act, so the argument goes.

[60] The scope and ambit of the Tax Administration Act is set out in s 4 thereof. The section stipulates that the Act is applicable to a person who is liable to comply with the provisions of a tax Act. The Tax Administration Act defines "tax Acts" as the Tax Administration Act or an Act or portion of an Act referred to in s 4 of the South African Revenue Service Act No 34 of 1997, excluding the Customs Act. It is therefore apparent from the reading of this section that matters pertaining to the Customs Act are specifically excluded from the ambit of the Tax Administration Act. S 60 of the Tax Administration Act refers to the commission of a tax offence, and, therefore, any offence committed under the auspices of the Customs Act should be excluded from its operation.

[61] It is also correct that Mpisi's business operations as a clearing and forwarding agent fall under the ambit of the Customs Act. However, that is not the end of the story. The contention that Mpisi's business should be excluded because it falls within the ambit of the Customs Act cannot be entertained because the various irregularities of Mpisi's business within that ambit have a direct impact on the verification of its

tax affairs in terms of the tax Acts. In any event, the payments made by Mpisi, even though Mpisi falls within the ambit of the Customs Act, have a direct bearing on Mpisi's tax affairs as envisaged in the tax Acts. It follows therefore that firstly, Mpisi is liable to pay income tax and VAT on the income it derives from its operations as a clearing and forwarding agent; secondly, as I have already found that Mpisi's is also involved in the export and import business and on that basis it is liable to pay income tax and VAT. This is where the Tax Administration Act comes into play. This summation is an indication that there is an overlapping inter-relationship between the Tax Administration Act and the Customs Act and thus the contention that Mpisi's business activities fall beyond the reach of the tax Acts is in my view mistaken. Besides, it is common cause that all three applicants are taxpayers for purposes of the Income Tax Act and VAT Act in their individual right.

[62] The applicants in their haste to have the warrant set aside, lost sight of the provisions of s 180 of the Tax Administration Act in terms of which a person may be held personally liable for any tax debt of the taxpayer to the extent that the person's negligence or fraud resulted in his or her failure to pay a tax debt if the person controls or is regularly involved in the management of the overall financial affairs of a taxpayer. What would happen is such a situation is that a clearing agent pays customs duty, if any, and VAT on behalf of an importer to customs using the importer/exporter's VAT number. The importer/exporter thereafter settles the clearing agent any outstanding dues or fees, and processes their VAT (input/output) documents in terms of the relevant VAT legislation. The forwarding or clearing agent does not attract liability for custom duty and VAT (save where it fails to take steps referred to in s 99 (2)). It is the importer or exporter (the clearing agent's principal) who incurs such liability. But in case where the clearing agent will be found negligent or having committed fraud he or she will be liable for such custom duty or VAT.

[63] The evidence before me is that the offences alleged to have been committed by the applicants and certain obligations the applicants are alleged not to have complied with, fall within the tax period ending on or after 1 March 2007. Such offences or obligations would of necessity

be covered by the Income Tax Act and the Vat Act as those were the relevant tax Acts for the said period until 1 October 2012. Because S 270 of the Tax Administration Act allows for the retrospective application of the Act in respect of any act or omission taken or occurring before the commencement of the Tax Administration Act, SARS was thus correct to have used the Tax Administration Act.

[64] Consequently, I cannot see how it could be alleged that SARS abused the court process by applying for the warrant to search the applicants' premises and to seize any relevant material. In the process of the verification of Mpisi's affairs as a taxpayer SARS was entitled to apply for the warrant as this is in accordance with its mandate to administer the tax Acts. Similarly, the submission that SARS should have distinguished between the Tax Administration Act and the Customs Act is not correct. It is clear from what is discussed above that SARS' warrant application was based solely on the provisions of the Tax Administration Act. There was no need to mention the Customs Act.

[65] The applicants' further argument on this point, is that SARS' failure to amplify the grounds upon which it relies for an *ex parte* application, omitted to bring to the court's attention a highly material and relevant consideration that would likely have had an influence on the court's decision. The applicants take issue with the fact that SARS in its founding affidavit mentioned other reasons why it was necessary to use the *ex parte* application proceedings without any substantiation. According to the applicants the failure to do so in *ex parte* proceedings is an abuse of process and the warrant application falls to be set aside or rescinded on this basis alone.

[66] My view is that this is in fact a non-issue. In this instance, SARS approached the court by way of *ex parte* proceedings mainly because it was enjoined by s 59 (2) of the Tax Administration Act to apply *ex parte* to a judge for the search and seizure warrant. The provisions of s 59 (2) of the Tax Administration Act are peremptory and SARS was bound thereby to proceed by way of *ex parte* application. The purpose of the section is in any event to avoid giving notice that would hamper

the effectiveness, purpose and object of a warrant for search and seizure. Moreover notice to a taxpayer is not a requirement in terms of the section. There was, therefore, no obligation on SARS to put up any evidence that would justify its resort to the *ex parte* proceedings.

[67] According to the applicants, the extensive on-going investigations concerning possible custom and excise related offences allegedly committed by Mpisi makes it clear that SARS has targeted Mpisi in its capacity as a clearing and forwarding agent and thus compels this court to consider the motives behind the main application being launched in the first place.

[68] The fact that the taxpayers feel that they are being targeted is no basis for them to approach the court to reconsider the warrant. The motive, if any, is irrelevant for purposes of this application. As it has been said, the best motive would not render the warrant valid if it otherwise does not comply with the provisions of the Tax Administration Act, just as the worst motive would not render it invalid if it complies.

[69] Consequently the application is dismissed with costs including costs of three counsel: two senior counsel and one junior.

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KUBUSHI J

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	**: 19 FEBRUARY 2014**
DATE OF JUDGMENT	**: 29 JULY 2014**
APPLICANTS' COUNSEL	**: ADV STEPHAN DU TOIT, SC**
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