

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 337/2022

SCA CASE NO: 516/2021

Tax Court Case No: IT 24918

In the matter between:

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

Applicant

*(Respondent in main application
for leave to appeal)*

and

THE THISTLE TRUST

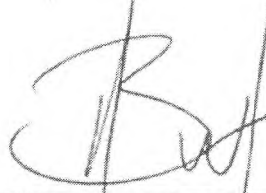
Respondent

*(Applicant in main application for
leave to appeal)*

NOTICE OF INTENTION TO OPPOSE

BE PLEASED TO TAKE NOTICE THAT the Respondent (who is the Applicant in the main application for leave to appeal to this honourable Court) intends to oppose the Applicant's application for leave to cross-appeal dated 8 December 2022, and that the accompanying affidavit of **CHRISTOPHER JOHN BRAMMER** will be used in support of such opposition.

DATED at **SANDTON** on this the 18TH day of **JANUARY 2023**



WERKSMANS ATTORNEYS

(For the Respondent)

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TO:
THE REGISTRAR OF THE CONSTITUTIONAL COURT

AND TO:
MADIBA MOTSAI MASITENYANE & GITHIRI INC.

(Applicant's Attorneys)

381 Rivonia Boulevard,

Unit 15 Rivonia Gate

First Floor, Block B

Rivonia

Ref: Ms Motsai/SARS/CMP113 C/O

RECEIVED BY:

Name: SILVIA MGOBENI

Date: 18/01/2023

Time: 15:23

MMMG ATTORNEYS

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 337/2022
SCA CASE NO: 516/2021
TAX COURT CASE NO: IT 24918

In the matter between:

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE

Applicant

and

THE THISTLE TRUST

Respondent

ANSWERING AFFIDAVIT: APPLICATION FOR LEAVE TO CROSS APPEAL

I the undersigned,

Christopher John Brammer

RECEIVED BY:

Name: SILVIA MGOBENI

Date: 18/01/2023

Time: 15:23

MMMGM ATTORNEYS

Say under oath:

- 1 I am a trustee and a beneficiary of the respondent ("Thistle"). Thistle has authorised me to depose to this affidavit opposing the applicant's application for conditional leave to cross appeal against the judgment of the Court *a quo* on the question of the understatement penalty levied by the applicant ("SARS").





- 2 The facts described in this affidavit fall within my personal knowledge, unless I state otherwise, or the context makes it clear that they do not. I confirm that those facts are, to the best of my knowledge, true and correct. To the extent that I make legal submissions, I rely on the legal advice obtained from my legal representatives.

Constitutional Issue raised

- 3 Thistle agrees with SARS that the issue of understatement penalties raises an issue of public importance as it engages SARS's statutory and constitutional powers and obligations to collect taxes effectively and efficiently. However, SARS is of course required to exercise those powers lawfully. In this matter, and as I discuss later in this affidavit, SARS may only exercise its statutory powers to levy an understatement penalty if certain jurisdictional requirements prescribed by the legislation exist. Based on the facts in this case, to the extent relevant here, a jurisdictional requirement was absent and SARS was accordingly not permitted to impose an understatement penalty.

- 4 Thistle relies on the following grounds of opposition.

The burden of proof

- 5 In terms of section 102(2) of the Tax Administration Act 28 of 2011, as amended ("the TAA"), SARS bears the burden of proving the facts on which it based the imposition of an understatement penalty.
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The understatement penalty actually imposed by SARS

- 6 SARS imposed an understatement penalty of R1 446 092 on the basis that Thistle's case was, for the purposes of the understatement penalty percentage table in section 223(1) of the TAA, a "standard" case and that Thistle had "no reasonable grounds for 'tax position' taken", resulting in the understatement penalty being levied at the rate of 50 per cent.

No facts pleaded and no evidence adduced by SARS

- 7 In its pleading, the Rule 31 "statement of grounds of assessment and opposing the appeal", SARS failed to plead sufficient, or indeed any, facts to support the conclusion that Thistle had had "no reasonable grounds for the 'tax position' taken". Since SARS led no evidence in this regard, it failed to discharge the burden of proof placed on it by section 102(2) of the TAA.

Reliance on the opinion of the late Adv Meyerowitz SC

- 8 It is common cause that Thistle's representatives had had access to a written opinion furnished by the late Adv Meyerowitz SC to another trust within the Zenprop Group with which Thistle was associated, on precisely the point raised in this matter, save that the beneficiaries in that matter were non-resident. Nevertheless, SARS failed in its Rule 31 statement to aver facts or to advance grounds justifying its allegation that Thistle had had no reasonable grounds for the tax position taken by it, apart from the bald allegation that the legislation in





question was clear. It can be observed that the legislation in question was not clear – in the sense intended by SARS – to the late Adv Meyerowitz SC. An opinion of senior counsel quite obviously constitutes reasonable grounds for taking a particular tax position.

Bona fide inadvertent error

- 9 Section 222(1) of the TAA provides that, in the event of an “understatement” by a taxpayer, the taxpayer must pay, in addition to the tax payable for the relevant tax period, the understatement penalty determined under subsection (2) unless the “understatement” results from a bona fide inadvertent error.
- 10 Thistle’s case on this aspect is that, if it erred on the main issue, this resulted from “a bona fide inadvertent error” and no understatement penalty was therefore leviable.

Meaning of inadvertent

- 11 SARS’s position on this aspect was, and apparently still is, that the misstatement was intentionally, i.e. deliberately, made, and was therefore not inadvertent.
- 12 Thistle’s response to this is that it is important to recognise that the word “inadvertent”, in the expression “a bona fide inadvertent error”, governs or qualifies the word “error”. So if a taxpayer has erred and the error has given rise to an “understatement” (as defined), no understatement penalty can be levied if the error was *bona fide* and inadvertent. The question is whether the taxpayer’s
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error was inadvertent, not whether the taxpayer's conduct in acting in the manner it did was inadvertent.

- 13 Thistle contends that the word "inadvertent" in this context means "unintentional". Thus, if a taxpayer has erred, but has done so in good faith and unintentionally, then SARS may not impose an understatement penalty at all. It is submitted that this is in keeping with the self-evident fact that understatement penalties are intended to be punitive.
- 14 Thistle acted in the belief that the capital gains in question were taxable in the hands of its resident beneficiaries and not in its own hands because it had acted as a mere "conduit-pipe". Its belief was *bona fide* in that it was based on the written opinion of the late Adv Meyerowitz SC to another trust in the Zenprop Group with which Thistle was associated. If the opinion of the late Adv Meyerowitz SC was wrong and Thistle erred, the resulting error was a *bona fide* inadvertent error.
- 15 It is no answer to say – as SARS has not pleaded, but has stated in disallowing Thistle's objection – that "the misstatement itself was intentionally made". Of course the statement (so to speak) was intentionally made, in the sense of being deliberately made, but if the statement was wrong, it does not follow that the error was deliberately made. This is the crux of the matter. The word "inadvertent" governs the word "error" in the phrase "*bona fide* inadvertent error".



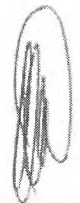

Judicial analogy

- 16 The South African law reports reveal many instances where even Judges disagree with each other, not only as between courts *a quo* and appeal courts, but also as between majorities and minorities within the same appeal courts, in circumstances where the Judges have had the opportunity to debate the issues amongst themselves before taking different legal positions.
- 17 Where a court *a quo* is found by an appeal court to have erred, this does not mean that the error of the court *a quo* – which it can be accepted acted deliberately and intentionally – was not a *bona fide* inadvertent error. To suggest otherwise would be absurd.

The nature of Thistle's error, if there was one

- 18 It is submitted that Thistle's understatement, if there was one, resulted from a *bona fide* inadvertent error inasmuch as it completed its tax returns based on legal advice it had received, and therefore in the reasonable and *bona fide* belief that it was doing so correctly. If this turns out to have been an error, it was an inadvertent error; and no understatement penalty should have been levied by SARS.

Issue conceded in the Court *a quo*

- 19 I am advised by Thistle's legal representatives who were present at the hearing in the Supreme Court of Appeal that counsel for SARS conceded the issue of the understatement penalties levied by SARS in the face of a suggestion from the
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Supreme Court of Appeal Bench that the submissions in Thistle's written heads of argument in this regard were clearly correct. As a result, no oral argument was presented by either side on this issue in the Supreme Court of Appeal.

- 20 I submit that the concession was correctly made, particularly since SARS has pleaded no facts whatsoever to support its imposition of an understatement penalty.

Affidavit in support of the application for leave to cross appeal

- 21 In dealing with the affidavit in support of the application for leave to cross appeal, I shall deal only with what I regard as being the main points in issue. This does not, however, mean that I am in agreement with paragraphs not dealt with in this affidavit which are in conflict with what has been stated above.

Ad Paras 10, 11 and 13

- 22 As stated in paragraph 3 above, I am advised by Thistle's legal representatives who were present at the hearing in the Supreme Court of Appeal that counsel for SARS did concede the question of the understatement penalty in the face of the view expressed by one of the learned Judges of Appeal that the submissions made in Thistle's written heads of argument were *prima facie* correct. As a result no oral argument ensued on the question of the understatement penalty.

Ad Para 24

- 23 SARS was not, as is suggested in paragraph 24, "deprived from raising an understatement penalty", nor is it prevented from exercising its statutory and

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constitutional powers and obligations to collect taxes effectively and efficiently. It is section 222(1) of the TAA that deprives SARS of the power to levy an understatement penalty where the understatement "results from a *bona fide* inadvertent error". The crisp point is that the absence of a *bona fide* inadvertent error is the jurisdictional requirement for the levy of an understatement penalty by SARS. This inquiry is fact-specific, and the Supreme Court of Appeal did nothing more than accept Thistle's submissions as to what constitutes a "*bona fide* inadvertent error", in the face of which counsel for SARS elected not to pursue the matter further.

Ad Para 30

- 24 I deny that SARS's right to have a dispute resolved by the application of law was infringed by the Supreme Court of Appeal. That Court clearly weighed the submissions contained in the written heads of argument of both parties before expressing the *prima facie* view that gave rise to the effective concession of the issue on behalf of SARS. It is simply wrong to suggest that the Supreme Court of Appeal did not consider SARS's submissions when it is clear that SARS's written submissions had indeed been considered prior to the suggestion from the Bench (*per* Van Der Merwe JA, I am told) that Thistle's submissions on the question of penalties were correct.

Ad Para 36

- 25 It is not correct to say that "where there is an understatement, the taxpayer must pay an understatement penalty". As already pointed out, in terms of section



222(1) of the TAA, no understatement penalty can be levied where an understatement "results from a *bona fide* inadvertent error".

Ad Paras 38 and 39.4

- 26 I deny that the "tax position" adopted by Thistle was unreasonable. To act in accordance with advice furnished by an eminent senior counsel specialising in tax law, who was moreover a well-known author on the subject, is hardly characteristic of unreasonable behaviour. In ***CSARS v Foskor (Pty) Ltd* [2010] ZASCA 45, 72 SATC 174, at para 50**, Navsa JA regarded the fact that the taxpayer had regulated its affairs on the basis of legal advice as being an important factor in remitting the interest levied by SARS under section 89quat(4) of the Income Tax Act, 58 of 1962, as it then read, on the legislative basis that the taxpayer had "on reasonable grounds" taken the tax position it had adopted.
- 27 The suggestion by SARS that the tax position adopted by Thistle was unreasonable is tantamount to suggesting that the Tax Court judgment of Wright J in this matter was unreasonable, as the learned Judge took much the same view as late Adv Meyerowitz SC, on whose opinion Thistle relied. I submit that this eloquently illustrates the fallacy of SARS's reasoning.

Ad Para 43

- 28 There are several points to be made in relation to the contents of paragraph 43. Firstly, section 223(1) of the TAA does not apply at all if an understatement "resulted from a *bona fide* inadvertent error". Secondly, if the facts of the matter do not justify the imposition of a 50 per cent understatement penalty (as posited



in paragraph 43), it does not follow that the automatic alternative is the next step down, i.e. 25 per cent. The behaviour justifying a 25 per cent understatement penalty is described as "reasonable care not taken in completing return". There is absolutely no evidence to support such an allegation as far as Thistle is concerned. On the contrary, the manner in which Thistle's return was completed was absolutely correct, given the tax position adopted by it. And thirdly, on the basis that a 25 per cent understatement penalty cannot be levied, the only alternative behaviour described in the understatement penalty percentage table in section 223(1) is "substantial understatement", for which an understatement penalty of 10 per cent is prescribed.


Ad Para 45.1

29 I deny that the effect of the order of the Supreme Court of Appeal on the understatement penalty issue is to prevent SARS from exercising its statutory and constitutional powers. The question is simply whether, if Thistle erred on the main issue, the resulting understatement "resulted from a *bona fide* inadvertent error" as contemplated in section 222(1) of the TAA. Where an understatement results from a *bona fide* inadvertent error, then no understatement penalty can be levied in terms of section 222(1) of the TAA. And where an understatement does not result from a *bona fide* inadvertent error, then SARS is not only entitled to, but obliged to impose the relevant understatement penalty in terms of the understatement penalty percentage table in section 223(1) of the TAA. What is stated in paragraph 45.1 is thus simply not correct.



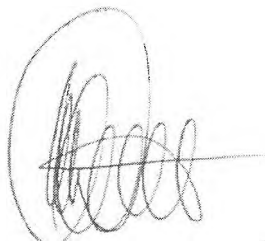
Conclusion

30 I accordingly submit that it is appropriate for this Court to refuse leave to cross appeal, there being no prospects of success on the part of SARS.



Christopher John Brammer

Thus signed and sworn to at *Sandton* on this 17 day of January 2023, the deponent having declared to know and understand the contents of this affidavit, has no objection to taking the oath, and regards the oath as binding on his conscience.



Commissioner of Oaths

ROSEMARIE LOUISE RAVENSCROFT
COMMISSIONER OF OATHS
BY APPOINTMENT
GROUND FLOOR
4 SANDTON VALLEY CRESCENT, SANDTON
JOHANNESBURG
REFERENCE No: 9/1/2 RANDBURG 04.11.2005