

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

NOTICE OF MOTION

TAKE NOTICE THAT the above-named applicant hereby applies for conditional leave to cross appeal to this Court in accordance with Rule 19(5) of the Constitutional Court Rules and seeks the following relief:

1. Leave to cross-appeal against paragraphs 28, 29 and 31.2(a) of the Judgment of the Supreme Court of Appeal, handed on 7 November 2022 is granted.
2. The assessment raised by the applicant including the imposition of understatement penalty is confirmed;

3. Costs in the conditional application for leave to cross appeal are to be costs in the cross appeal.
4. Ordering that the costs of the cross appeal be paid by the respondent.
5. Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the applicant seeks leave to appeal against the setting aside of the imposition of understatement penalty *only in the event* that the respondent is granted leave to appeal. If this Court refuses the respondent's application for leave to appeal, then the applicant will not persist in this application for leave to cross-appeal.

TAKE FURTHER NOTICE that the accompanying affidavit of **TSHOLOFELO CORDELIA SENATLA** will be used in support of this application.

TAKE NOTICE further that if you intend opposing this application, you must file your answer within 10 days of receipt hereof, in terms of Rule 19(4) of the Rules of this Court.

TAKE NOTICE FURTHER that the applicant has appointed the address of **Madiba Motsai Masitenyane & Githiri Attorneys** as the address at which it will accept service of all documents in these proceedings.

DATED AND SIGNED AT RIVONIA ON THIS THIS 8TH DAY OF DECEMBER 2022.



MADIBA MOTSAI MASITENYANE & GITHIRI ATTORNEYS

Applicant's Attorneys
381 Rivonia Boulevard

1st Floor Block B Unit 15
Rivonia Gate Office Park
2128

TO:

**THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
BRAAMFONTEIN**

AND TO:

WERKSMANS ATTORNEYS

Respondents' Attorneys

96 Rivonia Road

Sandton

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CCT CASE NO: 337/2022

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**THE COMMISSIONER FOR THE SOUTH AFRICAN
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**AFFIDAVIT IN SUPPORT OF CONDITIONAL APPLICATION FOR LEAVE TO
CROSS APPEAL**

I, the undersigned,

TSHOLOFELO CORDELIA SENATLA

do hereby make oath and state that:

1 I am employed by the applicant ("SARS") as a Senior Manager: Tax Court, in the



Revenue Litigation Division at its Head Office.

- 2 I am a Senior SARS Official, as contemplated in section 6(3), read with section 12(2) of the Tax Administration Act 28 of 2011 ("TAA"). I exercise the powers conferred upon me and perform my duties under the direction and supervision of the applicant. I am thus authorised to depose to this affidavit.
- 3 The contents of this affidavit are true and correct and, save where the context indicates to the contrary, are within my personal knowledge. Where I make statements that relate to legal matters, I do so on the advice of SARS' legal representatives.

INTRODUCTION

- 4 The respondent has lodged an application for leave to appeal against the order and judgment of the Supreme Court of Appeal that was issued on 7 November 2022 ("SCA Judgment").
- 5 SARS opposes the application for leave to appeal and has filed an answering affidavit to that effect. In addition, SARS seeks conditional leave to cross appeal against that part of the judgment and order of SCA, which set aside the understatement penalty that was raised by SARS against the respondent (SCA Judgment, paragraphs 29 and 31(a)).
- 6 A copy of the SCA's judgment has already been attached to the respondent's application for leave to appeal as annexure FA1. I thus do not attach it again here.
- 7 SARS only seeks leave to cross appeal conditionally. In other words, it only

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pursues this application for leave to cross appeal in the event that the Court grants the respondent leave to appeal.

FINDINGS APPEALED AGAINST

8 The SCA set aside the imposition of the understatement penalty by SARS on the basis that:

8.1 during the argument before the SCA, counsel for SARS conceded “correctly so” that the understatement by the respondent was a *bona fide* and inadvertent error as it had believed that section 25B was applicable to its case.

8.2 though the respondent erred, it did so in good faith and acted unintentionally.

8.3 in the circumstances, *“it was conceded that SARS was not entitled to levy the understatement penalty”*.¹

9 In essence, the understatement penalty was set aside on the basis of a purported concession by SARS that it was not entitled to levy an understatement penalty.

10 I submit that the SCA erred in arriving at this conclusion. The SCA appears to have elevated SARS’ counsel’s acknowledgment of the respondent’s interpretation whilst maintaining SARS position as a concession. There was accordingly no concession that the applicant’s understatement was a *bona*

¹ SCA Judgment, annexure FA1, para 29



fide inadvertent error and that SARS was not entitled to levy the understatement penalty.

- 11 To the contrary, SARS persisted with its case as pleaded in the Rule 31 Statement that it was entitled to impose an understatement penalty as contemplated in section 222 of the TAA, as there was no inadvertent error that caused the respondent's failure to declare the capital gains.²
- 12 SARS imposed an understatement penalty at the rate of 50% on the basis that the respondent had "*no reasonable grounds for the tax position taken*".
- 13 It was furthermore submitted, before the SCA, that the fact that the respondent relied on an opinion that was furnished by Advocate Meyerowitz SC to a different entity altogether several years earlier, indicates that it consciously and deliberately adopted a tax position when electing to distribute the amounts of the capital gains that had vested in it to its beneficiaries.
- 14 In doing so, the respondent's conduct did not constitute an inadvertent error or an innocent misstatement.³
- 15 I therefore respectfully submit that the SCA erred in setting aside the understatement that was raised by SARS. As I indicate in more detail below:

15.1 This application raises a constitutional matter;

15.2 There are good prospects of success in the cross appeal; and

² Rule 31 Statement, para 3.5.2

³ ITC 1890 79 SATC 62 as to the meaning of *bona fide* inadvertent error.



- 15.3 The interests of justice support leave to cross appeal being granted.
- 16 SARS' conditional application for leave to cross appeal has been launched together with the filing of its answering affidavit in the respondent's application for leave.
- 17 The answering affidavit sets out the context of this matter and the relevant facts. I therefore request that those facts be read as if specifically incorporated herein. I shall set out below only those additional features of the factual matrix that are pertinent to the imposition of understatement penalty.

CONSTITUTIONAL MATTER

- 18 SARS, as defined in section 1 of the TAA, is the Republic's tax-collection authority. It is responsible for administering the South African tax system and customs service.
- 19 Section 213 of the Constitution provides for the creation of a National Revenue Fund for the collection of all money paid to the national government. The provisions of the Constitution read with the fiscal statutes impose a duty and an obligation on the state to impose tax, and on SARS to exercise its powers in collecting taxes effectively and efficiently.
- 20 SARS' object is to collect revenue and administer the tax laws of South Africa. To this end, the South African Revenue Service Act 34 of 1997 ("the SARS Act") SARS Act was promulgated to make provision for the efficient and effective administration of the revenue-collecting system of the Republic.



- 21 SARS' objectives are the efficient and effective collection of revenue and the control over the import, export, manufacture, movement, storage and use of certain goods. In order to achieve these objectives, SARS secures the efficient and effective enforcement of national legislation authorising the collection of revenue in general and incidental matters.⁴
- 22 Tax legislation, such as the TAA, therefore seeks to enable SARS to achieve its objectives.
- 23 These constitutional obligations have recently been restated in the judgment of ***Lifman And Others v Commissioner For South African Revenue Service***,⁵ where it was held that:

"It is common cause that [SARS] is tasked by legislation to provide for the effective and efficient collection of tax; to make provision in respect of tax assessment; to make provision for the payment of tax; to provide for the recovery of tax; and to recover interest on outstanding tax debts amongst the others"

- 24 It accordingly follows that a finding which deprives SARS from raising an understatement penalty effectively prevents it from exercising its statutory and constitutional powers and obligations of collecting taxes effectively and efficiently.
- 25 The delay in paying tax when due causes prejudice to SARS and the fiscus.

⁴ Preamble to the TAA

⁵ Lifman And Others v Commissioner for South African Revenue Service and Others
77 SATC 383 para 23

g.c.
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Where taxes are due in a particular year and are not recovered in that year, the delay logically affects SARS' ability to collect the revenue as mandated by Treasury, which ultimately affects government's ability to fulfil its constitutional obligations to its citizens (LDC Taxpayer v Commissioner for the South African Revenue Service (IT 24888) [2021] ZATC 6 (18 June 2021) para 42).

- 26 An omission from the income tax returns results in prejudice to SARS and the fiscus and thus qualifies as an understatement for purposes of section 221 of the TAA. (LDC Taxpayer v Commissioner for the South African Revenue Service para 42))
- 27 On all of these bases, I submit that the issues raised above are manifestly constitutional issues or matters connected with constitutional issues. They all directly affect and undermine SARS and the government's constitutional right to raise taxes and impose penalties, as contemplated in section 213 of the Constitution, read with section 1 of the TAA and section 222 of the TAA.
- 28 The SCA' findings in relation to understatement penalty also raises a constitutional issue as SARS case on the understatement penalty was dismissed solely on the erroneous belief that it had conceded that it was not entitled to levy an understatement penalty.
- 29 In terms of section 34 of the Constitution, *"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"*.



30 SARS' right to have its dispute resolved by the application of law was accordingly infringed upon when its case on understatement penalties was dismissed without considering its submissions and based on an erroneous belief that it had conceded that part of the case.

31 On this basis also, I submit that this matter raises a constitutional issue.

PROSPECTS OF SUCCESS

32 Section 221 of the TAA defines 'understatement' as any prejudice to SARS or the *fiscus* as a result of—

(a) a default in rendering a return;

(b) an omission from a return;

(c) an incorrect statement in a return; or

(d) if no return is required, the failure to pay the correct amount of 'tax'.

33 'Substantial understatement' is in turn defined as a case where the prejudice to SARS or the *fiscus* exceeds the greater of five per cent of the amount of 'tax' properly chargeable or refundable under a tax Act for the relevant tax period, or R1 000 000.

34 'Tax position' means an assumption underlying one or more aspects of a tax return, including whether or not—

(a) an amount, transaction, event or item is taxable;

(b) an amount or item is deductible or may be set-off;

(c) a lower rate of tax than the maximum applicable to that class of taxpayer, transaction, event or item applies; or



(d) *an amount qualifies as a reduction of tax payable.*

35 Section 222(1) of the TAA provides as follows:

“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.”

36 Section 222 accordingly creates an obligation upon a tax payer, to pay an understatement penalty, in the event that his audit revealed an understatement as defined. Simply put, where there is an understatement, the tax payer must pay an understatement penalty.

37 Section 223 of the TAA in turn draws a distinction between different kinds of behaviour and the penalty percentages that flow from such behaviour. The understatement penalty that may be imposed by SARS depends on whether the understatement results from the taxpayer failing to take reasonable care to one where the taxpayer was grossly negligent.

38 On the facts of this matter there was an understatement. The respondent furthermore adopted an unreasonable tax position.

39 An understatement penalty was then levied at the rate of 50%. I submit that the imposition of an understatement penalty at the rate of 50% was correct having regard to the following:

39.1 the respondent was given an opinion that had been furnished by Advocate

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Meyerowitz SC to the Avin Lieberman Trust in 2009;

39.2 although Advocate Meyerowitz SC's opinion did not constitute an opinion as contemplated in section 223 of the TAA,⁶ the respondent relied on the advice furnished by Advocate Meyerowitz SC (which itself was not unequivocal) and consciously and deliberately adopted a tax position when electing to distribute the amounts of the capital gains that had vested in it to its beneficiaries;

39.3 in doing so, the respondent's conduct did not constitute an inadvertent error or an innocent misstatement.⁷

39.4 the fact that the respondent had received advice does not necessarily mean that its conduct was reasonable.

40 Furthermore, section 66 of the ITA provides that:

(6) *Any return furnished as contemplated in this section shall be signed by the tax payer or by his agent duly authorised in that behalf and any person signing any such return shall be deemed for all purposes in connection with this Act to be cognizant of all statements made in that return;*

(7) *Any return made or purporting to be made or signed by or on behalf of any person for the purposes of this Act shall be deemed to be duly made and signed by the affected person unless such person proves that such return was not made or signed by him or*

⁶ An opinion contemplated in section 223 is an opinion from an independent tax practitioner issued prior the date that the relevant return was due; and was based upon full disclosure of the specific facts and circumstances of the arrangement.

⁷ ITC 1890 79 SATC 62 as to the meaning of *bona fide* inadvertent error.

on his behalf.

- 41 Simply put, I submit that each tax payer is responsible for its own return, whether such return was based on advice or not.
- 42 A tax payer cannot simply accept advice without satisfying himself with the reasonableness of such advice. To do so, I submit, is to adopt an unreasonable tax position.
- 43 Even if it were to be held that the facts of this matter do not justify the imposition of a 50% understatement penalty, that would still not mean that the respondent escapes liability *in toto*. It simply means that it nonetheless remains liable for a reduced 25% penalty. This is so because once it is determined that the established behavior does not warrant the imposition of 50% penalty, the next step is then to determine the next applicable percentage penalty in terms of section 223 of the TAA, with the lowest applicable penalty being 10% for substantial understatement. (LDC Taxpayer v Commissioner for the South African Revenue Service para 49)).
- 44 On all of these bases, I submit that there are good prospects of success in the cross appeal.

INTERESTS OF JUSTICE

- 45 Moreover, I submit that it is in the interests of justice for leave to cross appeal to be granted.

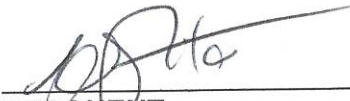
- 45.1 The effect of the order of the SCA prevents SARS from exercising its statutory and Constitutional powers.

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- 45.2 There also appears to be a suggestion by the SCA in paragraphs 28 and 29 that simply because the respondent had obtained a legal opinion, it then means that its understatement was *bona fide* and constituted an inadvertent error.
- 45.3 On this basis, I submit that it is critical that the precise meaning of *bona fide* inadvertent error be set out by this court. It is also pertinent for this honourable court to provide guidance on the extent to which a taxpayer can rely on advice in order to avoid liability for imposition of understatement penalty.
- 45.4 This will provide guidance to the legal profession at large given the uncertainty which currently prevails in relation to these issues.

CONCLUSION

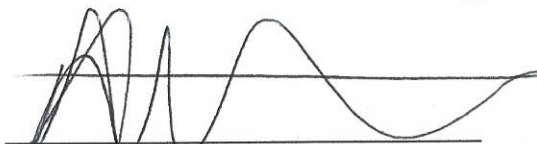
- 46 In the event that the respondent is granted leave to appeal, SARS seeks leave to cross-appeal against the setting aside of the understatement penalty by the Supreme Court of Appeal. SARS therefore asks for an order in terms of the Notice of Application to which this affidavit is attached.



DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at Midstream Estate on this the 8th day of December 2022, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

A



COMMISSIONER OF OATHS

Full names:

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Capacity:

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