

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 72539/2016

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[Signature] 10/11/2017
SIGNATURE DATE

In the matter between:

HARRY TREMORIO CHAKALA

1ST APPLICANT

SIYABONGA ABIUD NQUBUKA

2ND APPLICANT

H R COMPUTEK (PTY) LTD

3RD APPLICANT

and

COMMISSIONER FOR THE SOUTH AFRICAN

1ST RESPONDENT

REVENUE SERVICES

THE NATIONAL PROSECUTING AUTHORITY

2ND RESPONDENT

JUDGMENT

KUBUSHI J

[1] The applicant has approached this court in terms of s 69 of the Tax Administration Act 28 of 2011 as amended ("the Act"), seeking an order to compel the Commissioner for the South African Revenue Services (herein referred to as SARS) to discover certain documents which were used and/or referred to by an official of SARS Mr Velenkosini Mkhabela ("Mr Mkhabela") during evidence in aggravation of sentence in a criminal case (case number 41/1224/11) in which the applicants have been convicted of various tax violations. Section 69 of the Act enjoins officials of SARS to preserve the secrecy of taxpayer information and not to disclose taxpayer information to any person who is not a SARS official. Subsection (2) of s 69 of the Act provides for instances where taxpayer information may be disclosed and includes, among others, disclosure when ordered to do so by a High Court.

[2] In their notice of motion the applicants have referred to a plethora of documents which they seek SARS to disclose and/or discover for purposes of the criminal trial. Apparently Mr Mkhabela refused to disclose the documents to the applicants when asked to do so. I was informed during argument that the trial magistrate could not compel Mr Mkhabela to disclose the documents because of the secrecy of the information contained in the documents. This, however, is in dispute as the 2nd respondent's assertion is that the magistrate refused to grant an order for the disclosure of the documents.

[3] The contention by the applicants' counsel in argument before me is that besides assisting in cross examining Mr Mkhabela, the documents will assist in the review of the conviction before sentencing.

[4] The crux of the applicants' case is set out in their founding papers as follows:

"13. The State called a senior SARS official, Mr Velenkosini Mkhabela, a manager in the SARS Debt Collections department to give evidence regarding aggravation of sentence. Mr Mkhabela referred to six Arch lever files containing documents and computer system record pertaining to the tax affairs of HR Computek (Pty) Ltd and also read from certain documents that he had with him while giving evidence in Court.

14. Mr Mkhabela refused to discover the contents of the documents and files he referred to on 12 October 2017 and stated that the information contained in those documents are secret.
15. The purpose of this application is to compel the respondent to disclose the contents of these documents and files to the taxpayer."
- "46 During mitigation it transpired that:

- (vi) the evidence presented by the State in aggravation of sentence introduced new material evidence that was not previously disclosed by SARS nor by the State. The accused's defence benefited by this new evidence. The evidence was also material to the merits as it affected the conviction and charges."

[5] In opposing the application the respondents have raised points *in limine* and some defences that the applicants are not entitled to the documents. From their papers and their counsel's argument before me I did not understand the respondents to have raised the issue of secrecy of the information contained in the required documents. What is pertinent in their case is that the applicants are not entitled to the documents on the basis that they should have sought their discovery during the trial, before conviction and that the documents are irrelevant for purposes of sentencing proceedings.

[6] The first point I deal with is that the applicants have not approached the proper forum for their relief. I find however that s 69 (2) (c) of the Act entitles the applicants to approach this court for the relief they seek in the notice of motion. This court's inherent powers also entitles it to intervene in matters where there appears to be a travesty of justice. I shall expound more on this issue later on in this judgement.

[7] The application is before me on urgency and the respondents have raised urgency as one of the points in *limine*.

[8] The reason raised by the applicants for this matter to be heard on an urgent basis is because the criminal case is to be heard on the 13 November 2017, that is, Monday of the coming week. The applicants also allege that they only became aware of the documents they require during the criminal proceedings on 9, 11 and

12 October 2017 when Mr Mkhabela referred to the documents during his evidence in aggravation of sentence. I hold, therefore, that to the extent that the applicants require documents for the purposes related to the criminal sentencing proceedings, then there is urgency.

[9] In regard to the documents sought for purposes not related to the criminal sentencing proceedings, that is, all the other documents which were not used and/or referred to by Mr Mkhabela on the aforesaid dates, there is no urgency.

[10] I find as a result that the applicants are entitled only to the documents which Mr Mkhabela referred to when giving evidence in aggravation of sentence on 9, 11 and 12 October 2017, to enable them to cross examine Mr Mkhabela when the matter resumes on 13 November 2017. It would be a gross injustice perpetrated against the applicant should they not be allowed to have the documents which were adversely used and/or referred to by a witness in evidence against them. The papers before me do not exactly set out the specific documents that Mr Mkhabela referred to in his evidence on the aforesaid dates, however, these can be easily determined by perusing the record of the criminal court proceedings of 9, 11 and 12 October 2017.

[11] The other documents as far as I am concerned pertain to the merits of the criminal case which resulted in the applicants' conviction and are not urgent for purposes of the sentencing proceedings.

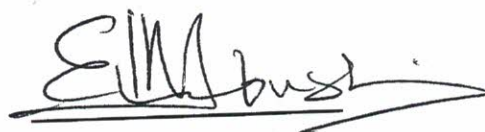
[12] As far as costs are concerned, based on the concession by the applicants' counsel when so asked by this court, that the applicants did not request disclosure of the documents from SARS before approaching the court and the fact that the applicants did not succeed wholly in the relief they sought, I hold that each party must pay own cost.

[13] I make the following order;

1. The application is urgent only in respect of the documents used and/or referred to by Mr Mkhabela in his evidence tendered in the criminal proceedings (case number 41/1224/11) on 9, 11 and 12 October 2017.
2. The 1st respondent is ordered to disclose to the applicants the documents used and/or referred to by Mr Mkhabela in his evidence tendered in the

criminal proceedings (case number 41/1224/11) on 9, 11 and 12 October 2017.

3. The application in respect of all the other document that are not part of the documents used and/or referred to by Mr Mkhabela in his evidence tendered in the criminal proceedings (case number 41/1224/11) on 9, 11 and 12 October 2017, is struck from the roll.
4. Each party to pay own costs.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE

DATE OF JUDGMENT

APPLICANT'S COUNSEL

APPLICANT'S ATTORNEYS

1ST RESPONDENTS' COUNSEL

2ND RESPONDENTS' COUNSEL

RESPONDENTS' ATTORNEYS

: 08 NOVEMBER 2017

: 10 NOVEMBER 2017

: ADV. A VAN DER WALT

: J.H VAN DER MERWE INC.

: ADV. LETHULI

: ADV. A .J. BARNARD

: GILDENHUYS MALATJI INC.