Reportable

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 3691/2018

In the matter between:

MOHAMMED SHAAZ MOOSA N.O.	**First Applicant**
MOHAMMED SHUABE MOOSA N.O.	**Second Applicant**
JOSE ALBERTO DELGADO N.O.	**Third Applicant**
YASEERA ABDUL KADER ESSACK N.O.	**Fourth Applicant**
YUSUF ABDUL KADER ESSACK N.O.	**Fifth Applicant**
ZAIBOON NIZA ISMAIL ESSACK N.O.	**Sixth Applicant**
ABDUL KADER MOHAMMED ESSACK N.O.	**Seventh Applicant**

and

THE HIGH STREET AUCTION COMPANY (PTY) LTD	**Respondent**

JUDGMENT

Delivered: 06 November 2018

Mbatha J

[1] The applicants sought an order before this court that the respondent be ordered to issue Value Added Tax invoices to the Mubaraak Family Trust IT1513/2007 and AKM Essack Family Trust IT754/2003 (the Trusts) for auctioneers commission in the amounts of R860 000 and R180 000 respectively.

[2] The respondent's stance was that it would abide by the decision of the court as it has concerns in that the relief sought by the applicants' prima facie amount to a contravention of the Value-Added Tax Act[1] (the VAT Act); that an order seeking to compel the vendor to take steps pursuant to the VAT Act requires the joinder of the Commissioner for the South African Revenue Services (CSARS) and that the application was riddled with technical irregularities.

[3] On 25 February 2015 two immovable properties were sold to one Mohammed Shuabe Moosa (Moosa), the deponent to the applicants' affidavit, who signed the offer to purchase as MS Moosa, for and on behalf of a nominee. The respondent acted as auctioneers in the sale of the properties. As auctioneers, the respondent issued a VAT invoice to Moosa, for and on behalf of a nominee. In 2016 the respondent was approached on behalf of the purchaser for a fresh invoice, to be issued in favour of the Trusts. It is common cause that the sales of the two immovable properties were cancelled and they are a subject of arbitration. This did not preclude the respondent from issuing a VAT invoice in respect of the non-refundable commission to Moosa, for and on behalf of a nominee.

[4] The applicants' case is that they nominated the Trusts as purchasers of the two immovable properties before 2 March 2015 in line with the law, ie on 28 February 2015 and February 2015 respectively. In the light thereof the applicants contend that the respondent should issue a credit note in terms of s 21 of the VAT Act, in respect of the Trusts and not Moosa, alternatively, the respondent should pay the amounts due to the applicants as per VAT invoices.

[5] The respondent's asserts that it has no difficulty with the VAT invoice, save that it can alter the tax invoice only at the direction of the court or the CSARS. The respondent submitted that it was precluded in terms of s 20(1)(i) read with s 58(k) of the VAT Act to just comply with the demand from the applicants as the provisions make it an offence to issue more than one tax invoice. Neither is there a provision which empowers it to issue a second tax invoice, under these circumstances or compelling it to do so. The respondent's submission was that it is only the CSARS

[1] 89 of 1991.

who could give such a direction to it, to issue the second tax invoice. In that regard, the applicants ought to have exhausted the internal remedies contained in ss 20 and 72 of the VAT Act, before approaching the court. The respondent pointed out that s 21 of the VAT Act provides for a system of credits and debits to be passed against previously rendered VAT returns in order to rectify mistakes.

[6] In the result the respondent submitted that the CSARS ought to have been joined as a party in the proceedings. The non-joinder of the CSARS is therefore fatal to the proceedings before court, as the entire issue before the court relates to the interpretation of the VAT Act, as the respondent is required to 'correct' something which is specifically unlawful in terms of the Act. Furthermore, the judiciary would be trampling in the terrain of the CSARS.

[7] The respondent also pointed out that the applicants' case is not as clear as they make it as there is an irregularity in the letter of authority which refers to the nominee as IPROTECT TRUSTEES (PTY) LTD instead of reflecting the name of the Mubaraak Family Trust as nominee. The respondent pointed out that even the resolutions that the applicants rely upon are not clear as to whether they authorise future conduct or ratify the previous conduct.

[8] The first issue that needs to be determined is whether the CSARS ought to have been joined as a party to the proceedings and if the court has the powers to grant an order directing the CSARS, 'in his absence' to accept the directions of the court.

[9] The purpose of the application is for the applicant to get new value added tax invoices made out in the name of the two Trusts. The VAT invoice was issued by the respondent on 31 March 2015 for its non-refundable commission to Moosa or on behalf of the nominee. The applicants' view is that the respondent failed to provide correct invoices, which is denied by the respondent, and therefore the respondent should ratify it. However the respondent has no objection to the re-issue thereof, though it denies that it was the cause of any fault save that the direction has to come from the CSARS as the respondent timeously complied with its mandate.

[10] The applicants contended in the founding affidavit at para 30 'that without the invoices the Trusts were not in a position to claim a VAT refund. The Trusts attempted to claim VAT refunds from the South African Revenue Services (SARS). The claims were rejected on the invoice as it stands. Without the correct VAT invoices there is no compliance with s 20(4)(c) of the Value-Added Tax Act, 89 of 1991.' Section 20(4)(c) provides as follows:

'Except as the Commissioner may otherwise allow, and subject to this section, a tax invoice (full tax invoice) shall be in the currency of the Republic of South Africa and shall contain the following particulars:

(a) …

(b) …

(c) the name, address and, where the recipient is a registered vendor, the VAT registration number of the recipient;…'

The words 'shall contain the following particulars' are peremptory in nature. I accept the submission made by counsel for the respondent that one should give a purposive interpretation to the wording of the subsec (4)(c), being to avoid fraud and other illicit dealings, if people were to issue or delete invoices on their own.

[11] The provisions of s 20(4)(c) should not be read disjunctively from the provisions of s 20(1) which provides that:

'Except as otherwise provided in this section, a supplier, being a registered vendor, making a taxable supply (other than a supply contemplated in section 8 (10)) to a recipient, must within 21 days of the date of that supply issue a tax invoice containing such particulars as are specified in this section: Provided that-

(i) it shall not be lawful to issue more than one tax invoice for each taxable supply;

(ii) if a vendor claims to have lost the original tax invoice, the supplier or the recipient, as the case may be, may provide a copy clearly marked "copy".'

[12] The provisions of s 20 should be read with s 58(k) of the VAT Act, which makes it an offence for any person who 'wilfully and without just cause (the burden of proof of which shall be upon him) fails to comply with the provisions of paragraph (i) of the proviso to section 20 (1) or paragraph (A) of the proviso to section 21 (3);…'

[13] The VAT Act in s 72 provides for a solution to problems as follows:

'**Arrangements and decisions to overcome difficulties, anomalies or incongruities.-**
If in any case the Commissioner is satisfied that in consequence of the manner in which any vendor or class of vendors conducts his, her or their business, trade or occupation, difficulties, anomalies or incongruities have arisen or may arise in regard to the application of any of the provisions of this Act, the Commissioner may make an arrangement or decision as to -

(a) the manner in which such provisions shall be applied; or

(b) … .'

The applicants merely state that the tax invoice was rejected, by SARS but have not given any kind of evidence to support that assertion. The VAT Act is clear in s 20(1) where it states that the re-issue of a tax invoice is impermissible. At the same time it provides a remedy in s 72(a) for any 'difficulties, anomalies or incongruities' that may have arisen in respect of any provision of the VAT Act to be directed to the Commissioner.

[14] The word 'anomaly' in the *Oxford Dictionary*,[2] refers to 'something that deviates from what is standard, normal or expected' and 'incongruity'[3] a noun, refers to a 'discrepancy, inappropriateness and mismatch.' I am pointing out these definitions as they state that the Commissioner by virtue of the provisions of s 72 has the power to resolve any kind of problem relating to VAT issues. Nowhere do the applicants state that they have exhausted all the remedies availed to them in the VAT Act or have complied with s 72(a) of the VAT Act.

[15] It is my opinion that the applicants' ought to have joined the Commissioner, as the order which they seek falls within the terms of s 72. The non-joinder of the CSARS in these proceedings is fatal to the proceedings. The test for joinder being 'whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined'.[4]

[16] The prejudice lies in that the applicants asserts that if the VAT tax invoices are changed the Trusts will be entitled to claim a higher refund than the figure

---

[2] *Oxford South African Concise Dictionary* 2 ed (2010).
[3] Webster New World Rodgets A-Z Thesaurus by Carton Laird and the editors of Webster's New World Dictionaries, 1991.
[4] *Absa Bank Ltd v Naude NO & others* 2016 (6) SA 540 (SCA) para 10; *Golden Dividend 339 (Pty) Ltd & another v Absa Bank Ltd* (569/2015) ZASCA 78 (30 May 2016).

reflected in the original tax invoice. All those issues fall within the purview of the Commissioner, including what should happen to the original tax invoice, the late request for the second tax invoice and for him to consider the merits of the applicants' application.

[17] I reject the applicants' contention that the qualified concession to the order sought made by the respondent should translate to the granting of an order in their favour. The respondent merely stated that it was bound by the law, and if CSARS or the court authorises it, then it will comply. The respondent did not want to breach the law.

[18] In the result I find that the failure by the applicants to exhaust the internal remedies provided in the VAT Act and the non-joinder of SARS to be fatal to their application.

[19] Accordingly, the application is dismissed with costs.

_____

Mbatha J

Date of hearing	:	09 October 2018 (H Court)
Date delivered	:	06 November 2018

Appearances:

For the Appellant	:	Mr AG Flemming
Instructed by	:	Carlos Miranda 273 Prince Alfred Street Pietermaritzburg
For the Respondent	:	Mr C van der Spuy
Instructed by	:	Lanham-Love Attorneys 7 Northwold Drive Cnr Jan Smuts Avenue Saxonwold Johannesburg c/o Tomlinson Mnguni James Inc 165 Pietermaritz Street Pietermaritzburg