THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 1196/2022

In the matter between:

KAPEEL BECHAN **FIRST APPELLANT**

BECHAN CONSULTING (PTY) LTD **SECOND APPELLANT**

and

SARS CUSTOMS INVESTIGATIONS UNIT **FIRST RESPONDENT**

SARS TACTICAL INVESTIGATIONS UNIT **SECOND RESPONDENT**

TANYA POTGIETER – SARS ILLICIT ECONOMY UNIT **THIRD RESPONDENT**

LINDIWE SHIBINDI – SARS ILLICIT ECONOMY UNIT **FOURTH RESPONDENT**

MINISTER OF POLICE **FIFTH RESPONDENT**

HAWKS SPECIAL INVESTIGATION UNIT **SIXTH RESPONDENT**

Neutral citation: *Bechan and Another v SARS Customs Investigations Unit and Others* (1196/2022) [2024] ZASCA 20 (05 March 2024)

Coram: PETSE DP, MBATHA and MATOJANE JJA and KATHREE-SETILOANE and KEIGHTLEY AJJA

Heard: 22 November 2023

Delivered: 05 March 2024

Summary: Search and seizure – Tax Administration Act 28 of 2011 (the TAA) – interpretation – ss 59(1) and 60(1) – execution of a warrant against third parties on premises identified in the warrant – s 61(3)*(a)* of TAA – permits search of anything on the premises identified in the warrant including motor vehicle parked on the premises on suspicion that it contains material relevant to the taxpayer.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Millar J, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Kathree-Setiloane AJA (Petse DP, Mbatha and Matojane JJA and Keightley AJA concurring):

[1] The first appellant is Mr Kapeel Bechan. He is the sole director of the second appellant, Bechan Consulting (Pty) Ltd.[1] The first and second respondents are divisions within the South African Revenue Service (SARS), whilst the third and fourth respondents are SARS officials attached to the SARS' Illicit Economy Unit, also a division of SARS.[2] The appellants applied to the Gauteng Division of the High Court, Pretoria (high court) for relief, by way of the *mandament van spolie* (spoliation), compelling SARS to return certain items seized, purportedly unlawfully, from Mr Bechan's motor vehicle during the execution of a warrant in respect of Bullion Star (Pty) Ltd (Bullion Star). The high court dismissed the application.

[2] On 28 March 2022, SARS applied to the high court without notice to the appellants for a warrant in terms of s 59 of the Tax Administration Act 28 of 2011

[1] The first and second appellants are referred to collectively as 'the appellants' in the judgment.

[2] The appellants cited SARS Customs Investigations Unit, SARS Tactical Investigations Unit, Tanya Potgieter (SARS Illicit Economy Unit) and Lindiwe Shibindi (SARS Tactical Investigations Unit) as the first to fourth respondents, respectively. The warrant was, however, executed at the behest of the Commissioner for SARS (the Commissioner). Thus, the Commissioner ought to have been cited in the application. However, the first to fourth respondents did not take issue with the incorrect citation of the Commissioner and regarded him as properly cited. The first to the fourth respondents are referred to collectively as 'SARS' in the judgment.

(the TAA).[3] The high court issued the warrant, in terms of s 60 of the TAA,[4] on the basis that there was reason to believe that Bullion Star had, amongst others, committed various tax offences. The warrant authorised SARS officials to search the premises identified as 62 Wessels Road, Rivonia, Johannesburg (the premises). It furthermore authorised them, 'in carrying out the search and seizure of the premises, to open or cause to be opened or remove and open, anything which the officials suspect to be relevant material[5] of Bullion Star'.

Execution of the warrant

[3] There is a factual dispute on the papers in relation to the execution of the warrant. Since these are motion proceedings in which the appellants sought final relief in the high court, the *Plascon-Evan's* rule applied.[6] This was confirmed by the Constitutional Court in *Thint (Pty) Ltd v National Director of Public Prosecutions (Thint),*[7] in the context of a factual dispute concerning the execution of a search and seizure warrant in terms of s 29 of the National Prosecuting Authority Act 32 of 1998. The Constitutional Court held as follows in that case:

'The latter disagreements are different because they are factual disputes concerning what happens during the execution of a warrant. Where a party challenges the lawfulness of a

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[3] Section 59 of the TAA provides:
'(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.'

[4] Section 60 of the TAA provides:
'(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) A warrant issued under subsection 1 must contain the following –
(a) the alleged failure to comply or offence that is the basis for the application;
(b) the person alleged to have failed to comply or to have committed the offence;
(c) the premises to be searched; and
(d) the fact that relevant material as defined in section 1 is likely to be found on the premises.
(3) The warrant must be exercised within 45 business days or such further period as a judge or magistrate deems appropriate on good cause shown.'

[5] 'Relevant material' as defined in s 1 of the TAA 'means any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed'.

[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[7] *Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) para 10.

warrant's execution on notice of motion and disputes of fact arise, that party remains the applicant, and the prosecution must accordingly be treated as the respondent under the *Plascon-Evans* rule. As far as this category of factual disputes is concerned, it is the state's version that must be accepted. That is the approach I take to the various factual disagreements arising in these two applications which relate to the execution of the warrants.'

The matter must, therefore, be adjudicated on SARS' version. The appellants conceded this during argument in the appeal.

[4] SARS' version of the events is that on 29 March 2022 its officials arrived at the premises at approximately 11h25 but were granted access only at approximately 11h50. Whilst SARS officials were at the gate awaiting access to the premises, they saw people removing items from the building and placing them in vehicles. They were, however, unable to identify the nature of these items.

[5] Upon entering the premises, SARS officials noticed a Toyota Fortuner motor vehicle with registration number HV07BBGP (the Fortuner) parked on the premises. They saw numerous files and notebooks as well as electronic equipment inside the Fortuner. Upon being informed that Mr Bechan owned the Fortuner, SARS officials requested him to unlock it to enable them to search for material relevant to Bullion Star. When Mr Bechan indicated that he could not find its keys, SARS officials obtained the services of a locksmith to unlock the Fortuner (and other vehicles on the premises). On opening it, they invited Mr Bechan to participate in and be present during, the search.

[6] SARS compiled inventories of the items found in the Fortuner. These included: 10 laptop computers, four cellular phones and various financial documents pertaining to Bullion Star, including purchase files and bank statements. However, in their notice of motion, the appellants claimed the return of only two laptop computers and two cellular phones. Despite the exchange of numerous letters in which SARS tendered the return of the seized items on proof of ownership, the appellants disavowed any knowledge of the other laptops and cellular phones.

In the high court

[7] On 4 April 2022, the appellants applied to the high court for the return of the items listed in paragraph 2 of the notice of motion by way of the spoliation remedy. To succeed in this application, the appellants had to satisfy the high court that they were in peaceful and undisturbed possession or had *quasi* possession of the property, and that SARS deprived them of their possession forcibly or wrongfully.[8] The appellants contended, in this regard, that SARS had unlawfully seized their property of which they were in peaceful and undisturbed possession; that the seized property was not found on the premises but was stored in the Fortuner which was parked in 'a general carpark' outside the premises; and that the scope of the warrant was limited to Bullion Star's property for the specified period of assessment, and did not extend to their property.

[8] SARS opposed the application. Its core defence was that it did not unlawfully dispossess the appellants of the items in question, because it had acted in accordance with the terms of a validly issued warrant under s 60 of the TAA. It pointed out that it had returned some items to the appellants but was unwilling to return the two laptop computers and two cellular phones (referenced above) because, without access to their passwords,[9] it was unable to determine whether they contained material relevant to Bullion Star.[10]

[9] The high court held that SARS was entitled to search for and seize items relevant to Bullion Star as the warrant specifically authorised its officials to search anywhere on the premises. This included vehicles parked on the premises. It furthermore held that to interpret the warrant to limit its terms to Bullion Star, the taxpayer referred to in the warrant, would serve to undermine its efficacy. The high court accordingly dismissed the application as well as the application for leave to appeal against its dismissal. The appellants subsequently applied to this Court for leave to appeal which was granted.

On appeal

[8] *Setlogelo v Setlogelo* 1914 AD 221; *Yeko v Qana* 1973 (4) SA 735 (A).
[9] Section 61(7) of the TAA provides that '[n]o person may obstruct a SARS official or a police officer from executing the warrant or without reasonable excuse refuse to give assistance as may be reasonably required for the execution of the warrant'.
[10] Section 61(3)*(c)* enables a SARS official to 'seize and retain a computer or storage device in which relevant material is stored for as long as is necessary to copy the material required'.

[10] The appellants conceded in their replying affidavit that the Fortuner was parked on the premises. Surprisingly, they contended, to the contrary, in their heads of argument in the appeal that the Fortuner was not parked on the premises. This question was, however, put to rest in the appeal when the appellants accepted, during argument, that the Fortuner was parked on the premises. They, nevertheless, argued that the warrant only applied to the taxpayer (Bullion Star) and not to third parties, such as themselves, who happened to be on the premises at the time of its execution.[11]

[11] Whether a warrant issued in terms of s 60 of the TAA may be executed against third parties depends on the interpretation of the warrant read together with the search and seizure provisions in the TAA.[12] The warrant largely mirrored the search and seizure provisions in Part D of the TAA.

[12] SARS contended that on a reading of the warrant with the provisions of ss 59(1) and 60(1) of the TAA, it was location specific and not taxpayer specific. Hence it could be executed against third parties on the premises. Section 59(1) provides that:

'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.' (Emphasis added.)

[13] Section 60(1)*(b)*, in turn, empowers a judge or magistrate to issue the warrant referred to in s 59(1) of the TAA, if satisfied that there are reasonable grounds to believe that, amongst others, relevant material likely to be found *on the premises specified in the application* may provide evidence of the failure to comply or, the commission of an offence. (My emphasis.) Properly construed, these provisions are location and not taxpayer specific. They contemplate that persons other than the

[11] This contention was raised in the appellants' replying affidavit but not in their heads of argument.
[12] The rules of interpretation articulated in *Natal Joint Municipal Pension v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 apply to the interpretation of the search and seizure provisions of the TAA. In interpreting them, this Court must consider the ordinary grammatical meaning of the words used in the provision, the context in which the provision occurs and the apparent purpose of the provision.

taxpayer may be present on the premises identified in the warrant and in possession of material relevant to the taxpayer.

[14] The phrase 'to search the premises and any persons present on the premises and seize relevant materials' in s 59(1) of the TAA, is a clear indicator that SARS officials may, on the authority of a warrant issued under s 60, search the taxpayer as well as any third parties on the premises, and seize any relevant material in their possession. It is immaterial that the seized items are not in the possession of the taxpayer when seized. If they constitute relevant material as defined, they may be seized from a third party who is on the premises.[13]

[15] Section 61(3) sets out the powers of a SARS official who executes a warrant issued in terms of s 60 of the TAA. It provides:

'The SARS official may–

(a) open or cause to be opened or remove in conducting a search, anything which the official suspects to contain relevant material;

(b) seize any relevant material;

(c) seize and retain a computer or storage device in which relevant material is stored for as long as it is necessary to copy the material required;

(d) . . .

(e) if the premises listed in the warrant is a vessel, aircraft, or vehicle, stop and board the vessel, aircraft, or vehicle, search the vessel, aircraft or vehicle or a person found in the vessel, aircraft or vehicle and question the person with respect to a matter dealt with in a tax Act.'

[16] Section 61(3) of the TAA does not limit the execution of a warrant to the business of the taxpayer. Properly construed, it contemplates that in executing a warrant, SARS officials may search anything on the premises identified in the warrant, if they suspect that it contains relevant material. This is clear from the ordinary grammatical meaning of the word 'anything'[14] which is used in s 61(3)*(a)*. This word is broad enough to include a search of vehicles parked on the premises identified in the warrant.

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[13] See fn 5 above for the definition of 'relevant material'.

[14] According to the Oxford English Dictionary, the word 'anything' is 'used to refer to a thing, no matter what'.

[17] Significantly, s 61(3)*(a)* of the TAA does not afford a SARS official *carte blanche* in searching the property of third parties who may be on the premises identified in the warrant. A SARS official may only do so if they suspect that the property of a third party contains material relevant to the taxpayer. This interpretation gives effect to the manifest purpose of the search and seizure provisions of the TAA, which is to obtain evidence against a taxpayer if there are reasonable grounds to suspect non-compliance with, or tax offences under, a tax Act. As I see it, search and seizure operations on the premises identified in a warrant would be rendered ineffectual if SARS officials were powerless, under the TAA, to search third parties for relevant material. This would be especially so, in a case such as this, where material relevant to the taxpayer was spirited away and placed in a vehicle belonging to a third party, with impunity.

[18] In a final attempt to overcome the insurmountable hurdles in their case, the appellants contended that the execution of the warrant was unlawful, as SARS officials did not have reasonable and probable cause to search the Fortuner. I disagree. On the objective facts, SARS officials had reasonable cause to suspect that the Fortuner contained material relevant to Bullion Star.[15] They saw files, notebooks, and electrical equipment inside the Fortuner before searching it. In addition, whilst waiting to gain access to the premises, they saw items being removed from the building and being placed in vehicles parked on the premises.

[19] The appellants sought to counter this by submitting that SARS officials had to know with certainty, before searching the Fortuner, that it contained material relevant to Bullion Star. That the executing officials could not know this with any degree of certitude did not mean that they had no probable cause to search the Fortuner. In terms of s 61(3)*(a)* of the TAA, nothing more than a suspicion that the Fortuner contained material relevant to the taxpayer was required. Thus, in terms of s 61(3)*(a)* of the TAA, SARS was entitled to search and seize material from the Fortuner on the suspicion that it contained material relevant to Bullion Star.

[20] Raising the threshold for the execution of search and seizure warrants, as the appellants would have it, would impact negatively on their efficacy in bringing tax

[15] See paragraphs 4 and 5 of the judgment.

offenders to book. As investigation tools, search and seizure warrants play a vital role in achieving the core objective of the TAA, which is to ensure the effective and efficient collection of tax.[16]

[21] In the context of the facts of this case, SARS had a statutory right to dispossess the appellants of the property found in the Fortuner. They were, therefore, not entitled to the relief sought in the spoliation application. For these reasons, the appeal must fail.

[22] For the sake of completeness, it is necessary to record that as preparations for delivery of this judgment were being made the appellants' attorneys advised the Court that on 2 February 2024 the high court set aside the search and seizure warrant.[17] This was consequent on a separate application instituted by Bullion Star. The Court was further advised by SARS' attorneys that it was considering an appeal against that order. It is a well-established general principle that this Court decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances that came into existence afterwards.[18] It follows that the subsequent setting aside of the warrant by the high court is irrelevant to this appeal.

[23] In the result, the following order is made:

The appeal is dismissed with costs, including those of two counsel.

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F KATHREE-SETILOANE

ACTING JUDGE OF APPEAL

[16] Section 2 of the TAA.
[17] *Bullion Star (Pty) Limited v The Commissioner for the South African Revenue Service* Case no. 18176/2022, unreported judgment of the Gauteng Division of the High Court, Pretoria, dated 2 February 2024.
[18] *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1992 (2) SA 469 (A) at 507C-D.

Appearances

For the appellants:	A E Bham SC (with T Scott)
Instructed by:	Faber Goërtz Ellis Austen Inc, Pretoria
	McIntyre Van der Post, Bloemfontein
For the first to fourth respondents:	B H Swart SC (with S Maritz)
Instructed by:	VZLR Inc, Pretoria
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