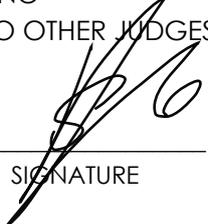




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	NOT REVISED.
<u>05/11/2020</u>	
DATE	SIGNATURE

CASE NO. 20/18875

In the matter between:

RAPPA RESOURCES (PTY) LTD

FIRST APPLICANT

RAPPA HOLDINGS (PTY) LTD

SECOND APPLICANT

and

THE COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICE

RESPONDENT

JUDGMENT

YACOOB J:

1. The applicants (“Rappa”) approached this court on an urgent basis for an ostensibly interim order that the respondent (“SARS”) **make payment of VAT refunds** which SARS has withheld, pending a review of SARS’s decision to withhold payment of those VAT refunds. In the alternative, Rappa seeks the refund of 50% of the total withheld refunds.
2. Rappa also seeks in these urgent proceedings an order that SARS complete the audit instituted in March 2020 (“the March audit”) within 15 days of the grant of the order, and directing SARS not to withhold any further refunds in respect of periods not part of the March audit.
3. Rappa also filed an amendment to its notice of motion, to apply for any condonation that may be required for non-compliance with sections 11(4) and 11(5) of the Tax Administration Act, 26 of 2011 (“the TAA”), and dispensing with the notice period provided for in section 11(4).
4. SARS opposed all the relief sought by Rappa, including that the matter was urgent. SARS also requested in its practice note, and argued an application from the Bar, that its answering affidavit or portions thereof should be kept confidential and that the matter should be heard *in camera*. After hearing comprehensive argument on the issue I made an interim order that the matter should be heard *in camera* and that until I had given a decision on the issue, all the papers should remain confidential. Rappa opposed SARS’s application vociferously on the basis that no case was made out and it was not in the interests of justice.

5. Before I deal with the issues I will set out a summary of the facts as they have emerged from the affidavits.

FACTUAL BACKGROUND

6. Rappa purchases and sells gold bearing bars which are an alloy of between 55 and 99.9% gold and the remainder silver. It also sells gold extracted from by-products of gold mining, but this is the smallest part of its business. Rappa asserts that does not mine gold itself, nor does it purchase second-hand goods which attract a “notional VAT input credit”. It holds a Precious Metals Refining Licence. Rappa also trades in other precious metals. All of Rappa’s sales are exports.
7. Rappa pays VAT on its purchases but the exports are 0 rated for VAT purposes. Rappa then claims VAT refunds for the VAT paid to the suppliers. Rappa’s business model is such that it relies on the VAT refunds for survival. It buys bars usually at the gold spot price less 3% plus 15% VAT and sells usually at the spot price less 1%, plus zero VAT. If there are no VAT refunds, then Rappa would operate at a deficit.
8. SARS has notified Rappa that it is being audited, and has stopped the payment of Rappa’s VAT refunds while the audit is taking place. The basis of the audit, according to SARS, is that it was reason to believe that Rappa is either directly or indirectly involved in unlawful activities which use the type of business model used by Rappa as a front for disposing of either illegally mined gold or smelted down Krugerrands, which are zero-rated for VAT.
9. The details of these activities and the evidence on which SARS bases its

suspicious form the basis of SARS's application for keeping the answering affidavit confidential. SARS contends that were the affidavit to be in the public domain, this would alert other role players involved in the unlawful schemes that SARS is investigating and attempting to put a stop to.

10. SARS has previously notified Rappa of an audit and did not withhold VAT refunds. However, this time, refunds have been withheld since February 2020. The total amount of refunds withheld from February to June 2020 is approximately R1.6 billion. Rappa contends that it will not be able to function without the refunds, which is the basis for urgency. Rappa's bank has also terminated its overdraft facility on which it has been reliant based on a combination of the withholding of the VAT refunds and a period of five weeks during March and April 2020 when it was unable to operate due to the hard lockdown imposed as a result of the Covid-19 pandemic.

11. I am satisfied that, should Rappa be able to make out a case that it is entitled to the refunds, the matter is urgent.

CONFIDENTIALITY

12. SARS applied for the answering affidavit to be kept confidential and for the matter to be heard *in camera*. The relief sought in that regard was amended twice in response to my queries about the practicalities of the relief. Eventually the relief sought was that certain portions of the answering and replying affidavits, together with the annexures to those affidavits would be embargoed from publication, as well as the identity of certain taxpayers referred to.

13. In the answering affidavit SARS referred to this relief as something it was

simply “informing” the applicant and the Court would happen. SARS assumed that this relief would automatically follow upon its say so, because the TAA provides for confidentiality of information. This is clearly an incorrect assumption. The TAA provides that certain information should not be disclosed save upon the order of a court (amongst others), but SARS disclosed the information and then sought to protect its confidentiality after disclosing it. This is not what the TAA contemplates nor is it the manner in which an application for confidentiality ought to be made.

14. The reason given by SARS for wishing to keep the proceedings and the affidavits confidential is that the answering affidavit, and therefore the replying affidavit in the relevant parts, identified certain taxpayers, provided certain information, set out the details of a suspected scheme, and included evidence from a confidential Inquiry. SARS wished to avoid any harm that may be caused by the publication of its suspicions which may alert other participants in the alleged schemes, and also to avoid publication of taxpayer details. SARS alleges that certain witnesses sought assurances that their evidence would not be disclosed because they fear for their lives.

15. Rappa vociferously opposed this relief, on the basis that it was not in the interests of justice and that SARS had an ulterior purpose in seeking to keep these proceedings confidential. The alleged ulterior purpose is that SARS does not want the public to know that it is not paying VAT refunds in order to fund a shortfall in revenue collection. I am satisfied that the allegations of an ulterior purpose have no merit.

16. Rappa also contended that because SARS amended the terms of the relief

sought so many times it was prejudiced and unable to meet the case made out. I am satisfied also that Rappa did not suffer any prejudice in this regard, because from the outset it was clear what outcome SARS sought to achieve, even if it was not well articulated, and because Rappa in any event did not allege or submit any interest in the openness of the proceedings that was particular to itself. Rappa rather relied on the interests of justice and the need for openness of court proceedings.

17. Nevertheless, having made an interim order that the papers in the matter may not be published, and that the argument would not be open to the public, it remains for me to decide whether the specified papers should remain embargoed from publication.

18. SARS did not make a formal application for the order it sought. It also did not file a separate affidavit containing the allegedly confidential material. Although the matter was dealt with on an urgent basis, SARS did not contend that this was the reason for its slapdash approach to the confidentiality issue. SARS also had a number of people on its legal team, and there was no reason to believe that SARS suffered from any lack of resources in dealing with this matter. The manner in which the issue of confidentiality was dealt with is therefore somewhat perplexing.

19. The only information about other taxpayers that was included in the affidavit was that they were suspected of being involved in a scheme and the manner in which the scheme was run. Knowing that the sort of activities described in the affidavit exist would not give anyone a disadvantage and SARS did not actually point to any prejudice that may result to its investigations were the information to become public. SARS does not identify any of the witnesses

who wished to remain anonymous.

20. SARS did not make any allegation that the taxpayers being investigated were unaware of the investigations or of SARS's interest in the alleged unlawful activities.

21. SARS also states in its answering affidavit that limited details are being disclosed because of the confidentiality requirements. In these circumstances it is difficult to justify an order that the papers remain confidential.

22. For these reasons SARS's application to preserve the confidentiality of the answering and replying affidavits is dismissed with costs.

CONDONATION

23. Considering the urgent nature of these proceedings, and that SARS clearly had sufficient time to respond to the application, it is clearly in the interests of justice that the Rappa's failure to comply with section 11(4) is condoned.

24. Rappa has demonstrated compliance with section 11(5).

PAYMENT OF THE REFUNDS

25. Section 190 TAA requires SARS to pay a refund if a person is entitled to it, but need not pay a refund if that person is under audit, until the audit has been finalized. SARS must pay the refund even if the person is under audit, if that person provides acceptable security.

26. Rappa contends that it is entitled to the refunds, because it has submitted VAT returns which show that the refunds are due. It suggests that the decision to withhold the refunds is without lawful or factual basis, which is why it seeks

to review that decision. It suggests also that, even though it is Rappa's own case that the refunds are needed to pay debts and operating expenses, an order that the refunds be paid is an interim order because SARS could always claim the money back from Rappa.

27. SARS, on the other hand, contends that no decision has been made to withhold the refunds, and therefore there is no decision that may be reviewed. It makes the submission that the withholding of refunds when an audit is instituted is automatic, and is not a decision. The decision is only made after the audit. This is patently inconsistent with both the TAA and with SARS's practice, including in other audits on Rappa.

28. Accepting that a decision has been made to withhold the refunds for the present, the question is then whether Rappa has demonstrated a right to the refunds pending the audit, or pending the decision on part B of the application.

29. It is clear that, although Rappa casts the relief as interim relief, it is actually final in nature. Rappa does not have security for the amounts claimed, on its own version, and if it did have security, it would have been able to obtain the refunds from SARS in accordance with the section. If the refunds are paid, they will not be preserved for SARS to reclaim if the audit and inquiry disclose that Rappa is somehow involved in the unlawful scheme SARS has described.

30. Rappa must therefore show a clear right to the refunds.

31. Rappa contends that it is a compliant tax payer, it has a tax certificate, and it has all relevant documents. It has also, in July, provided SARS with all the information SARS requested for the audit.

32. SARS points out, rightly, that if Rappa was in fact involved in an unlawful scheme, it would, on paper and *prima facie*, appear to be a compliant taxpayer with all its affairs in order. SARS wishes to investigate the whole chain to find out whether there is collusion and whether the paperwork is in some way false.

33. While the prejudice to Rappa in the withholding of the refunds (and future refunds while the audit is proceeding) is astronomical, the prejudice to the fiscus if the audit or inquiry discloses that Rappa is in fact colluding with others in the supply chain is also astronomical. The TAA seems to seek to balance the interests of the taxpayer and the fiscus by allowing SARS to retain the refunds pending the outcome of the audit. If this is not done the taxpayer who claims refunds based on the self-assessment system that is used would always have an advantage and SARS would be able to do nothing until it has clear evidence that there is something untoward at play.

34. If SARS has made an incorrect decision to withhold the refunds, Rappa may be successful in reviewing that decision. SARS contends that the decision is not reviewable, on the basis of the judgment in *Cart Blanche Marketing CC and Others v Commissioner for the South African Revenue Service*,¹ to which I was referred after the hearing.

35. The *Cart Blanche* judgment held that a decision to select a taxpayer for audit was not reviewable primarily because it has no external legal effect, as the audit itself could not be prejudicial. It was also made clear that the decision was not reviewable within the factual matrix of that specific case. Rappa

¹ [2020] 4 All SA 434 (GJ)

pertinently points out that it is not the decision to audit that is at issue here.

36. In my view the decision to withhold refunds is patently different to a decision to audit, because it has a direct, external legal effect. The taxpayer's liquidity is immediately affected.

37. However, the decision being reviewable still does not entitle Rappa to the refunds.

38. Rappa contended that, because section 190(2) stated that SARS "need not authorise a refund" until an audit is complete, rather than "must" or "may" not, this meant that the taxpayer was still entitled to the refund which SARS must pay in terms of section 190(1), and the institution of the audit did not change that.

39. I disagree. Applying the principles of statutory interpretation which Rappa usefully referred to, as set out in *Cool Ideas 1186 CC v Hubbard and Another*,² that a statute must be interpreted purposively, in context, and as much as possible in a manner consistent with the constitution, I cannot agree that the scheme of the TAA leads to the necessary conclusion that, section 190(2) does not interfere with the taxpayer's entitlement set out in section 190(1).

40. The reason for this is that a VAT vendor is entitled, in good faith, to a refund on submission on a self-assessment. Even if nobody has checked that it actually is entitled to the refund claimed, it is entitled by law and the amount, however large, must be paid.

² 2014 (4) SA 474 (CC)

41. Section 190(2) then functions as a mechanism to rebalance the scales somewhat in favour of the fiscus, to protect money that may have been claimed wrongly or mistakenly as a refund. It would be ludicrous if SARS was still obliged to pay out refunds with no security when there was doubt as to the correctness of returns or any other reason to doubt the taxpayer's entitlement to the refund.

42. This is made clear by the provision requiring payment on the provision of acceptable security. The purpose is to preserve the funds until it is clear who is entitled to it. Rappa has not, at this stage, demonstrated a clear right to the relief sought.

43. Rappa was not able to offer security to SARS for the full amount of the refunds, and SARS refused to accept security for any less. At the hearing SARS contended that it could not make part payment of a refund. Rappa had to offer security for the whole amount of the refund and the whole refund would be paid, or none at all.

44. In my view this is an unreasonable position to take, and is not at all supported by the plain language or obvious purpose of the statute. Rappa is entitled to a refund of as much as it is able to provide acceptable security for.

45. Rappa also complained that SARS was unreasonable in requiring only a bank guarantee as security, particularly as Rappa's banking facilities were curtailed by the withholding of the refunds. SARS was unable to explain why that would be the only acceptable security. However, there was not enough information before me, nor was I asked to determine, whether the decision regarding the type of security was a proper one in the circumstances.

46. I am unable therefore to make any decision on the appropriateness of the security offered by Rappa.

47. Rappa also complained that SARS has withheld refunds for periods between April and June when they were not yet under audit, and only issued audit notices well after Rappa complained. Obviously this practice cannot be condoned. Rappa originally sought an order that refunds which were withheld subsequent to the February and March refunds, which did not fall under the March audit, be paid to it.

48. However, Rappa then received notices that the later periods were also under audit. I cannot order SARS to pay refunds not covered by the March audit if those refunds for those periods are also under audit. However, SARS cannot continue to withhold refunds where those refunds are not under audit.

MANDAMUS THAT SARS COMPLETE THE MARCH AUDIT

49. Rappa also sought an order that SARS complete the audit of the March 2020 return within fifteen days of the order. SARS contended that it would require 6 months from the provision of the information it required from Rappa to complete the audit.

50. Rappa provided what it considered to be all the relevant information by 9 July. SARS requested further information on 31 July, which was provided on 11 August. There was no contention at the time of the hearing that SARS required any further information. It would also not be open to SARS to continue requesting information, which would delay the finalization of the

audit. This may open the process up to further challenge.

51. Taking the scheme of the TAA as a whole, where SARS has withheld a refund, particularly where the refund is as integral to the business model of the taxpayer as in this matter, it cannot be allowed to take an indefinite time to complete an audit. This would mean that the TAA is inherently unfair towards the taxpayer. The audit has to be completed in a reasonable time, taking into account the circumstances.

52. SARS has not explained why it would need six months to complete the audit, and in fact was hard pushed to suggest any period that would be reasonable.

53. However, SARS must be afforded sufficient time to carry out the audit, and to ensure that Rappa's information does not support a conclusion that Rappa is complicit in the unlawful scheme described. Fifteen days appears to me to be far too short.

54. Taking into account that SARS has had the necessary information since at least 11 August, and that any further information requested may only supplement a process already well under way, I am satisfied that SARS should be allowed until 11 December at the latest to finalise its audit and make payment of the refunds unless the audit indicates that the payment is not due.

55. This should include the audit of all the refunds withheld for audit until the date of the hearing, since the argument was that the subsequent audits were necessary because if something was wrong with the March period, that issue would have continued in the following periods.

CONCLUSION

56. There is no reason why costs should not follow the result. Rappa has been substantially successful in the sense that SARS has not been able to sustain its argument that the audit process including the withholding of refunds should take place in a manner and at a pace that is entirely at SARS's discretion with no consideration of fairness.

57. For these reasons I make the following order:

1. The application is enrolled as urgent and the applicant's failure to comply with the Uniform Rules is condoned;
2. Rappa's non-compliance with section 11(4) of the Tax Administration Act 28 of 2011 is condoned and the notice period is dispensed with
3. SARS's application that these proceedings and portions of the papers remain confidential is dismissed;
4. SARS is directed to pay to Rappa immediately a portion of the refunds that have been withheld for which amount Rappa is able to provide acceptable security;
5. SARS is directed to complete "the March audit", and any subsequent audits of which Rappa has been notified in the period between March and August 2020, on or before 11 December 2020.
6. SARS is to pay the costs of this application, including the costs of two counsel.



S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicants:	A Bhana SC, G Nel SC and Ms Griffiths
Instructed by:	Girard Hayward Inc

Counsel for the respondent: E Coetzee SC, De Wet SC, Ms Maritz and
Mr Mkhawane

Instructed by: VZLR Inc

Date of hearing: 19-21 August 2020

Date of judgment: 05 November 2020