REPORTABLE

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

Case no: 6927/2014

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	APPLICANT
And	
JACQUES SASSIN (ID 73…….)	1ST RESPONDENT
TROJIN FEEDS (PTY) LTD (Registration number 2013/020344/07)	2ND RESPONDENT
FRANCOISE JANE SASSIN (ID 75……)	3RD RESPONDENT
THE TRUSTEES FOR THE TIME BEING OF THE GLOBAL TRUST (IT 1049/2012)	4TH RESPONDENT

Being

JACQUES SASSIN
And
JOSE ALBERTO DELGADO (ID 70…….)
As nominee of IPROTECT TRUSTEES (PTY) LTD

THE TRUSTEES FOR THE TIME BEING OF THE FIRST TRUST (IT 1261/2009), — 5TH RESPONDENT

Being

JACQUES SASSIN
(ID 73……)

JOSE ALBERTO DELGADO
Representing THE BEST TRUST COMPANY (WESTERN CAPE) (PTY) LTD
(Registration Number 2001/018739/07)

THE TRUSTEES FOR THE TIME BEING OF THE THIRD TRUST (IT 2180/2008) — 6TH RESPONDENT

Being

FRANCOIE JANE SASSIN;
JAQUES SASSIN
and
JOSE ALBERTO DELGADO

THE TRUSTEES FOR THE TIME BEING OF THE HOME TRUST (IT 2761/2009) — 7TH RESPONDENT

Being

FRANCOISE JANE SASSIN;
JACQUES SASSIN
and
GUY EMILE THOMAS

THE TRUSTEES FOR THE TIME BEING OF THE DUAL TRUST [IT 298/2013 (DBN)], — 8TH RESPONDENT

Being

JACQUES SASSIN
and
JOSE ALBERTO DELGADO
representing IPROTECT TRUSTEES (PTY) LTD

THE TRUSTEES FOR THE TIME BEING OF THE
FRENCH TRUST (IT 2763/2009), 9TH RESPONDENT

Being

FRANCOISE JANE SASSIN;
JACQUES SASSIN
and
THE BEST TRUST COMPANY (WESTERN CAPE)
(PTY) LTD
(Registration Number: 2001/018739/07)
represented by

JOSE ALBERTO DELGADO

THE TRUSTEES FOR THE TIME BEING OF THE 10TH RESPONDENT
SECOND TRUST (IT 2181/2008)

Being

JACQUES SASSIN
And
THE BEST TRUST COMPANY (WESTERN CAPE)
(PTY) LTD
(Registration Number 2001/018739/07)

represented by

JOSE ALBERTO DELGADO

THE TRUSTEES FOR THE TIME BEING OF THE
PROPERTY TRUST [IT 1050/2012 (DBN)] 11TH RESPONDENT

Being

JACQUES SASSIN

And
JOSE ALBERTO DELGADO
As a nominee of IPROTECT TRUSTEES (PTY) LTD

THE TRUSTEES FOR THE TIME BEING OF THE TRIO TRUST [IT 300/2013 (DBN)] — 12TH RESPONDENT

Being

JACQUES SASSIN
And
JOSE ALBERTO DELGADO
as nominee of IPROTECT TRUSTEES (PTY) LTD

THE TRUSTEES FOR THE TIME BEING OF THE RETIREMENT TRUST [IT 718/2013 (DBN)] — 13TH RESPONDENT

Being

JACQUES SASSIN
And
JOSE ALBERTO DELGADO
as a nominee of IPROTECT TRUSTEES (PTY) LTD

ORDER

(a) The parties are ordered to trial.

(b) The Notice of Motion shall stand as a summons with the applicant to file its declaration within one (1) month from date of delivery of this judgment.

(c) The respondents are directed to file their plea (or any other pleading) within 20 days after delivery of the applicant's declaration.

(d) The applicant is ordered to pay the respondents' costs of the application including the costs of the argument on 27 August 2015, such costs to include the costs consequent upon the employment of two counsel.

JUDGMENT

SEEGOBIN J:

INTRODUCTION

[1] This is without doubt an extraordinary matter. It arises out of VAT fraud committed on a grand scale against the South African Revenue Service (SARS) causing it to suffer a huge loss. It is common cause that the fraud was perpetrated (rather shamelessly I may add) by a certain Petrus Johannes Uys Badenhorst ('Badenhorst') who, at all material times, traded as SA Global Trading ('SA Global'). Badenhorst is not a party to these proceedings and as such no relief is being sought against him in spite of the fact that he is indebted to SARS in an amount exceeding R800 million. He is currently insolvent and there is no hope of SARS recovering any amount from him.

[2] In the present motion proceedings, the applicant, being the Commissioner for the South African Revenue Services, seeks judgment in an amount of R41 253 533.50 against the first respondent, a Mr Jacques Sassin (Mr Sassin) and the second respondent, Trojin Feeds (Pty) Ltd (Trojin Feeds) of which Mr Sassin was the sole director. The applicant further seeks a declaratory order

against Mr Sassin and also seeks certain ancillary relief against the third to thirteenth respondents. The third respondent, Ms Francois Jane Sassin (Mrs Sassin), is the wife of Mr Sassin. The fourth to thirteenth respondents are all trusts of which Mr Sassin and a Mr Jose Alberto Delgado (Mr Delgado) are trustees. The claims against Mrs Sassin and the other respondents are for certain specified amounts paid to them by Mr Sassin allegedly from the ill-gotten gains received by him from Badenhorst as a consequence of the fraud.

[3] The declaratory relief sought against Mr Sassin is to hold him liable as a co-wrongdoer for the total amount of the damage caused to the applicant as a result of the fraudulent scheme perpetrated by Badenhorst and to which Mr Sassin was allegedly a party. The total liability that was required to be fixed in this regard was said to be an astronomical R370 million. However, at the hearing of the application the applicant was content not to have an amount specified in the event of such an order being granted. A draft order to this effect was handed up.

[4] To complete the picture as far as the parties are concerned, it should be mentioned that Mr Sassin was also a director and employee of a company known as Benietha Veevoere (Pty) Ltd (Benietha) until 7 August 2013. Mr Sassin held a 30% share in Benietha. The balance of 70% was held by a Mr and Mrs van der Westhuizen (the van der Westhuizens). The latter were said to be semi-retired but nonetheless still took a keen interest in Benietha. Mr Sassin's shareholding in Benietha was held through a trust.

FULL EXTENT OF RELIEF SOUGHT

[5] The full extent of the relief sought in the notice of motion[1] is in the following terms:

"1. The first and second respondents are ordered to pay the amount of R41,253,533.50 jointly and severally, the one to pay the other to be absolved, to the applicant, together with interest thereon at the *mora* rate of 15.5% per annum reckoned from 1 August 2013 to date of payment.

2. The Third respondent is declared to be liable to the applicant in the amount of R400,000.00 in so far as the applicant is unable to recover the amount of R41 million aforesaid from the first and/or second respondents.

   The fourth respondent, the Global Trust (IT 1049/2012), is declared to be liable to the applicant in the amount of R37,455,203.00 in so far as the applicant cannot recover the R41 million mentioned above form first and/or second respondents.

3. The fifth respondent, the First Trust (IT2761/2009), is declared to be liable to the applicant in the amount of R37,452,635.00 in so far as the applicant cannot recover the R41 million mentioned above from first and/or second respondents. This liability is not cumulative to the liability of the Global Trust, and accordingly in so far as the one pays, the other of them will be absolved from liability.

4. The sixth respondent, the Third Trust (IT2180/2008), is declared to be liable to the applicant in the amount of R5,017,215.00 in so far as the applicant cannot recover the R41 million mentioned above from first and/or second respondents. This liability is not cumulative to the liabilities of the Global Trust or the First Trust, and accordingly in so far as the one pays, the other of them will be absolved from liability.

5. The seventh respondent, the Home Trust (IT 1276/2009), is declared to be liable to the applicant in the amount of R1,149,331.35 in so far as the applicant cannot recover the R41 million mentioned above from first and/or second respondents. This liability is not cumulative to the liabilities of the Global Trust or the First Trust, and accordingly in so far as the one pays, the other of them will be absolved from liability.

[1] Notice of Motion, pages 1-14.

6. The eighth respondent, the Dual Trust (IT 298/2013 (DBN)), is declared to be liable to the applicant in the amount of R3,983,076.81 in so far as the applicant cannot recover the R41 million mentioned above from first and/or second respondents. This liability is not cumulative to the liabilities of the Global Trust or the First Trust, and accordingly in so far as the one pays, the other of them will be absolved from liability.

7. The ninth respondent, the French Trust (IT 2763/2009), is declared to be liable to the applicant in the amount of R1,491,339.90 in so far as the applicant cannot recover the R41 million mentioned above from first and/or second respondents. This liability is not cumulative to the liabilities of the Global Trust or the First Trust, and accordingly in so far as the one pays, the other of them will be absolved from liability.

8. The tenth respondent, the Second Trust (IT 2181/2008), is declared to be liable to the applicant in the amount of R7,149,680.00 in so far as the applicant cannot recover the R41 million mentioned above from first and/or second respondents. This liability is not cumulative to the liabilities of the Global Trust or the First Trust, and accordingly in so far as the one pays, the other of them will be absolved from liability.

9. The eleventh respondent, the Property Trust (IT 1050/2012 (DBN)), is declared to be liable to the applicant in the amount of R1,219,623.00 in so far as the applicant cannot recover the R41 million mentioned above from first and/or second respondents. This liability is not cumulative to the liabilities of the Global Trust or the First Trust, and accordingly in so far as the one pays, the other of them will be absolved from liability.

10. The twelfth respondent, the Trio Trust (IT 300/2013 (DBN)), is declared to be liable to the applicant in the amount of R3,305,875.00 in so far as the applicant cannot recover the R41 million mentioned above from first and/or second respondents. This liability is not cumulative to the liabilities of the Global Trust or the First Trust, and accordingly in so far as the one pays, the other of them will be absolved from liability.

11. The thirteenth respondent, the Retirement Trust (IT 718/2013 (DBN)), is declared to be liable to the applicant in the amount of R11,955.74 in so far as the applicant cannot recover the R41 million mentioned above from first and/or second respondents. This liability is not cumulative to the liabilities of the Global Trust or the First Trust, and accordingly in so far as the one pays, the other of them will be absolved from liability.

12. The fourteenth respondent, the China Trust (IT 716/2013 (DBN)), is declared to be liable to the applicant in the amount of R978,020.27 in so far as the applicant cannot recover the R41 million mentioned above from first and/or second respondents. This liability is not cumulative to the liabilities of the Global Trust or the First Trust, and accordingly in so far as the one pays, the other of them will be absolved from liability.

13. An order declaring that Mr Sassin as co-wrongdoer is liable for the total amount of the damage caused to the applicant as a result of the fraudulent scheme conducted by the said Mr PJU Badenhorst and the first respondent and which liability is fixed in an amount of R370 million.

14. The first respondent is ordered to pay the amount of R370 million to the applicant, together with interest thereon at the *mora* rate of 15.5% per annum reckoned from 1 August 2013 to date of payment thereof.

15. Costs of suit against the first and second respondents jointly and severally and as against such other respondents as may oppose this application.

16. Further and/or alternative relief."

[6] As I understand the applicant's claim for a monetary judgment against the respondents (claim 1) it seems to be premised on three alternative bases: the *first*, is that they constitute 'secret profits' paid to Mr Sassin and/or his nominees; these claims are brought in terms of a written cession given by Benietha to the applicant; the *second*, appears to be based on s190(5) of the Tax Administration Act 28 of 2011 ('the TA Act'); and the *third*, seems to be made on the basis of a ceded claim from Badenhorst to the Commissioner; this claim is for enrichment based on the *condictio ob turpem vel iniustam causam* for which the applicant seeks a relaxation of the *in pari delictum* rule.

[7] Regarding the claim for a declarator (claim 2), this seems to be premised on the fact that Mr Sassin was a joint wrongdoer in respect of the fraudulent scheme conducted by Badenhorst.

MAIN ISSUE

[8] While it is common cause that Badenhorst was integrally involved in the VAT fraud, the main issue to be determined herein is whether, from all the available evidence, Mr Sassin can also be held liable and to what extent. A finding on this issue of necessity involves a finding that Mr Sassin was fully aware of the fraud being perpetrated by Badenhorst against SARS and that he was a party to it.

THE PAPERS

[9] The papers in this application are voluminous. Apart from the affidavits delivered on behalf of the parties, the papers comprise numerous annexures amongst which are certain portions of the transcript of proceedings which emanate from an inquiry (the inquiry) held in terms of s50 of the TA Act. This inquiry was held towards the end of 2013.

[10] At the opposed hearing of this matter on 27 August 2015, the applicant was represented by Mr *van der Merwe* SC and Ms *Kilmartin* while the respondents were represented by Mr *Limberis* SC and Mr *Maastenbroek*. I am indebted to counsel for their detailed heads of argument and helpful submissions.

LEGISLATIVE CONTENT

[11] The applicable legislation are the relevant provisions of the Value Added Tax Act 89 of 1991 and the Tax Administration Act 28 of 2011.

RELEVANT BACKGROUND AND SARS CASE

[12] To place matters in perspective it is necessary to highlight at the outset that at the centre of the fraud committed against SARS is a certificate commonly known as a VAT 103 certificate, which Badenhorst possessed and which he used to full advantage in his fraudulent scheme against SARS. A VAT 103 certificate entitles the possessor thereof to obtain certain goods at a zero VAT rate. As in the present matter, an enterprise that purchases feed for animals could register with SARS to purchase animal feed at a zero VAT rate. However, (according to SARS) the certificate restricts the use thereof to purchases for specified purposes namely, the feeding by the purchaser of its own animals. Trading with the feed is not such a purpose[2]. At all times Mr Sassin has maintained that he was not aware of how the VAT 103 certificate worked. Nor was he aware that Badenhorst was using the VAT 103 certificate in his fraudulent scheme against SARS.

[13] According to the applicant, until 7 August 2013, Mr Sassin, as a director of and minority shareholder in Benietha, was actively involved in the management of the affairs of this company, and, as employee, was an active so-called 'trader'. In other words, he bought and sold animal feed products for and in the name of Benietha and earned commission from Benietha on such transactions. Benietha was an established and successful trader in animal feed with a good reputation in the industry and with SARS.

[2] This is provided for in s11(1)(g) of the VAT Act read with provisions of Part 1 of Schedule 2 of the said Act.

[14] Over a number of years, Benietha from time to time purchased feed from Badenhorst's company, namely, SA Global Trading. It also turned out that on occasion Benietha sold animal feed to SA Global. This trade between dealers is not altogether strange. Although dealers usually purchase trading stock from importers or producers, they sometimes buy from other dealers if they experience a shortfall of supply. SA Global was a very small one man enterprise in this competitive industry. The volume of trade between SA Global and Benietha was, until 2012, extremely low.

[15] Things changed in 2012. This was mainly due to the fact that during or about September 2012 a meeting took place between Mr Sassin and Badenhorst. This meeting did not take place on the premises of Benietha, nor did it take place on the premises of SA Global. The meeting took place at a nearby restaurant. Shortly after this meeting the volume of trade between the two entities escalated. The trade consisted of both dealers buying and selling the same quantities of animal feed from each other during the same periods. According to the applicant, this trade was strange for two reasons: *first*, Benietha sold the animal feed to SA Global and thereafter bought it back at a lower price, causing SA Global to make a certain loss on the trade between the two dealers; and *second*, Benietha bought the animal feed at a 14% VAT rate from SA Global but SA Global bought the animal feed from Benietha at a zero VAT rate in terms of its VAT 103 certificate referred to above. This difference of 14% caused Benietha to be able to claim 14% VAT from SARS on the total volume of the trade between the two dealers.

[16] These pay-outs by SARS ended up being huge VAT refunds to Benietha which consisted of 14% calculated on the artificial volumes generated by the

exchange of VAT invoices between the two traders. The huge amounts received by Benietha in this way were for the most part being paid over by Benietha to SA Global. Benietha merely subtracted the 'discount' that SA Global granted to it. In this way hundreds of millions of rand's ended up with Badenhorst. On receipt thereof Badenhorst would immediately pay over a sizeable reward to Mr Sassin. This reward was allegedly for arranging that Benietha would engage in this roundabout. The reward was to be kept secret from the van der Westhuizens. For that reason the funds were paid over by Badenhorst into the account of Trojin Feeds, the company belonging to Mr Sassin.

[17] In later phases Mr Sassin would order excessive amounts of feed from importers and then after the loop with SA Global cancel 90% of the order. He made use of a trade usage called 'wash out'. This trade usage is generally utilised to protect a purchaser that orders feed so that if he cannot dispose of everything he can resell the unrequired portion at a small discount to the seller. In these circumstances the purchaser is not saddled with feed that he cannot dispose of. According to SARS, Mr Sassin abused this by 'washing-out' 90% of the purchase immediately after the exchange of invoices with SA Global. This enabled Benietha to increase the volumes of trade with SA Global to extreme heights.

[18] Since approximately April 2013 this 'trade' rose sharply and eventually reached proportions that were so high that neither of the two trading partners would be able to handle the volumes if physical delivery would have taken place. Delivery, however, was not necessary because the transactions between these two dealers cancelled themselves out.

[19] By the beginning of July 2013, SARS began to suspect that something was amiss. It wrote a letter to Benietha on 4 July 2013. In this letter SARS adopted the stance that SA Global was not entitled to purchase animal feed at a zero rating because it utilised the feed for trading purposes and not for feeding its animals. SARS then informed Benietha that it intended to disallow the VAT claims of Benietha on this basis and to this extent i.e. to adjust Benietha's return to take purchases off SA Global at a 14% VAT rate.

[20] Benietha's attorney, Mr Retief, responded to SARS on 18 July 2013. He stated that it was not for a vendor to identify for what purposes their customers would utilise products as purchased from them. The letter went on to state that to the best of Benietha's knowledge SA Global has a valid certificate and "there are no facts to supply the conclusion raised by SARS that the supplies to SA Global should be standard rated. In addition, SARS penalises our client knowingly that there is no onus on the Tax payer to verify that it is selling goods to farmer clients, who hold a VAT 103 registration certificate".

[21] The said letter further stated that non-payment by SARS of the VAT claims based on the SA Global transactions at that stage caused Benietha to trade at a R25 million deficit and would lead to Benietha having to cease trading with job losses. The SARS officials dealing with this matter at that stage were persuaded and allowed a further payment to be made to Benietha by the end of July 2013 in an amount of R94 866 019.75, more than was properly due to Benietha. Immediately on receipt of these funds, Benietha paid the bulk of it over to Badenhorst and Badenhorst in turn paid Mr Sassin his share.

[22] By 2 August 2013 and on several occasions thereafter, SARS arranged a series of meetings with Badenhorst and his team of advisors as well as with Mr and Mrs van der Westhuizen. It was Ms Hanlie Janse van Rensburg (aka Ms Ungerer – an advisor to Badenhorst) who informed SARS and the van der Westhuizens about the secret payments made to Mr Sassin. It was alleged that these payments amounted to about R73 million. Badenhorst said that he would co-operate and would pay back as much as he could to SARS. On 7 August 2013, the van der Westhuizens and the team of advisors of Badenhorst, including Badenhorst's advocate, Mr Cloete, confronted Mr Sassin in Durban at the offices of Benietha. This occurred at a stage when Mr Sassin was still busy arranging further transactions with SA Global.

[23] At the meeting of 7 August 2013, Mr Sassin agreed to repay the amounts received from Badenhorst in order for SARS to collect them from Badenhorst. Mr Sassin also settled with the van der Westhuizens on that basis and agreed to resign his directorship from Benietha and to transfer his shareholding to the van der Westhuizens. Mr Sassin thereafter paid an amount of R19 164 999.00 back to Badenhorst on 7 August 2013 and a further amount of R5 million on 8 August 2013. This amounted to R24 164 999.00. However, when Mr Sassin attempted to pay further amounts back to Badenhorst he found that his accounts had already been frozen.

[24] The amount which has been verified by SARS as representing payments made by Badenhorst to Mr Sassin is the sum of R65 418 532.50. In these proceedings SARS claims an amount of R41 253 533.50 from Mr Sassin and Trojin Feeds (claim 1). This amount represents the balance of the amount of

R65 418 532.50 that was secretly paid to Mr Sassin and/or his nominee (Trojin Feeds) by Badenhorst, after deducting the repayment by Mr Sassin of R24 164 999.00 as set out above.

THE s50 INQUIRY

[25] On 30 October 2013 the North Gauteng High Court sanctioned the holding of an inquiry in terms of s50 of the TA Act. This was done in terms of an *ex parte* order obtained by SARS. Despite a request by their attorneys, the respondents were not favoured with a copy of the *ex parte* application nor were they provided with a copy of the full order as granted on 30 October 2013. What appears in the papers is an edited version of the court order, a copy of which is annexure "AA3" to the answering affidavit.

[26] As appears from annexure "AA3", the inquiry was authorised to inquire into certain non-compliances or contraventions committed by Badenhorst, Benietha, Mr Sassin, Trojin Feeds and Ms H Janse van Rensburg, within the provisions of the VAT Act, the Income Tax Act 58 of 1962 and the TA Act in the period 1 March 2008 to 31 July 2013. The inquiry was further authorised to inquire into certain alleged offences committed by these persons as provided for in these Acts. One of the alleged offences that the inquiry was to investigate was whether Badenorst/SA Global and Mr Sassin had made use of fraud, art or contrivance in order to obtain a refund under a Tax Act. The present application flows from the evidence gathered by SARS in the s50 inquiry.

BASIS OF SARS CLAIM FOR PAYMENT OF R41 253 533.50

[27] SARS avers that the van der Westhuizens were never informed about the way in which the trade took place. It was only at a later stage that they received some information but they were never informed that Badenhorst would make huge secret payments to Mr Sassin or his nominee (Trojin Feeds). SARS contends that these payments were made to reward Mr Sassin for involving Benietha in this trade relationship. The payments were made into the account of Trojin Feeds to make it more difficult for the van der Westhuizens to discover. On this basis SARS submits that Mr Sassin's conduct constituted a fraud against the van der Westhuizens and Benietha.

[28] SARS further contends that Mr Sassin disguised his fraud against Benietha and the van der Westhuizens by, *inter alia*, splitting the huge transactions into a number of smaller transactions. On this basis it submits that the money so received by Mr Sassin from Badenhorst was not received in terms of a valid agreement as it was paid so that Benietha could be defrauded by Mr Sassin. The payment of R65 million, according to SARS, was made and received *contra bonos mores*. These payments amount to secret profits and are claimable in law[3].

[29] As I pointed out earlier[4], SARS relies on a cession of Benietha's claim against Mr Sassin for payment of the amount claimed in prayer 1. *Alternatively*, it relies on the cession of the claim of Badenhorst based on the fact that the

[3] See *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009(6) SA 531 (SCA).
[4] See par [6] above.

agreement in terms of which the payments were made was void because of its illegality with reliance being placed on the *condictio ob turpe vel iniustam causam*. SARS submits that, in any event, in its own right it has an enrichment claim against Mr Sassin as Badenhorst used funds originating from SARS to pay Mr Sassin without a valid cause. Since it cannot recover the full amount from Badenhorst, it seeks to do so from Mr Sassin.

BASIS OF SARS CLAIM AGAINST MRS SASSIN

[30] SARS contends that where Mr Sassin admits that he received some of the funds either directly or indirectly i.e. from Trojin Feeds, he was in a position to advance the funds to Mrs Sassin as a result of the funds he earned illegitimately. It was submitted that Mrs Sassin would have foreseen that the funds donated to her originated from fraud.

BASIS OF SARS CLAIMS AGAINST OTHER RESPONDENTS

[31] SARS contends that the other respondents received proceeds of the money paid to Mr Sassin for their participation in the scheme as a secret reward. It was submitted that since these moneys were obtained illegally, there can be no defence to the claim by SARS.

BASIS OF DECLARING MR SASSIN TO BE A CO-WRONGDOER

[32] SARS contends that a strong case has been made out against Mr Sassin on the papers and that he failed to explain the number of *prima facie* inexplicable facts showing that he was a co-wrongdoer with Badenhorst. It averred that Mr Sassin knowingly took part in three frauds, viz:

[32.1] he knew that Benietha could not issue invoices to SA Global at a zero VAT rate;

[32.2] he also knew that the transactions between SA Global and Benietha during the period April 2013 onwards was artificial; and

[32.3] he also knew during this period that Badenhorst did not intend to pay VAT as reflected on his invoices issued to Benietha but intended to distribute the VAT collected from Benietha between himself and Mr Sassin.

[33] In support of its claim for the above relief, SARS relies on information obtained in the s50 inquiry as well as from various other affidavits. It submits that there can be no dispute on the evidence it presents on the papers. On the basis of established authorities[5] it submits that there is no genuine dispute of fact and that Mr Sassin's version is so far-fetched and clearly untenable that it warrants a rejection on the papers.

MR SASSIN'S (AND THE OTHER RESPONDENTS) ANSWER TO SARS CLAIM

[34] What is Mr Sassin's (and the other respondents) response to the claims made by SARS in this application? Both in their answering affidavit and in argument before me, the respondents raised several preliminary challenges to the claims made by SARS. The main thrust of their challenge is that this

[5] *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949(3) SA 1155 (T) at 1163; *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634H-635B; *Fakie NO v CC 11 Systems (Pty) Ltd* 2006(1) SA at 347H; *Pennello v Pennello* [2004] 1 All SA 32 (SCA) paras [37] to [40].

application is bad in law and that it constitutes an abuse of the process of court. They base their contentions in this regard on the following grounds:

[34.1] the *first* is that neither the Commissioner nor the main deponent to the founding papers, viz Pieter Willem Posthumus (Posthumus), has the authority (or capacity) to bring this application under the TA Act since the application does not relate to the administration of a tax Act nor does it relate to the collection of a tax due by any of the respondents.

[34.2] the *second* is that the Commissioner is precluded, in these proceedings, from using and relying upon incomplete, hearsay, uncertified and untested evidence obtained at the s50 inquiry. Mr Sassin avers that such evidence was obtained from various witnesses who testified in the absence of himself and his wife and without providing them (i.e. him and his wife) with an opportunity to cross-examine these witnesses. The respondents further contend that even the evidence of Mr Sassin and his wife given at the inquiry are inadmissible against him.

[34.3] the *third* relates to the lack of admissible evidence in the founding papers. This contention was advanced on the ground that SARS failed to put up affidavits by the witnesses whose evidence it sought to rely upon in which they dealt with the material facts, including documents. SARS relies instead on an affidavit deposed to by Posthumus who the respondents claim has no knowledge of the 'facts'. They aver that Posthumus relies on selected, untested and inadmissible oral and documentary hearsay evidence obtained at the secret s50 inquiry. The respondents aver that Posthumus says nothing in the founding

affidavit regarding the admissibility and authenticity of the s50 inquiry. SARS' right to use such evidence was pertinently raised by the respondents in their answering affidavit. In reply Posthumus states, for the first time, that SARS was entitled to rely on the s50 evidence by virtue of s56(4) of the TA Act.

[34.4] the *fourth* is that the founding affidavit lacks averments necessary to sustain a cause of action against the respondents in respect of the secret profits allegedly received by Mr Sassin from Badenhorst. They contend that there was no need for SARS to bring this application for the relief sought in claim 1. In this regard they draw attention to the 'prejudice offer' made to SARS to repay the remaining available funds which emanated from the alleged fraudulent scheme conducted by Badenhorst and which SARS by its conduct has refused to accept. They aver that this offer still stands. They contend that the true reason for this application is for SARS to try and get judgment on the fraud claim in motion proceedings in the face of irresoluble disputes of fact.

[34.5] the *fifth* is that motion proceedings are inappropriate for determining claims based on fraud and as such the application is an abuse of the process of court. As far as his conduct is concerned, Mr Sassin has categorically denied being a party to the fraudulent scheme perpetrated by Badenhorst. Mr Sassin avers that at all material times he was not aware that Badenhorst was not entitled to use his VAT 103 certificate to purchase goods at a zero VAT rate. Nor was he aware that Badenhorst did not account to SARS for VAT which he raised with Benietha.

[35] Ultimately the respondents contend that the fraud claim (claim 2) is destructive of all the other claims. In other words, judgment cannot be given on claim 1 in the absence of a determination on claim 2. They argue that there are irresoluble disputes of fact on the papers in relation to claim 1 (i.e. insofar as it is based on the ceded claim for secret profits and the ceded claim based on the *condictio*, as well as the claim against the third respondent, Mrs Sassin, for payment of R400 000.00) and claim 2 which is based entirely on fraud.

[36] In light of the manner in which the applicant approached the court for relief in this matter, Mr *Limberis* (on behalf of the respondents) contended strongly for a dismissal of the application on any one or more of the defences outlined above. As a worst case scenario he submitted that the matter should go to trial on certain conditions. Mr *van der Merwe*, on the other hand, persisted for the relief sought, except perhaps for the relief against Mrs Sassin. He submitted, however, that in the event of my finding that Mr Sassin's version is not as far-fetched and clearly untenable as to be rejected on the papers as they stand, then in that event the matter should be referred for the hearing of oral evidence on certain defined issues. These issues would turn on Mr Sassin's state of mind at the time and his knowledge or otherwise of Badenhorst's fraudulent scheme.

[37] Against the above background and the myriad of submissions advanced on behalf of both parties, I turn to consider whether the applicant has made out a proper case for the relief claimed. For the purposes of this judgment, I accept for the moment that SARS, and Posthumus for that matter, have the necessary *locus standi* to bring this application. For the reasons set out hereunder, I

consider that the applicant has far greater difficulties to overcome in this application than the issue of *locus standi.*

FINDINGS

A. MOTION PROCEEDINGS

[38] It is well established that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities[6]. Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[7] set out the approach to be taken when factual disputes arise in application proceedings, as follows:

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)*(g)* of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly

[6] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) par 26.
[7] 1984 (3) SA 623 (A) 634H – 635C.

> untenable that the Court is justified in rejecting them merely on the papers. . . . ”

[39] The manner in which courts should consider the adequacy of a respondent’s denial in motion proceedings for the purpose of determining whether a real, genuine or *bona fide* dispute of fact had been raised was dealt with by Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[8], as follows:

> “[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. . . .
>
> [13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say generally because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving

[8] 2008 (3) SA 371 (SCA); [2008] 2 All SA 512 paras 12-13.

at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[40] In *National Scrap Metal (Cape Town) v Murray & Roberts Ltd and others*[9] it was held as follows:

"[21] These factors — particularly collectively — do cast a measure of doubt on the appellants' version, which is certainly improbable in a number of respects. However, as the high court was called on to decide the matter without the benefit of oral evidence, it had to accept the facts alleged by the appellants (as respondents below), unless they were 'so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers'. An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the appellants is so far-fetched and improbable that it can be rejected without evidence.

[22] As was recently remarked in this court, the test in that regard is 'a stringent one not easily satisfied'. In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross-examination, things turn out differently from the way they might have appeared at first blush.[4] As Megarry J observed in a well-known dictum in *John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John* [1970] 1 Ch 345 ([1969] 2 All ER 274 (Ch)) at 402 (Ch) and 309F (All ER):

[9] 2012 (5) SA 300 (SCA).

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'"

[footnotes omitted]

[41] A similar view was expressed by Leon J in *Sewmungal and Another NNO v Regent Cinema*[10] at 819 A-C, as follows:

"In approaching this particular type of problem, it is not wrong for a Court at the outset to have some regard to the realities of litigation. What appears to be a good case on paper may become less impressive after the deponents to the affidavits have been cross-examined. Conversely, what appears to be an improbable case on the affidavits, may turn out to be less improbable or even probable in relation to a particular witness after he has been seen and heard by a Court. An incautious answer in cross-examination may change the whole complexion of a case. Considerations such as these may have influenced SCHREINER, J., when he observed in *Butterworth v Butterworth*, 1943 W.L.D. 127 at p. 131, that –

'in litigation as in less serious forms of adventure one may have a reasonable chance of winning though the odds may be against one'."

[42] As I have already mentioned, Mr Sassin has emphatically denied any wrongdoing on his part. In paragraphs 68 and 69 of the respondents' answering affidavit[11] he states the following:

"68 My evidence (if found to be admissible in these proceedings) is before this Court. It is contained at "**SARS1"/108 - 213** and **"SARS2"/214 – 250.**

[10] 1977 (1) SA 814 (NPD).
[11] Respondents' answering affidavit, page 975.

> That evidence is true. It is, moreover, uncontradicted. I did not know that Badenhorst did not intend to pay VAT to SARS (see for example **"SARS1"/197 – 199; 206 and 208 – 212; "SARS3"/249)**.
>
> 69 I was not a party to any (alleged) fraud which may have been perpetrated by Badenhorst against SARS. There is no basis for an Order to declare me jointly and severally liable with Badenhorst for any damage he may have caused to SARS. If this Court finds that there may be a case for me to answer then I say that, that case must be properly pleaded and decided at a fair trial where all the witnesses including me testify and are cross-examined."

[43] I agree with the submissions made on behalf of the respondents to the effect that this is not one of those rare cases where the disputed statements made on affidavit are so manifestly untrue so as to justify their rejection on the papers. It falls rather into the category of seemingly unanswerable charges which might be completely answered (see *Sewmungal and Another NNO, supra*, as well as the remarks by Megarry J in *John v Rees and Others, supra*). In this regard the role played by Badenhorst, as the mastermind behind the fraud, is crucial, so too is the role played by Ms Hanlie Janse van Rensburg. The papers reveal that she purported to be a SARS official when in actual fact she was employed as an advisor to Badenhorst. She clearly lied that she was a SARS official. Both she and Badenhorst said a lot to Mr Sassin in the period when SARS became suspicious and raised concerns regarding the huge VAT refunds that were due to Benietha. She in particular made Mr Sassin believe that it was SARS that was acting unfairly in the matter. Badenhorst and Ms Janse van Rensburg also said much to Mr Sassin and the van der Westhuizens to make them believe that Badenhorst had fully accounted to SARS for VAT and there

was nothing to worry about. The van der Westhuizens themselves seemingly believed that everything was above board[12].

[44] The above factors all persuade me that the dispute raised by Mr Sassin regarding his knowledge of the fraudulent VAT scheme conducted by Badenhorst cannot be rejected on the papers as being 'far-fetched and clearly untenable'. I consider that a genuine factual dispute arises on these papers which cannot be resolved without resort to *viva voce* evidence. There is, however, a further compelling reason why this matter cannot be decided on the papers. I deal with this aspect hereunder.

FINDINGS OF FRAUD IN MOTION PROCEEDINGS

[45] It is well-established that motion proceedings are by their very nature generally inappropriate for the purpose of making findings of fraud[13]. Fraud is a serious allegation that carries serious consequences. It is an offence that affects a person's good name and reputation and could have serious consequences for him/her, particularly in the business world. In matters in which charges of criminal or immoral conduct are made, it is a requirement that such charges must be proved by the "clearest" evidence, or "clear and satisfactory" evidence or some similar phrase[14]. Moreover, fraud will not lightly be inferred because as explained in *Gates v Gates, supra*:

> "… There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to a

[12] Annexure SARS 1/139-141. 143. 146-147; Annexure SARS 6/482-484/43-48. 502/102-107; Annexure SARS 7/605; Annexure SARS 8/713-714, 727.
[13] *Korff v Scheepers en Andere* 1962 (3) SA 83 (W) at 85; *Baart v Malan* 1990 (2) SA 862 (E); *BAG Industrial Roofing CC v Cromhout and Others* [2000] JOL 7072 (W) at 8.
[14] *Gates v Gates* 1939 AD 150 at 155; See also: *Motswai v Road Accident Fund* 2014 (6) 360 (SCA) at [46].

> reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal."

[46] The approach that application proceedings are inappropriate for the resolution of matters where fraud is alleged, is in my view, correct since it is undesirable to resolve disputed issues on paper which are largely dependent on considerations not only of probability but also of credibility.

[47] Our courts have consistently held that it would be unwise to decide a disputed issue of whether fraud was committed on motion proceedings without the benefits inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses, and so forth. The logic behind this is to be found in the reasoning of Brand JA in *Prinsloo NO and others v Goldex (Pty) Ltd*[15] in which he states the following:

> "[16] The appellants' argument that the application of issue estoppel in these proceedings would result in unfairness and inequity derives from two hypotheses. First, that it was not necessary for Webster J to arrive at any final decision as to whether or not Prinsloo committed fraud in order to dismiss the trust's application to compel specific performance. Secondly, that Webster J could not and should not have decided the disputed issue of whether fraud was committed on motion proceedings without the benefits inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses, and so forth.
>
> [17] I think both these propositions are well supported by authority. As to the first, the trite position is that, as a general rule and save in exceptional circumstances, disputes

[15] 2014 (5) SA 297 (SCA) at 303-305; See also the remarks by Cachalia JA in *Odendaal v Ferraris* 2009(4) SA 313 (SCA) at page 326, par [42].

of fact arising on affidavit cannot be finally determined on the papers. The concomitant rule is that, in the event of material factual disputes arising on affidavit in motion proceedings, the applicant can only succeed in those exceptional circumstances where the respondent's version of the disputed facts can safely be rejected on the papers as far-fetched or untenable (see eg the oft-quoted passage in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–635C). The dispute of fact that arose in the motion proceedings before Webster J fell outside the ambit of the exceptional circumstances envisaged by the authorities. The allegations of fraud against Prinsloo, which Goldex raised in answer to the application by the trust, could hardly be described as so far-fetched or untenable that they could be rejected on the papers, and it was not suggested that they should. The application for final relief by the trust was therefore doomed to fail. On that basis and that basis alone Webster J was bound to dismiss the application with costs. That is obviously also why this court refused the trust's application for leave to appeal. Appeals are not aimed at the reasoning but at the order of the lower court. Whether or not the court of appeal agrees with the lower court's reasoning is therefore of no consequence, if the result would remain the same (see eg *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355).

[18] This brings me to the appellants' second proposition: that it was inappropriate and unwise for Webster J to find Prinsloo guilty of fraud purely on the basis of allegations against him on affidavit, which he disputed on feasible grounds. This proposition emanates from the same considerations as the previous one. The appellants were also entitled to have their version approached with caution on the basis that it could only be rejected if it were clearly untenable, which it was not. What rendered a final rejection of the appellants' version in principle even more unwise and inappropriate was, of course, that, as the respondents' version could not be rejected out of hand, the application was in any event bound to fail.

[19] I therefore agree with the appellants' contention that Webster J should not have made a finding of fraud against Prinsloo on the basis of untested allegations against him on motion papers that were denied on grounds that could not be described as far-fetched or untenable. The reasons why he should not have done so derive not only

from common sense, but from many years of collective judicial experience. They were thus formulated in *Sewmungal and Another, NNO v Regent Cinema* 1977 (1) SA 814 (N) at 819A–C:

> 'In approaching this particular type of problem [of factual disputes arising on affidavit] it is not wrong for a court at the outset to have some regard to the realities of litigation. What appears to be a good case on paper may become less impressive after the deponents to the affidavits have been cross-examined. Conversely, what appears to be an improbable case on the affidavits, may turn out to be less improbable or even probable in relation to a particular witness after he had been seen and heard by a court. An incautious answer in cross-examination may change the whole complexion of a case.'"

[48] Fraud cannot be inferred, particularly in motion proceedings, from a mere error, a misunderstanding or an oversight, however unreasonable such might be[16]. Where the basis of an allegation of fraud is the knowledge of a particular fact, our courts tend to distinguish between knowledge and belief of that fact. Although knowledge of a fact can generally be inferred from evidence, a belief of that fact only leads to an inference of knowledge where the party would have some justification for that belief, and the means of establishing it[17].

[49] Knowledge of a fact can be inferred where it results from what was referred to in *Rex v Meyers*[18] as a 'fraudulent diligence in ignorance', which like fraud, is very difficult to prove[19]. As Greenberg JA said in *Meyers, supra,* at page 382, quoting Halsbury's Laws of England (2nd edition, volume 23):

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[16] *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A) at 822.
[17] *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) para 22.
[18] 1948 (1) SA 375 (A) at 382. See also: RH Christies & GB Bradfield: Christies Law of Contract in South Africa, 6th Ed pages 305-306.
[19] *Road Accident Fund v Shabangu and Another* 2005 (1) SA 265 (SCA) para 18.

> " … a belief is not honest [and is therefore fraudulent] which 'though in fact entertained by the representer may have been itself the outcome of fraudulent diligence in ignorance – that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense) believe'."

[50] Following from the above the learned Judge went on to state the following:

> "It appears to me to follow that, in English law, proof of negligence in making enquiries as to the facts which are represented, even though it be of so extreme a degree as to merit the epithet of 'gross', can never in itself amount to proof of absence of an honest belief, and the same applies to an absence of reasonable grounds for the belief (see *Derry v Peek (supra,* at pp 361, 363, 369 and 375) and of *Bassner v Trigger* (1946 AD 83 at p 106). But, as is pointed out in both these cases, absence of reasonable grounds for belief in the truth of what is stated may provide cogent evidence that there was in fact no such belief."

[51] In the circumstances and based on the legal principles set out above, I am of the view that no matter how strongly SARS may feel about Mr Sassin's involvement with Badenhorst and whether this amounts to fraud, is a matter that cannot be decided on these papers. The position adopted by SARS in these proceedings is that a finding of fraud must be made against Mr Sassin based on so-called 'evidence' gathered by it, without affording Mr Sassin an opportunity to cross-examine his accusers and/or to give oral evidence in order to clear his name. In my view, no court, acting reasonably, should be prepared to make such a finding on paper.

[52] From what I have said thus far regarding the difficulties facing the applicant in motion proceedings, it is clear that this application has no prospect of succeeding as it stands. The applicant's difficulties are compounded even further by its failure to prove the authenticity of the s50 inquiry evidence. I deal with this aspect herebelow.

APPLICANT'S FAILURE TO PROVE THE AUTHENTICITY OF THE s50 EVIDENCE

[53] In attempting to show that Mr Sassin was aware of the fraudulent scheme conducted by Badenhorst and that he was a party to it, the applicant relies on the evidence that was gathered at the s50 inquiry. There are several difficulties with this which I highlight hereunder.

> [53.1] The *first* is that the applicant simply failed to prove the authenticity of that evidence in its founding papers[20]. This point was raised pertinently by the respondents in their answering affidavit. This was conceded by the applicant in reply. In order to ameliorate the situation, the applicant then put up certain affidavits, notably by the van der Westhuizens and a Mr van Driel, in which they merely confirm that they have read their evidence given at the inquiry and that they confirm the correctness thereof. Additionally, the applicant put up a transcriber's certificate which it avers was 'inadvertently' not annexed to the founding affidavit.

[20] *Rex v Klisser and Rosenberg* 1949 (3) SA 807 (W) at 813-814; *Du Plessis NO v Oosthuizen; Du Plessis NO v Van Zyl* 1995 (3) SA 604 (OPA) at 609.

[53.2] The transcriber's certificate[21] referred to above has some curious features to it: *firstly*, it is not signed by the transcriber concerned; *secondly*, the inquiry seems to have a heading, viz: 'South African Revenue Services v PJV Badenhorst and Others,' … *thirdly*, the transcriber indicates that although he/she is not a qualified translator, he/she translated the Afrikaans sections to be of assistance; *fourthly*, he/she inserted headings (on the transcript) as a 'possible helpful tool to the reader of the aforegoing', and *fifthly*, indicates that 10 digital files were recorded and the number of pages amount to 244. No affidavit was put up by the transcriber concerned confirming any of the above. While the number of pages has been given as 244, in truth and in fact, the selected portions put up by the applicant in these proceedings far exceed 244. In my view, no reliance can be placed on the transcriber's certificate.

[53.3] The *second* is that the transcript put up by the applicant is incomplete. The applicant has elected to use only those portions which it seeks to rely on for a finding against Mr Sassin. None of the documentary evidence referred to by those who testified at the inquiry (including Mr and Mrs Sassin) have been put up. The applicant adopts the view that the respondents are not entitled either to the full transcript or to the documents referred to in the evidence at the inquiry. This, in my view, is not only fundamentally wrong, it is unfair.

[21] This appears as Annexure 'SARS R5' at page 1237 of the papers.

[53.4] The *third* is that the evidence given by witnesses (in the absence of Mr and Mrs Sassin) at the inquiry was never tested under cross-examination. That evidence in my view, amounts to hearsay.

[54] In spite of all of this, Posthumus, the main deponent to the applicant's founding affidavit not only freely refers to selective portions of this evidence but goes on to draw inferences therefrom and expresses opinions on the veracity of such evidence and the probabilities. All this is done in an effort to persuade the court that Mr Sassin acted fraudulently. He also does this well knowing that such evidence of SARS witnesses as well as that of Mr and Mrs Sassin, even if held to be admissible, merely proves that that was what they said at the inquiry and not that what they said was true[22].

[55] Before I leave this aspect I consider it necessary to comment about the manner in which the founding affidavit was drafted. It goes without saying that in application proceedings the affidavits constitute not only the evidence but also the pleadings[23]. While it is not necessary that the affidavits 'should set out a formal declaration or [an answering] affidavit set out a formal plea, these documents should contain, in the evidence they set out, all that would have been necessary in a trial'[24]. In *Hart v Pinetown Drive-in Cinema (Pty) Ltd*[25], it was pointed out by Miller J that:

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[22] *Du Plessis NO v Oosthuizen en 'n Ander* 1999 (2) SA 191 (OPA) at 206 D-E; *African Guarantee and Indemnity Co. Ltd v Moni* 1916 AD 524 at 532.
[23] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at 600, referring to previous decisions; *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust* and others 2008 (2) SA 184 (SCA) at 200.
[24] Per Millin J in *SA Diamond Workers' Union v Master Diamond Cutters' Association of SA* 1948 (2) PH A83 (T) at 283; see also, *Saunders Valve Co. Ltd v Insamcor (Pty) Ltd* 1985(1) SA 146 (T) at 149 (C).
[25] 1972 (1) SA 464 (D) at 469 C-E.

> ". . .where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound."

[56] It follows that an application not only takes the place of a declaration in an action but also of essential evidence to be led at trial. An application is therefore required to include all facts which are necessary for determination of the issue in the applicants favour[26].

[57] In the present matter the founding affidavit has been drafted in a most unusual manner. In relying on the body of evidence procured at the s50 inquiry, Posthumus makes reference to this evidence by way of footnotes. This requires of a reader, at every step of the way, to trawl through pages upon pages of documents to make sense of what the deponent seeks to convey. I consider this approach by the applicant to be highly improper and an abuse of the court process. If this is a kind of practice that is now developing amongst practitioners, it is to be deprecated. This is certainly not how an applicant is required to place its case before a court let alone expect a respondent to provide a meaningful response thereto.

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[26] *Total South Africa (Pty)Limited v Nedcor Bank Limited* [1997] 3 All SA 562 (W) at 567.

WHETHER THE TA ACT PERMITS THE USE OF EVIDENCE GIVEN AT A s50 INQUIRY IN THIS APPLICATION

[58] I have already shown that the evidence obtained by SARS at the s50 inquiry and which it seeks to rely upon in these proceedings was never authenticated or proved. Posthumus has said nothing about the admissibility of such evidence in the founding affidavit. The applicant's right to use such evidence was specifically challenged by the respondent's in their answering affidavit. In reply Posthumus avers (again, for the first time) that SARS was entitled to rely on the s50 inquiry evidence by virtue of s56(4) of the TA Act[27]. In light of this it becomes necessary to examine the provisions of s56(4).

[59] It would seem to me that s56(4) falls to be interpreted having regard to its language, context and purpose. The correct approach to interpretation in this regard is that set out by the SCA in *KPMG Chartered Accountants (SA) v Securefin Ltd*[28] which was followed more recently in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[29], as follows:

> "Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own.[13] It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.*[14] The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the

[27] Applicant's replying affidavit, page 1064, para 19.
[28] 2009(4) SA 399 (SCA) para [39].
[29] 2012(4) SA 593 (SCA) para [18].

> apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.[15] The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',[16] read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."
>
> [footnotes omitted]

[60] I consider that part of that context would require that it be construed against the backdrop of the Constitution[30]. This requires that all legislation, and the rules of court, must be interpreted where this is reasonably possible in a way that would render the statute (or the rule in question) constitutional. Additionally, where two interpretations are possible, both of which are constitutionally compatible, s39(2) of the Constitution requires a court to adopt an interpretation that better promotes the spirit, purport and objects of the Bill of Rights[31]. The applicable provisions of the Constitution in this regard are the following:

[60.1] s59(1), which provides that:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[60.2] s9(2), which provides that:

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[30] Constitution of the Republic of South Africa 1996.

[31] *De Beer NO v North Central Local Council and South Central Local Council and Others* 2011)11) BCLR (CC) at [11]; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors v Smit NO* 2001(1) SA 545 (CC) at [22] and [23]; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009(1) SA 337 (CC) at [46], [84] and [107].

> "Equality includes the full and equal enjoyment of all rights and freedoms."

[60.3] s34, which provides that:

> "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 of law."

[61] Ponnan JA in *Legal Aid Board v S and Others*[32], pointed out that:

> "The adversarial system that prevails in this country assumes a forensic contest that is more or less evenly matched. The sad reality is all too frequently it is not."

[62] The above was stated in the context of criminal proceedings. In my view, the same holds true for civil proceedings as well. I agree with counsel for the respondents that "a certain measure of equality of arms" must prevail. And so it should. Anything short of this would render proceedings (such as this) or a trial unfair thus resulting in a failure of justice.

[63] In the matter of *Nyathi v MEC for Department of Health, Gauteng and Another*[33], the Constitutional Court held that s3 of the State Liability Act, which prevented execution of a judgment debt against the State, was inconsistent with s9(1) of the Constitution, not only because it " … places the State above the law …"[34] but also because it did not give a private litigant who obtained a judgment

[32] [2011] 1 All SA 378 (SCA) at [1].
[33] 2008(5) SA 94 (CC).
[34] At para [44].

against the State the same protection that a judgment creditor enjoys against a private litigant[35].

[64] It therefore seems to me that SARS powers (on the assumption that it is entitled to bring this application in this fashion) ought not to be interpreted so as to permit it to enjoy an advantage which a private litigant does not have particularly where, as in the present case, SARS sues (on claim 1) as a cessionary of common law claims from private cedents such as Badenhorst and Benietha.

[65] I turn to examine the provisions of s56(4) within its context in the TA Act. The following provisions seem to be relevant:

[65.1] Section 11 deals with 'legal proceedings' and provides in s11(1) that:

> "No SARS official other than the Commissioner or a SARS official duly authorised by the Commissioner may institute or defend civil proceedings on behalf of the Commissioner."

[65.2] Part C of Chapter 5 of the TA Act (i.e. s52-58) deals with inquiries. S52 provides:

> "52 Inquiry proceedings (2) The presiding officer must ensure that the recording of the proceedings and evidence at the inquiry is of a standard that would meet the standard required for the proceedings and evidence to be used in a court of law."

[65.3] S56 provides as follows:

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[35] At para [40].

"56 Confidentiality of proceedings –

(1) An inquiry under this part is private and confidential.

(2) The presiding officer may, on request, exclude a person from the inquiry of the person's attendance is prejudicial to the inquiry.

(3) Section 69 applies with the necessary changes to persons present at the questioning of a person, including the person being questioned.

(4) Subject to section 57(2), SARS may use evidence given by a person under oath or solemn declaration at an inquiry in subsequent proceedings involving the person or another person."

[65,4] S57(2) provides that a person may not refuse to answer a question during the inquiry on the grounds that it may incriminate him. S57(3) stipulates that incriminating evidence obtained at the inquiry 'is not admissible in criminal proceedings against the person giving the evidence' except where the proceedings relate to perjury.

[65.5] S58 provides:

"58 Inquiry not suspended by civil or criminal proceedings:- unless a court orders otherwise, an inquiry relating to a person referred to in section 51(1)(a) must proceed despite the fact that a civil or criminal proceeding is pending or contemplated against or involves the person, a witness or potential witness in the inquiry, or another person whose affairs may be investigated in the course of the inquiry."

[65.6] S69 Provides:

"69 Secrecy of taxpayer information and general disclosure:-

> (1) A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official.''

> [65.7] Chapter 8 deals with assessments. Chapter 9 deals with dispute resolution. This includes proceedings to dispute an assessment (s104 – 106); proceedings for an appeal against an assessment or decision before a tax board (s107–114); proceedings for an appeal to a tax court (s115-132); proceedings for an appeal against a decision of a tax court (s133-137); proceedings for an appeal to the SCA (s138-139); proceedings for the settlement of disputes (s142-150). SARS also has the power to institute liquidation and sequestration proceedings. In terms of s163 it is also entitled to apply for a preservation order (without notice to the taxpayer).

[66] S56(4), as pointed out by counsel for the respondents, is nested within the section entitled 'Confidentiality of Proceedings' in Part C of the TA Act which deals essentially with inquiry proceedings. This suggests strongly that where s56(4) speaks of 'proceedings' as opposed to 'civil proceedings' or 'legal proceedings' or 'civil or criminal proceedings', as it does elsewhere in the TA Act, this must be interpreted in its context to mean inquiry proceedings or in its widest permissible sense, to proceedings under Chapter 9 of the TA Act which are confidential.

[67] It would seem to me that the above is a correct interpretation for the reason that s56(4) does not legislate for the use of evidence "against a person", which is the usual pointer to the use in civil or criminal proceedings, but rather

for its use in proceedings "involving the person or another person". Moreover, s56(3), read with s69, confirms that the evidence taken at the inquiry must be kept confidential.

[68] Whilst I have no difficulty in principle regarding the important public function that SARS is required to perform in the collection of taxes in order to enable government to comply with its constitutional duties, I do have a difficulty when SARS sets out to achieve its aims in an unfair, unconstitutional and prejudicial manner, as it seeks to do in the present matter. Admittedly, SARS has extraordinary and wide-ranging powers in terms of the TA Act as well as the South African Revenue Act, Act 34 of 1997 (the SARS Act), in order to carry out its duties. I do not believe, however, that our courts should sanction any conduct on the part of SARS and/or its officials which fall foul of the Constitution and the Bill of Rights.

[69] I accordingly find that there is some substance in the argument advanced on behalf of the respondents to the effect that to permit the use of evidence compelled at a s50 inquiry in subsequent civil proceedings against any person, would mean that SARS would enjoy an unfair advantage against such person (in this case Mr Sassin) for at least two reasons: the *first* is that it could compel a person to put up his/her version under oath and to then use that version against him/her; and the *second* is that it would render the compelled hearsay evidence of other witnesses against such a person to be admissible against him/her in the absence of an application under s3 of the Law of Evidence Amendment Act 45 of 1988[36].

[36] *O'Shea NO v Van Zyl and Others NNO* 2012(1) SA 90 (SCA) at 95D-96F.

OTHER MATTERS

[70] In light of the conclusion I have reached in this matter, I do not consider it necessary to address the further defences raised by the respondents to this application.

COURT'S DISCRETION

[71] It is well-established that where, at the hearing of application proceedings (as in this case), a dispute of fact arises on the affidavits and cannot be decided without the hearing of oral evidence, the court has a discretion as to the future course of the proceedings, and may (i) dismiss the application with costs; (ii) order that oral evidence be heard in terms of the rules of court, or (iii) order the parties to trial[37].

[72] Rule 6(5)(g) of the Uniform Rules provides as follows:

> "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

[37] *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, supra, at 1162, 1168; *Joosab v Shah* 1972(4) SA 298 (R); *Cullen v Haupt* 1988(4) SA 39 (C) at 40F-41C; *Pressma Services v Schuttler* 1990(2) SA 411 (c) at 419 C-I. See also the comments by the learned authors Cilliers, Loots and Nel of The Civil Practice of High Courts of South Africa (Herbstein & van Winsen), 5th Edition, pages 459-468.

REFERRAL TO TRIAL

[73] As I mentioned earlier on, I was urged by counsel for the respondents to either dismiss the application with costs or to refer it to trial in the event of my finding that a real, genuine and *bona fide* dispute of fact is to be found on the papers. I am not inclined to dismiss the application, nor am I inclined to simply order that oral evidence be heard on certain defined issues as proposed by Mr van der Merwe. In my view the factual dispute which arises in this matter raises a number of wide-ranging factual enquiries which involve real and substantial questions of fact which will involve issues of credibility. Moreover, these factual enquiries would require an examination of the roles played not only of Badenhorst and Mr Sassin but also of Ms Janse van Rensburg as well as the van der Westhuizens. They would also involve the role played by SARS itself which continued to make refunds to Benietha in the face of an admitted fraud on the part of Badenhorst/SA Global. I do not believe that the procedure envisaged by Rule 6(5)(g) was intended for all these purposes[38]. In these circumstances, it would be more appropriate to order the parties to trial on certain conditions which will be set out in the order which is to follow herebelow.

COSTS

[74] The question of costs remain. I see no reason why the applicant should not bear the costs of this application including the costs of the argument on 27 August 2015. Quite clearly its choice of procedure was incorrect. In my view, the applicant acted rather presumptuously by approaching the court in this fashion. Additionally, and in any event, I consider that the respondents' have achieved substantial success in the preliminary arguments dealt with by me herein.

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[38] *Less and Another v Bornstein and Another* 1948(4) SA 333 (C) at 337.

ORDER

[75] In the result, I make the following order:

(a) The parties are ordered to trial.

(b) The Notice of Motion shall stand as a summons with the applicant to file its declaration within one (1) month from date of delivery of this judgment.

(c) The respondents are directed to file their plea (or any other pleading) within 20 days after delivery of the applicant's declaration.

(d) The applicant is ordered to pay the respondents' costs of the application including the costs of the argument on 27 August 2015, such costs to include the costs consequent upon the employment of two counsel.

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JUDGMENT RESERVED: **27 AUGUST 2015**

JUDGMENT HANDED DOWN: **21 OCTOBER 2015**

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