VONNISSE

JUST HOW VOLUNTARY IS "VOLUNTARY" FOR PURPOSE OF A VOLUNTARY DISCLOSURE APPLICATION IN TERMS OF SECTION 226 OF THE TAX ADMINISTRATION ACT 28 OF 2011?

Purveyors South Africa Mine Services (Pty) Ltd v Commissioner: South African Revenue Service (61689/2019) [2020] ZAGPPHC 404 (25 Aug 2020)

OPSOMMING

Hoe vrywillig is "vrywillig" vir doeleindes van 'n vrywillige openbaarmakingsaansoek ingevolge artikel 226 van die Belastingadministrasiewet 28 van 2011?

Artikel 226, saamgelees met artikel 227 van die Wet op Belastingadministrasie 28 van 2011, maak daarvoor voorsiening dat 'n belastingpligtige sy nienakoming kan regstel deur om 'n vrywillige openbaarmakingsooreekoms aansoek te doen. Ingevolge hierdie ooreenkoms kan die belastingpligtige kwytskelding van nie-nakomingsboetes, onderstellingsboetes, en strafregterlike vervolging ontvang. Ten einde by hierdie program baat te vind, is dit onder andere 'n vereiste dat die belastingpligtige vrywillig met die hele sak patats vorendag kom. In *Purveyors South Africa Mine Services (Pty) Ltd v Commissioner: South African Revenue Service* (61689/2019) [2020] ZAGPPHC 404 (25 Aug 2020) het die vraag ontstaan of die openbaarmaking van inligting wat reeds aan die kommissaris bekend is, 'n vrywillige openbaarmaking daarstel om by die openbaarmakingsooreenkomsprogram baat te vind. Hierdie bydrae neem die hof se uitleg en toepassing van artikels 226 en 227 van die Wet op Belastingadministrasie indringend onder die loep en kritiseer veral die betekenis wat die hof aan die woord "vrywillig" toedig.

1 Introduction

Part B of Chapter 16 of the Tax Administration Act 28 of 2011 ("TAA") provides for a voluntary disclosure programme ("VDP") in terms of which a defaulting taxpayer may correct her non-compliance by way of application for a voluntary disclosure agreement ("VDA"). In terms of the VDA the defaulting taxpayer can get relief in the form of remittance of understatement penalties (in accordance with section 223), remittance of non-compliance penalties, and a permanent stay of criminal prosecution (s 229). Obviously, to benefit from a VDA, the defaulting taxpayer must disclose the entire default complete in all material aspects (s 227(c)), and the taxpayer must do so voluntarily (s 227(a)). In *Purveyors South Africa Mine Services (Pty) Ltd v Commissioner: South African Revenue Service* (61689/2019) [2020] ZAGPPHC 404 (25 August 2020) ("*Purveyors*") the meaning of "voluntary" for purposes of the VDP came into question. Specifically, the question arose whether a disclosure of facts that falls within the knowledge of the South African Revenue Service ("SARS") is still a voluntary disclosure of a tax default. We criticise the court's interpretation of the scope and application of sections 226 and 227 of the TAA. In addition, we dissect the meaning that the court attached to the word "voluntary" from a forensic linguistics perspective.

2 Facts

During 2015, Purveyors imported an aircraft into South Africa for the purpose of the transport of goods and persons to other African countries (*Purveyors* para 4). At the time, Purveyors did not account for Value Added Tax ("VAT") on the import. During 2016, Purveyors presented uncertainties about its failure to account for VAT on the import (*ibid*). Accordingly, during 2016 Purveyors engaged with representatives of SARS to gauge its liability for VAT on the import (*ibid*). In doing so, Purveyors revealed to the SARS representatives no more than a broad overview of the facts (*ibid*). On 1 February 2017, SARS conveyed to Purveyors that VAT should have been paid on the import and that the non-compliance is likely to attract penalties and interest (*ibid*). Important to note is that there is no indication that this communication from SARS was done as official communication between SARS and a taxpayer. The communication between SARS and Purveyors was limited to e-mail and telephone conversations. In one of the e-mails, the SARS representative indicated that there is no waiver of potential penalties and that the amount outstanding is subject to interest. On 16 May 2017, the SARS representative wrote in an e-mail that Purveyors must address their non-compliance because a considerable time has lapsed since it conveyed the non-compliance to SARS (para 6). It was only on 4 April 2018 that Purveyors applied for voluntary disclosure relief. A senior SARS official declined the application on the basis that Purveyors did not meet the requirements set out in section 227 of the TAA to qualify for a VDA (para 4).

3 Judgment

In the main, a VDP rests on three concepts, namely, "default", "voluntary", and "disclosure" (para 5). Section 225 defines a default to mean "the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a "tax position", where such submission, non-submission, or adoption resulted in an understatement". There is no doubt that Purveyors' failure to account for VAT on the import of the aircraft constitutes a "default" (*ibid*). Purveyors argued that since SARS did not give notice of the commencement of an audit or criminal investigation, their application for a VDP relief falls outside the scope of section 226(2), and that the application falls within the ambit of section 226(a) read with section 227 (para 7). Accordingly, in the absence of a notice of such investigation as envisaged in section 226(2), the disclosure of information of which SARS has prior knowledge, remains voluntary (para 9). SARS argued that because they have prior knowledge of the information, there can be no disclosure (para 11). In addition, any such disclosure is made in an attempt to avoid penalties and interest (*ibid*). Accordingly, it cannot be said that the disclosure is made voluntary (*ibid*). Purveyors' argument that, in the absence of a notice of an audit investigation in terms of section 226(2), the only possible logical result is that the VDP is voluntary must fail (para 11). This is so because circumstances may exist that would classify the disclosure as involuntary (*ibid*). The current case, where the taxpayer is driven by "compulsion", is one of such circumstances rendering the disclosure involuntary (paras 11–12). In addition, the information disclosed under the VDP application is information known to SARS already. There can be no disclosure to a person if that person has knowledge thereof already (para 13). As such, although there was a default by Purveyors, there was no disclosure nor was the so-called disclosure voluntary (para 14).

4 VDP in brief

For purpose of understanding our critique on the judgment, it is prudent to discuss the VDP application briefly. In terms of section 226(1) "[a] person may apply, whether in a personal, representative, withholding, or other capacity for voluntary disclosure relief". Section 226(1) must be read together with section 227 that lists the requirements of a "voluntary disclosure" for a person to qualify for the VDP relief as –

> "(a) be voluntary;
> (b) involve a "default" which has not occurred within five years of the disclosure of a similar "default" by the applicant or person referred to in section 226(3);
> (c) be full and complete in all material respects;
> (d) involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223;
> (e) not result in a refund due by SARS; and
> (f) be made in the prescribed form and manner".

Importantly, where a person seeking the relief has been given notice of the commencement of an audit or criminal investigation into the affairs of that person, a disclosure is deemed to be not voluntary unless, having regard to the circumstances of the audit or investigation –

(a) the default so disclosed would otherwise not have been detected during the audit or investigation; and

(b) it is in the interest of good management of tax resources to approve an application for such disclosure (section 226(2)).

Once the VDP application has been approved, the senior SARS official enters into a VDA with the defaulting taxpayer (section 230), and grants the defaulting taxpayer the following VDP relief –

(a) SARS will not pursue criminal prosecution for a tax offence arising from the default (section 229(a));

(b) remittance understatement penalties in accordance with columns 5 or 6 of the understatement penalty table in section 223 (section 229(b)); and

(c) remittance of 100 per cent of any administrative non-compliance penalties imposed in terms of the TAA or any other tax Act (section 229(c)).

4 1 *Purpose of the VDP*

It is important to note that the VDP is designed primarily to settle disputes with defaulting taxpayers on terms favourable to the taxpayer to eliminate long and costly audits followed by long and costly litigation (see, in general, SARS *Memorandum on the objects of the Tax Administration Bill* (2011) 199; and Rudnicki and De Jager "The voluntary disclosure programme" 2010 (4) *Business Tax and Company Law Quarterly* 27–34). In other words, the VDP relief serves as a statutory bargaining tool for SARS to solicit taxpayer disclosure of non-compliance in an effort to utilise state resources more effectively rather than to spend it on audit investigations and possible subsequent litigation. It has become a modern-day phenomenon the world over for revenue authorities to adopt a permanent tax amnesty regime (Langenmayr "Voluntary disclosure of evaded taxes – Increasing revenue, or increasing incentives to evade?" 2017 (151) *Journal of Public Economics* 110; OECD *Offshore voluntary disclosure: comparative analysis, guidance and policy advice* 2010; and OECD *Update on voluntary disclosure programmes: A pathway to tax compliance* 2015). While the motivation

for some states to adopt a permanent tax amnesty regime is to raise revenue (Alm, Mckee and Beck "Amazing grace: tax amnesties and compliance" (43) *National Tax Journal* 23), the OECD and commentators agree that the main drive behind tax amnesty must remain the benefit of lowered administrative costs of tax compliance (Langenmayer 110; OECD 2010 11–12). In other words, the VDP is a low-cost compliance initiative to encourage taxpayers to self-correct previous non-compliance or tax defaults.

4 2 *Motivations in VDP application decision-making*

Taxpayer decision-making – also known as the intention of the taxpayer – is complex and based on various intrinsic and extrinsic factors (Alm, Kirchler and Muehlbacher "Combining psychology and economics in the analysis of compliance: From enforcement to cooperation" 2012 (42) *Economic Analysis & Policy* 133–151). Finding the taxpayer's intention objectively requires an analysis of the intrinsic and extrinsic factors. There is no one-size-fits-all test. For purpose of understanding the meaning of "voluntary" (as we discuss below extensively) in terms of section 227, it is important to understand what drives a person to come forward to disclose a tax default *voluntarily*. In the main, studies about the success of tax amnesty regimes suggest that a decision to disclose non-compliance or default is pillared primarily on economic decisions (Sandmo "The theory of tax evasion: A retrospective review" 2005 (58(4)) *National Tax Journal* 643–663; Alm and Beck "Wiping the slate clean: Individual response to state tax amnesties 1991 (57) *Southern Economic Journal* 1043–1053; and Dunn *et al* "The influence of guilt cognitions on taxpayers' voluntary disclosures 2018 (148) *Journal for Business Ethics* 689–701). Thus, the taxpayer weighs the economic impact of paying penalties versus coming clean and getting VDP relief. The taxpayer assesses the size of the penalty versus the probability of getting caught and the effort of coming clean (Farrar and Hausserman "An exploratory investigation of extrinsic and intrinsic motivations in tax amnesty decision-making" 2016 (2) *Journal of Tax Administration* 54). The studies show that it is a no brainer that a taxpayer would opt for paying no or reduced penalties because of the economic impact of a penalty on their financial well-being (*ibid* 55). Accordingly, the primary force is not a fear of penalties, but rather the incentive of escaping penalties. Of course, penalties apply only if the taxpayer's non-compliance or default is caught out. Secondary to the economic decision is the taxpayer's assessment of the likelihood of getting caught (Sandmo; Alm and Beck; Dunn *et al*; Farrar and Hausserman). Dunn *et al* note that the assessment of the likelihood of getting caught is not necessarily driven by the fear of getting caught but rather that it is driven by a cognition of guilt (Dunn *et al* 689). The guilt cognition in ethical decision-making is based on three inter-linked emotions, namely, a recognition of the responsibility of the decision (tax default), justification for the tax default, and a foreseeability of the consequences of the tax default (*ibid*). It can be argued that the foreseeability of the consequences of the tax default, namely, penalties, criminal prosecution, and interest, may invoke fear in the taxpayer. Farrar and Hausserman choose to refer to the taxpayer's "concern about how the taxpayer will be treated" as opposed to a fear of the consequences (Farrar and Hausserman 54). Interestingly, Dunn *et al* opine that shame, although an integral part of the emotion of guilt, is not applicable in the case of a tax amnesty application (*ibid*). This is so because the tax amnesty agreement is a confidential agreement between the taxpayer and the revenue authority. Dunn *et al*, however, did not consider the shame of getting caught

as part of the ethical decision-making to come clean. The VDA entered into between the senior SARS official and the taxpayer is confidential. Yet, section 74 of the TAA provides that the Commissioner may publish the names of taxpayers convicted of a tax offence as well as the particulars of the offence and the penalties or sentence imposed. Since 2018, SARS published the names of several tax offenders either through media statements or newspaper articles in well-known newspapers (See, in general, Business Tech "SARS to 'name and shame' tax dodgers in South Africa" 1 Aug 2020 available at https://businesstech.co.za/news/business-opinion/421650/sars-to-name-and-shame-tax-dodgers-in-south-africa/#:~:text=It%20seems%20the%20South%20African,technical%20at%20Tax%20Consulting%20SA (accessed on 16-09-2020). But is it really a fear of shame or a fear of criminal prosecution that motivates the taxpayer to come forward? Or, does the taxpayer merely want to protect her good name or her intellectual property (such as a well-known trademark)? As pointed out above, this is a complex investigation that is unlikely to be determined accurately. The experiment by Farrar and Hausserman, in respect of taxpayers in the United States of America, reveals that the most important extrinsic motivator is the desire not to pay the penalty, and the most important intrinsic factor is the feeling of responsibility to pay the taxes owed (Farrar and Hausserman 60). As with any experiment, the results must be interpreted with caution. Factors unique to specific circumstances may yield a different result.

4 3 *What motivated Purveyors?*

Frabricius J agreed with SARS that Purveyors feared the imposition of penalties (para 12) and that this fear motivated them to apply for VDP relief to avoid the penalties (*ibid*). This is so because Purveyors were warned that they would be liable for penalties and interest (*ibid*). As such, in the context of Part B of chapter 16 of the TAA, a disclosure cannot be made voluntary where the taxpayer has been warned of the penalties (*ibid*). As pointed out above, a taxpayer has an intrinsic desire not to pay penalties. A penalty is an extrinsic economic motivation tool to trigger the taxpayer's desire in an attempt to ensure tax compliance. The desire can motivate the taxpayer to be tax compliant from the start, or to rectify non-compliance. This desire is coupled with the cognisance of the feeling of responsibility to pay taxes. Fear is, for the most part, a secondary feeling that cannot be determined objectively. Attributing fear to the taxpayer's subjective intention by merely looking at the facts is speculation. We can explain this by way of two examples.

Example 1: I have a fear of having my things stolen during a break-in. I also have a desire not to suffer patrimonial loss. I can prevent the potential patrimonial loss (during a break-in) by acquiring various crime-prevention tools such as an alarm, burglar bars, electric fencing, and a security guard. Or I can choose to never leave the house and stay awake and protect my things. I choose to install an alarm with 24-hour armed response. Can it be said I installed the alarm involuntarily because of fear? Without asking me directly, any observation is mere speculation.

Example 2: The National Road Traffic Act 93 of 1996 provides for various fines for traffic offences. Not wearing a seatbelt is not only dangerous, it is also a traffic offence punishable with a fine. I have a strong desire not to pay traffic fines. I also have a strong desire not to get involved in a motor-vehicle collision, and if I do, I want to get out alive with as little injuries as possible. Do I wear a

seatbelt because I fear paying a penalty or because I recognise the safety value of wearing one? Without asking me directly, any observation is mere speculation.

It is obvious, from the facts, that Purveyors showed concern for their non-compliance. This behaviour is evident of a feeling of responsibility (guilt) that was triggered. Realising the guilt, Purveyors can choose to come clean and disclose the non-compliance or keep quiet and hope for the best. Since it makes financial sense not to pay penalties, it is a natural desire to avoid paying the penalties. There was only one way to satisfy both desires: apply for VDP relief. The decision to apply for VDP, in our view, is motivated by logic rather than fear. That said, even this observation is mere speculation as to Purveyors' real intention.

We believe a linguistic analysis of the meaning of "voluntary" and "disclose" will aid in determining if the alleged "fear of penalties" compelled Purveyors to apply for VPD relief.

5 Interpretation of "voluntary", "constraint" and "disclose"

Using linguistic devices to better understand and interpret word problems as they occur in legal settings is no longer a novel approach. Although South African courts remain hesitant to accept linguistic methodologies to help solve legal-linguistic issues, scholars on both sides of the spectrum have used (and criticised) language tools for statutory interpretation (Anderson "Misreading like a lawyer: cognitive bias in statutory interpretation" 2014 *Harvard Law Review* 1522; Hutton *Word meaning and legal interpretation* (2014); Langford *The semantics of crime: a linguistic analysis* (2002)). Not only have legal fictions like "ordinary meaning" and "the reasonable person" been debated (Solan "Linguistic issues in statutory interpretation" in *The Oxford handbook of language and law* (2012) 87; Slocum *Ordinary meaning* (2015); Carney "A legal fallacy? Testing the ordinariness of 'ordinary meaning'" 2020 *SALJ* 269), but arguments in favour of linguistic approaches to consider and assign meaning to contested words have also been offered (Shuy *Fighting over words* (2008); Butters "If the wages of sin are for death: the semantics and pragmatics of a statutory ambiguity" 1993 *American Speech* 83; Sanderson "Linguistic analysis of competing trademarks" 2007 *Language Matters* 132). Law depends on language. For many legal scholars and practitioners, this means that linguistic investigations start and end with dictionary searches. This is an ignorant approach. Although dictionaries are helpful resources that aid as a starting point, it should never be the train's terminus (Cunningham, Green and Kaplan "Plain meaning and hard cases" 1994 *Yale Law Review* 1561; Note "Looking it up: dictionaries and statutory interpretation" 1994 *Harvard Law Review* 1437; Thumma and Kirchmeier "The lexicon has become a fortress: the United States Supreme Court's use of dictionaries" 1999 *Buffalo Law Review* 241). A far richer yield can be expected when a disputed word is analysed linguistically (when necessary). A local example of a language approach to a tax-related investigation is that of Van Zyl and Carney in "A cry for certainty as to the application of 'accrued to' for purposes of section 1 of the Income Tax Act 58 of 1962" 2018 *THRHR* 484. In their interpretation of the phrase "accrued to" they applied cognitive linguistic devices like semantic frames and semantic field theory to argue that "interest" forms part of "finance charges". They also made the important observation that words cannot simply be divorced from the network they form part of. Instead, a word's meaning depends simultaneously on its semantic and pragmatic context – the

way words relate to one another as well as the way speakers use words from day-to-day.

When the meaning of words is contested, it essentially becomes a lexical semantic investigation; as such, it involves an individual or collective's lexicon. Murphy (Murphy *Lexical meaning* (2010) 3) defines "lexicon" as "a collection of information about words and similar linguistic expressions in a language". It not only refers to the actual vocabulary within a language (the lexis), but also to our knowledge about the words contained in it. When speakers use words (either productively or receptively), they link them to related concepts (mental images), which encompasses everything they know about those words, including the context in which they are used (Murphy 38). Meaning is often arbitrary and elusive; as a result, speakers should be cautious to assign additional criteria and meaning to words and hold them up as truths, as has been the case in *S v Molefe* (A240/12) [2012] ZAGPPHC 52; 2012 2 SACR 574 (GNP) (3 April 2012) and *Road Accident Fund v Mbele* (555/19) [2020] ZASCA 72 (22 June 2020), for instance.

Another thing to keep in mind is the fact that words and their many meanings are often related conceptually and semantically (Geeraerts *Theories of lexical semantics* (2010) 54, 59, 66; Saeed *Semantics* (2009) 38; 63). By tracing these relations we can appraise a contested word's meaning as it applies to a given context. As "voluntary", "constraint" and "disclose" are undefined in section 1, and the direct context of sections 226 and 227 shed no light on what these words mean, their ordinary meaning must suffice. In fact, as Fabricius J in the case under discussion cited from *CSARS v United Manganese of Kalahari* (para 9.12), the ordinary meaning of contested words should be the point of departure. However, Fabricius J argues that the ordinary meaning of "voluntary" is flouted due to the presence of two criteria, which are:

(a) SARS's prior knowledge of the case at hand; and

(b) Purveyor's fear of being penalised, which acts as a constraint to free will.

In other words, the fact that SARS supposedly knew about the non-compliance and the possibility that Purveyors disclosed information out of fear, extends beyond the ordinary meaning of "voluntary". Mention is also made of the fact that the disclosure was made a year later, implying that the time lapse could be a third criterion, suggesting that information must be disclosed within a specified timeframe for it to qualify as "voluntary".

In summary, the judgment denotes that a disclosure qualifies as "voluntary" when

(a) information is disclosed out of free will;

(b) information is disclosed without constraint or compulsion;

(c) information is disclosed within a reasonable time; and

(d) disclosure precedes any warnings from SARS.

While the last two criteria are legal in principle and could be gauged by evaluating applicable legislation and correspondences, the first two carry linguistic weight. As there is a clear relationship between "voluntary" and "constraint", we shall direct our focus to those two words first, followed by an appraisal of "disclose".

5 1 *Voluntary and constraint*

As a first step, the relationship between "voluntary" and "constraint" can be gauged through the relation of opposition.

Opposites are co-dependent; therefore, we can usually tell what something is by considering what it is not. Generally, we distinguish between three kinds of opposites: complementary pairs (you either walk or remain stationary), gradable antonyms (you are either fast or slow) and converses (you are either the doctor or the patient). In the instance of "voluntary" we are dealing with complementary pairs, which leaves us with opposites like "compulsory" and "obligatory". "Compulsory disclosure" means that you cannot act in free will; implying that you are constrained by external (legislation) or internal (fear) forces. If the judgment is to be believed, Purveyors' free will was constrained by fear. To know if this is true, we should also consider the meanings of "constraint" and "fear" by studying their relations as well.

The use of complementary pairs assists in understanding the semantic features of words. Semantic features function in binary code and reflect semantic characteristics associated with words, indicated either as a positive or a negative value (Löbner *Semantik* (2003) 201; Murphy 44, 46–47; Saeed 260). For example, we know that a stag is [+male], [+adult] and [+animal]. We also know the opposite is true and that a stag is simultaneously [−female], [−juvenile] and [−human]. Another example is "boiling water": we understand the compound noun features [+temperature] and that this feature is graded [+high], [+extreme]. Logic and conventional meaning assure us that boiling water can never be [+cold]. Below, we consider the semantic features of "voluntary", "constrain" and "fear" (Urdang *The Oxford thesaurus* (1991) 145, 397, 540):

(a) voluntary [+free will; +spontaneous; +optional; −constraint]

(b) constraint [+inhibit; +hinder; +force; −self-control]

(c) fear [+panic; +fright; +respect; −courage]

The semantic features for "voluntary" and "constraint" confirm what we already know, namely that to act voluntarily is to do so without being restricted in any way. Interestingly, to act voluntarily also means that a person has a choice to act. This is an important feature to note, because optionality implies that a person can choose to act regardless of causative forces. In contrast, "constraint" points to the notion that a person has little to no control. Through these features, both words invoke the concept of "agency", which exhibit the features [+action; +instrumentality; +means]. A party either has the means to act or is prevented from doing so. To what extent fear functions as a barrier to agency is not entirely clear from its own semantic features. When someone is afraid, she either panics or admires something greater (for instance, in awe of a god). However, when we consider the features of "agency" once again, it becomes clear that fear could function as an agent too. Therefore, either fear can inhibit someone from acting by freezing her from doing something, or it can compel a person to act. For instance, if a robber points a gun against someone's head, that person could do a number of things out of fear and by force. In this case, the victim has no control and therefore no agency – the actions can no longer be assigned to that person without accounting for the agent as well. However, if a person panics (because she realises they will get into trouble for non-disclosure) and decides to act, fear once more functions as an agent to set things in motion. Fear functions here as a motivator without debilitating the person's self-agency.

To help us understand whether Purveyors' action qualifies as free will or not and whether fear should be included as a semantic criterion of constraint, we subject the facts to a truth-value test based on entailment. This test is often summarised as "if A then B" statements through which a sentence is evaluated for either being true or false. If A is true, then B must be true as well (see Murphy 31–32; Saeed 88, 99). The validity lies in the logical conclusion, which is entailed by its premise. In other words, the conclusion must be a logical consequence of the initial statement. The truth-value depends in large on the logical relation between words, phrases and sentences. See the examples below (where the logical form (p, q) have been substituted for asterisk characters):

(a) The following entailment is true, based on the relation between the words "killed" and "dead".

 * Lerato killed Ithumuleng.

 ** Ithumuleng is dead.

(b) The following entailment is false, based on what we know about the semantic distance between "bought" and "dead".

 * Lerato bought an ice-cream.

 ** Ithumuleng is dead.

(c) The following entailment is false, based on the relation between the words "shot" and "killed".

 * Lerato shot Ithumuleng.

 ** Lerato killed Ithumuleng.

Based on our knowledge of the English language and what we know about the world we live in, we understand that killing can only end in death (a). It is impossible for Ithumuleng to be killed and to survive at the same time and it contravenes the maxim of contradiction: a statement cannot simultaneously be true and false (Löbner 82). In the same vein, we know that buying something like ice-cream does not automatically lead to death, as in (b). The link between "bought" and "dead" is simply too far apart for a logical inference. Of course, there is always a possibility that Lerato poisoned the ice-cream and fed it to Ithumuleng, but this interpretation depends on pragmatic evidence that we simply do not have access to. Without clear evidence, the entailment remains false. The entailment in (c) is false as well, for the simple reason that shooting is not equal to killing. We can shoot at someone and miss, or we can shoot someone in the leg without causing death. Once again, the contextual information present in the statement is too little to accept that A necessarily entails B.

The same challenge is present in the claims that Purveyors acted out of fear. There is no obvious linguistic evidence that Purveyors decided to disclose information about their transaction because they were afraid of SARS or subsequent penalties. And, similar to the example in (c), without very clear pragmatic evidence, the truth-value of statements based on fear claims can hardly be true. As a result, it is foolish to cite fear as a constraint of voluntary disclosure. Consider the following statements based on the facts in *Purveyors v CSARS*, followed by their potential entailments:

(d) Purveyors suspected that it is tax non-compliant.

 * Purveyors is tax non-compliant.

 ** Purveyors suspected it did not pay the necessary taxes.

*** Purveyors did not pay the necessary taxes.

**** Purveyors is afraid of the consequences.

(e) Purveyors contacted a SARS official.

* Purveyors sought advice from a SARS official.

** Purveyors notified a SARS official.

*** A SARS official advised Purveyors.

**** Purveyors is afraid of SARS.

(f) Purveyors explained the transaction in broad terms to the SARS official.

* The SARS official understands the transaction.

** The SARS official warned Purveyors.

*** The SARS official advised Purveyors.

**** Purveyors is afraid of the consequences.

(g) The SARS official explained Purveyor's tax position.

* The SARS official told Purveyors what to do.

** The SARS official issued a notice of commencement of an audit or criminal investigation.

*** Purveyors understands its tax position.

**** Purveyors is afraid of the consequences.

(h) A penalty is payable on tax non-compliance.

* Tax non-compliance is punishable.

** Tax non-compliance has consequences.

*** If you are tax non-compliant, you must pay.

**** Tax non-compliance is impoverishing.

(i) Purveyors applied for voluntary disclosure relief.

* Purveyors sought voluntary disclosure relief.

** Purveyors qualified for voluntary disclosure relief.

*** Purveyors was forced to apply for voluntary disclosure relief.

**** Purveyors was afraid of the consequences.

(j) Purveyors disclosed the entire transaction.

* Purveyors provided all the information it had.

** SARS has all of the facts.

*** Purveyors excluded new information.

*** Purveyors was afraid of penalties.

The relation between the verbs "suspected", "is" and "did not" in (d) are at odds. The former indicates modality whereas the latter two indicate finality. To think that you might be non-compliant is not the same as being non-compliant. Wondering whether you paid your taxes is not the same thing as having paid or refrained from paying your taxes. More importantly, to suspect something does not imply that you are afraid of it.

The relation between the verbs "contacted", "sought", "notified" and "advised" in (e) are also quite removed from one another. Someone can contact a SARS office for a number of reasons of which seeking advice, assistance or information

could realise. However, contacting someone is not the same thing as notifying them and it does not imply that the receiver provided advice in exchange. Likewise, to contact someone does not suggest that you are afraid of him or her.

To explain something to someone else does not guarantee comprehension and neither does the act of explaining logically lead to warnings or advice. Therefore, the entailment in (f) is untrue. The entailment between (f) and (****) is also untrue, because there is no clear contextual relation between the words "explain" and "fear" or "afraid" to support a truth value.

Similar to the suggested entailment in (f), explaining something to someone in (g) is not equal to telling him or her what to do or issuing a notice of any kind. And, it does not mean that a party like Purveyors becomes fearful after speaking to a SARS official. It is perfectly possible for Purveyors to realise its mistake and to decide to rectify it as soon as possible due to their sense of responsibility or its fear to be impoverished through penalties. Whatever the motivation, there is not enough pragmatic evidence that renders this entailment true.

Whereas not all the propositions thus far entail the statements that follow, (h) reflects truth statements based on the relation between the words "penalty", "punishable" and "consequences". They belong to the same semantic field of "punishment". Punishment is a consequence of bad behaviour and it can take many different forms of which penalty is one. There is also a link between paying a penalty and depleting funds, especially if the penalty is heavy. Punishment can, therefore, lead to impoverishment. Yet, (h) does not entail (****), because penalties might be inconsequential.

Although an application for relief implies that you want it (i and *), it does not imply that you either qualified for relief or were forced to apply in the first place (either by fear or by an external force). Purveyors still retains agency; the choice to apply remains theirs. Applying for something does not mean that you are doing it out of fear. Of course, it is a possibility; but there is equal merit in arguing the reverse and without definitive evidence to prove this, the linguistic data indicates no entailment.

Lastly, Purveyors provided the information to its disposal. This does not necessarily suggest that SARS is now in possession of all the relevant information. However, it also does not imply that Purveyors deliberately withheld information considered to be new or relevant – it provided what it had. There is no clear relation between the words "disclose" and "fear" or "afraid". To propose that someone provided information because they were afraid neither affects the nature of the information (whether new or existing) nor prevents the disclosure from taking place. Disclosing information does not entail a fear of penalties. Instead, fear presupposes disclosing information for a number of possible reasons.

Based on the facts of the case, the absence of entailment in sentences (d) to (j) shows it is difficult to prove that fear constrained Purveyors' actions. It is also not apparent to what extent Purveyors relinquished its agency and refrained from choosing when and how to act.

We now examine "disclose".

5 2 *Disclose*

The lexeme "disclosure" denotes a statement that exposes, opens or reveals something, especially new or secret information (compare the Oxford English

dictionary, https://0-www-oed-com.oasis.unisa.ac.za/view/Entry/53779?redirectedFrom=disclosure#eid (accessed 07-10-2020). However, it is also defined as "the action of making something openly known". By making a statement by which person A provides all the facts known to her, and then sending it to person B with the sole purpose for B to study these facts, qualifies as making something openly known. If person A sends person B information that is already known to B, then A is merely stating the obvious and not revealing anything new. However, communication takes place in a specific direction. This means the agent initiating the exchange is in charge of the nature of the activity. The agent (person A) communicates what is known to her to be true. If person B is already in position of the facts it does not make the existing statement a lie.

If Purveyors knew that SARS already had the same set of information on record, then they would probably not see any reason to make an official disclosure. Or, they would have insisted on an official confirmation of facts from SARS instead. Furthermore, neither dictionary nor corpus data makes it plain that "disclosure" denotes you cannot make a new statement once you have submitted a previous one.

Conceptual semantics distinguishes between states and events (Murphy 207–209). Both states and events express activity through verbs, but events describe things that happen, whereas states describe a condition that either starts to change or changed entirely. Verbs like "disclose" are called "inchoative verbs" and express states. When information is revealed, it changes from a state of not knowing to a state of knowing. And, once someone knows something, it cannot be unknown, which means that the change of state is lasting. The same applies to the actual provision of information; once person A informs person B of the facts in her possession, the state of providing information cannot be reversed. In other words, if a disclosure is made, but the receiver claims to have had access to the information already, the disclosure itself cannot be unmade. Information was still disclosed; the state of ignorance was still affected.

To get a contextual perspective on what "disclosure" could possibly mean, we direct ourselves to language corpora for more clarity. A corpus is a large collection of written and/or spoken text used for linguistic analysis (Weisser *Practical corpus linguistics: An introduction to corpus-based language analysis* (2016) 13). It allows researchers to study language as it is used by its speakers, providing access to the context of use. This is an important difference to traditional dictionaries, because corpus studies not only enable researchers to investigate truth-value sentences, but contextual utterances as well (Stubbs *Words and phrases: Corpus studies of lexical semantics* (2002) 9). More importantly, we can see what company a specific word keeps by looking at the words that co-occur alongside it (Stubbs 29). Understanding a word's collocations and user context makes it possible to infer different senses, including references that might not be included in a dictionary (Fillmore and Atkins "Describing polysemy: the case of 'crawl'" (2000) in Ravin and Leacock (eds) 91).

As access to South African English corpora are limited and because it focuses on English varieties as opposed to South African English in general (Carney footnote 78), very large English corpora – operated by Brigham Young University – are consulted in its place: the British National Corpus (BNC) and the News on the Web corpus (NOW). The BNC consist of 100 million words and contains written and spoken texts collected between 1980 and 1993. The NOW is

a web-based corpus, collecting texts from online newspapers and agencies from twenty different countries. It contains more than eleven billion words and is updated daily since 2010.

Considering the results from these two corpora, it becomes apparent that "disclosure" denotes more than new or secret information. When "disclosure" is searched within the BNC (https://www.english-corpora.org/bnc/ (accessed 07-10-2020)), the noun is frequently associated with sensitive or private information (like medical test results or financial statements). Examples taken from the first 100 instances (of 1008 occurrences), include the following:

(a) disclosure of exempt information

(b) disclosure of interest

(c) disclosure of confidential information

(d) disclosure of an individual's education

(e) disclosure of information received in confidence

(f) disclosure of an iniquity

(g) disclosure of the nature and location of assets

(h) disclosure of information on defence

(i) disclosure of information received in confidence

(j) disclosure of incriminating evidence

(k) disclosure of reports

(l) disclosure of unused material.

When collocates to the left of the node word is searched, the word "full" is isolated as the most frequently co-occurring word, although it only occurs 53 times throughout the corpus. The implication is that people are expected to disclose all the information they have in their possession, whether voluntarily or not.

When the first 100 examples (within 356080 instances) of "disclosure" is studied in the NOW (https://www.english-corpora.org/now/ (accessed 07-10-2020)), a keyword in context (KWIC) search similarly denotes the provision of ordinary details like personal particulars or sensitive information related to medicine, finance and security. Words used in conjunction with "disclosure" include "public disclosure", "annual fee disclosure", "financial reporting and disclosure of all fraud", "protected disclosure", "technical disclosure", "additional disclosure" and even "further disclosure", suggesting that disclosure doesn't have to be a single occurrence. A search for collocates on the right of the node word reveals that "disclosure" co-occurs most frequently with "information" (138947 times), "statement" (21061 times) and "personal" (12315 times). It goes without saying the type of information that Purveyors communicated to SARS when they sought advice qualifies as sensitive and private information.

Consequently, "disclosure" is neither restricted in its denotation nor does its context in the TAA limit its meaning to "new" or "secret" information explicitly. To argue this would be precarious in the least.

It is advisable, in interpreting the TAA, to keep to the ordinary meaning of "voluntary disclosure" namely that it denotes a "provision of information by a taxpayer". However, where the legislator intends to limit the scope of "voluntary

disclosure" to mean that the disclosure must contain information unknown to SARS, the meaning of "voluntary" and "disclosure" must be defined in the Act specifically to denote such a limited scope and application.

6 Implications of the judgment

6 1 *Warning? What warning?*

Fabricius J agreed with SARS that in the context of Part B of chapter 16 of the TAA, a disclosure cannot be made voluntary where the taxpayer has been warned of the penalties (*ibid*). This is so because Purveyors acted in fear of paying penalties (*ibid*).

There is a clear distinction between a VDP where the applicant was issued with a notice of an impending or on-going audit into her tax affairs, and where no such notification was issued. In the current matter, Purveyors realised their tax non-compliance and approached a SARS official for an opinion. The communication between Purveyors and the SARS official was limited to e-mails and telephone conversation. The SARS official provided Purveyors with his opinion of the tax consequences of the transaction and the consequences of subsequent tax non-compliance. He explained to Purveyors that penalties are likely to be imposed. This e-mail in which the SARS official explains the consequences (in his opinion) does not reflect the official position of SARS on the specific facts, nor does it indicate that SARS intends to impose penalties. In other words, it cannot serve as a notice to the taxpayer as envisaged in section 226(2).

Chapters 15 and 16 of the TAA are very clear as to the penalties that can be imposed for non-compliance and tax defaults. Most certainly, the provisions in these Chapters tell a story of what will happen to a taxpayer who is in default. It is a warning to taxpayers to be tax compliant from the start.

Based on the judgment that actions following a warning cannot be voluntary, the entire VDP regime becomes useless and unenforceable. This is so because Chapters 15 and 16 of the TAA warns the taxpayer of the consequence of non-compliance. Thus, if a taxpayer acts on this warning and applies for VDP relief, the application is no longer voluntary.

An opinion by a SARS official that penalties are payable and an e-mail that the SARS official is obligated to follow the procedure set-out in the TAA to ensure that Purveyors rectify the non-compliance is basically putting the "warning" contained in Chapters 15 and 16 of the TAA in different wording in an e-mail.

6 2 *Disclosure of prior knowledge*

In addition to the disclosure being voluntary, section 227(c) provides that the disclosure must be "full and complete in all material respects". The Act is silent on the disclosure of information of which SARS has prior knowledge. All that is required is that the disclosure must lay bare all the relevant and material facts.

In the current matter Purveyors, prior to lodging a VDP application, disclosed to a SARS official, in broad terms, the transaction of importation of the aircraft and their subsequent non-compliance. In its VDP application, Purveyors formalised their disclosure by laying bare all the facts in respect of the import and non-compliance. In essence, the information disclosed in broad terms to the SARS official does not differ materially from the detailed information disclosed in the VDP application. In other words, the detailed disclosure does not alter the penalties and interest determination.

It is impossible, in hindsight, to establish if SARS would ever have noticed the non-compliance or identify Purveyors for an audit (and pick up the non-compliance during that audit). The fact remains, Purveyors disclosed the non-compliance to a SARS official albeit not in the prescribed form and manner as required in terms of section 227(f) for a VDP application. Does it mean that because the information was disclosed during a conversation with a SARS official, that the taxpayer is precluded from applying for VDP relief? Can it be said that because the detailed information disclosed formally in terms of the VDP application does not differ essentially and materially from the information disclosed prior, there is no disclosure? No. The manner in which the information is disclosed does not remove the fact that there was a disclosure of information.

Important to note is that section 227(f) requires the disclosure to be in the prescribed form and manner as provided for in Part B of Chapter 16 of the TAA. If the disclosure is not made in terms of the provision in Part B of Chapter 16 the taxpayer is not entitled to the VDP relief. The court did not rule on the scope and application of section 227(f). The judgment has the effect that section 227(f) is intended to prevent a situation where a taxpayer discloses information to SARS to see how SARS will treat the taxpayer's default, and then formalise the disclosure by way of a VDP application to avoid the way in which SARS will treat the taxpayer. This, in our view, is not the case. Again, Chapters 15 and 16 state very clearly how a defaulting taxpayer will be treated both as a VDP or a non-VDP applicant. Thus, the taxpayer is well aware of how the default will be treated. What is unknown to a taxpayer is if the SARS views specific circumstances as a default. For example, a taxpayer enters into an agreement. The taxpayer is not sure if the transaction is subject to VAT. The taxpayer can approach a tax expert like an attorney for advice, or the taxpayer can approach SARS for advice by visiting a help desk at a SARS office. Based on the advice, the taxpayer has a choice to be tax compliant or tax non-compliant. Where the taxpayer decides to apply for VDP relief, it cannot be said that the information previously disclosed to SARS suddenly falls outside the VDP application just because SARS became aware of the information previously. Nothing in the Act, save for the provisions of section 226(2), which deals with a different VDP application altogether, suggests that the information disclosed must be "new". All that is required is that it must be complete in all material respects. Similarly, where the taxpayer approaches SARS in a more formal manner by way of application for an advanced ruling in terms of Chapter 7 of the TAA, it cannot be said that the information disclosed to SARS in the advanced ruling application suddenly falls outside the VDP application just because SARS became aware of the information previously.

Similarly, where SARS obtains information from an anonymous tip-off, and SARS does not act on the tip-off, and the taxpayer applies for a VDP, it cannot be said that there is no disclosure on the part of the taxpayer. In this case, when the taxpayer applies for the VDP, she does not know what information falls within the knowledge of SARS already. Again, it is not a requirement that the information disclosed must be "new".

7 Conclusion

Section 227 of the TAA requires that the taxpayer must disclose all the relevant information. There is no limitation that the information so disclosed must be "new" or fall outside of the knowledge of SARS. In the current case, the prior

knowledge is precisely because of a disclosure by the taxpayer albeit not in terms of a VDP application. The fact that the disclosure is formalised by way of an application a year later is irrelevant.

The requirement of "absence of fear" attributed to the meaning of "voluntary" affords an overly restrictive meaning to voluntary. Generally, taxpayers make use of the VDP specifically because they want to avoid the penalties and prosecution. That is what lures defaulting taxpayers. This restrictive interpretation is likely to render the majority of VDP disclosures involuntary.

Additionally, the judiciary should refrain from assigning semantic criteria to words when they have not been well-defined by the legislator. This only provides grounds for deconstruction and ultimately undermines the judgment's result. Instead, the rule of thumb should be to either adhere to a contested word's ordinary meaning or to officially extend its meaning by giving it a technical definition. If the latter approach is preferred, then either the legislator or an applicable court should set out what is meant by each contested word by carefully outlining its features.

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THE COVID-19 LOCKDOWN REGULATIONS AND THE COURTS' IRRATIONAL RATIONALITY-TEST

De Beer v Minister of Cooperative Governance and Traditional Affairs **(21542/2020) [2020] ZAGPPHC 184 (2 June 2020)**

Fair Trade Independent Tobacco Association v President of the RSA **(21688/2020) [2020] ZAGPPHC 246 (26 June 2020)**

OPSOMMING

Die COVID-19 grendeltyd-regulasies en die howe se irrasionele rasionaliteitstoets

Die Grondwet van die Republiek van Suid-Afrika, 1996 verwys nie uitdruklik na rasionaliteit nie. Desnieteenstaande is rasionaliteit 'n beginsel wat sentraal tot die "rule of law"-beginsel kragtens artikel 1 van die Grondwet staan. Die howe oorweeg rasionaliteit in verskillende kontekste. Eerstens, die howe oorweeg rasionaliteit wanneer bepaal moet word of 'n handvesreg in ooreenstemming met artikel 36 van die Grondwet beperk is. Tweedens, rasionaliteit word in die konteks van die administratiefreg oorweeg wanneer bepaal word of uitvoerende organe se administratiewe handelinge ooreenkomstig die Wet op Bevordering van Administratiewe Geregtigheid 3 van 2000 (beter bekend as PAJA), as deel van die redelikheidstoets, of ingevolge die legaliteitsbeginsel (indien die administratiewe handeling nie onder PAJA tuisgebring kan word nie) uitgevoer is.

Hierdie bydrae oorweeg die howe se teenstrydige benaderings ten aansien van die rasionaliteitstoets in die konteks van die beperking van regte en die toepassing van die legaliteitsbeginsel. Ter voorstelling van hierdie teenstrydige benaderings, word twee sake