IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER A67/2020

In the matter between:

PERI FORMWORK SCAFFOLDING ENGINEERING (PTY) LTD Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Coram: Erasmus, Steyn and Kusevitsky, JJJ

Heard: 22 January 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date of hand-down is deemed to be 23 August 2021.

JUDGMENT

KUSEVITSKY, J

Introduction

[1] This appeal relates to a 10% penalty of R 1 064 607.69 which was imposed by the Respondent on the Appellant for a late payment of employees tax pursuant to paragraph 6(1) of the Fourth Schedule of the Income Tax Act No. 58 of 1962 ("the Income Tax Act") and interest thereon in terms of section 89 bis(2) of the Income Tax Act, read together with s 213 of the Tax Administration Act, No. 28 of 2011 ("the Tax Administration Act").

[2] The Appellant relies on two contentions; Firstly, the Appellant argues that the Tax Court erred in dismissing an in *limine* point raised by the Appellant with regard to the computation of the time periods as provided for in the Income Tax Act and Tax Administration Act, respectively, which would have meant that the payment made by the Appellant was, in fact, not late. Secondly, the Appellant appeals against the Tax Court's finding that the Appellant had failed to show that reasonable grounds existed, in the event that the in *limine* point was not upheld, for making the late payment to the South African Revenue Service ("SARS") in contravention of the Income Tax Act.

Background

[3] The following facts are evident from the initial Request for remission to SARS dated 21 February 2018. The Appellant submitted its Employer Reconciliation Declaration which was due on 31 December 2017, on 18 December 2017. An amount of R 10 648 340.93 was due in terms of this return. The Appellant submitted the instruction for payment on e-filing on the same date as the return was filed to their bank, Nedbank, for payment on 3 January 2018. According to the Appellant, the taxpayer's business was closed for the holiday season from 15 December 2017 and only re-opened on 3 January 2018.

[4] According to the Appellant, third party payments are authorised on Nedbank electronically by the company's cash book administrator and an accountant when it is sent from SARS e-filing to Nedbank. In this instance, the cash book administrator and the accountant were unable to release the payment on 3 January 2018 as there were insufficient funds available to make the payment.

[5] A payment of R 10 648340.93 was made by the Appellant and received by the Respondent on Monday, 8 January 2018, when the payment was ostensibly due on Saturday, 6 January 2018.

[6] According to the Appellant, the reason advanced for the late payment was that the Appellant was waiting for its debtors to make payment to *it*, and that based on historical payments, it had projected that payments received would cover its liability to SARS. Suffice to say that this did not materialise, which necessitated the Appellant to request a R 5 million overdraft from Nedbank in order for it to service its indebtedness to SARS. On 5 January 2018, the overdraft of R 5 million from Nedbank was approved, which resulted in an available balance of R 10 510 079.65. However, the debit order to SARS was in the amount of R 10 648 340.93, which resulted in a shortfall of R 138 261.58. According to the Appellant, an amount of R 200 000.00 had been predicted to be paid to it by that Friday, 5 January 2018.

[7] They state further that deposits are only deposited by Nedbank into their current account at 7pm the same evening. On Saturday however, the Appellant's debtors had only paid an amount of R 132 338.19, which was insufficient to allow payment to be released on 6 January 2018, as there was still a shortfall of R 5 923.39. As a result, the administrator requested additional funds in the form of a transfer of R 20 000.00 from another of its entities in order to make up the shortfall

for payment on the Monday morning, 8 January 2018. Once the payment had reflected, payment to SARS was released at approximately 10h13 on the same day.

[8] Late payments to SARS are governed by the following provisions. Section 244 of the Tax Administration Act provides as follows:

> "**244. Deadlines**. (1) If –
>
> (a) A day notified by SARS or specified in a tax Act for payment, submission or other action; or
>
> (b) The last day of a period within which payment, submission or other action under a tax Act must be made,
>
> falls on a Saturday, Sunday or public holiday, the action must be done not later than the last business day before the Saturday, Sunday or public holiday."

[9] Paragraph 6 (1) of the Fourth Schedule of the Income Tax Act provides as follows:

> "6. (1) If an employer fails to pay any amount of employees' tax for which he or her is liable within the period allowable for payment thereof in terms of paragraph 2 SARS must in accordance with Chapter 15 of the Tax Administration Act, impose a penalty equal to ten percent of such amount."

[10] Section 213 of the Tax Administration Act provides as follows:

> "**213. Imposition of percentage based penalty**. – (1) If SARS is satisfied that an amount of tax was not paid as and when required under a tax Act, SARS must, in addition to any other 'penalty' or interest for which a person may be liable, impose a 'penalty' equal to the percentage of the amount of unpaid tax as prescribed in the tax Act."

[11] It is common cause that as a result of the late payment, penalty interest was raised on 6 January 2018.

First ground of Appeal – Computation of time

[12] The Appellant contends that the Tax Court erred in finding that in terms of paragraph 2(1) of the Fourth Schedule of the Income Tax Act, the last day of the

period within which the Appellant was allowed to make payment of the amount of payroll taxes of R 10 648 340.93 it had declared on 18 December 2017, was 5 January 2018, and not 8 January 2018.

[13] The Notice of Appeal *inter alia* states the following:

13.1 The court erred in law in finding that the framework of the Fourth schedule of the Income Tax Act requires an employer to pay over to SARS '*within the week the exact amount of PAYE is deducted or withheld from the employee's salary or wage'*, and accordingly failed to distinguish between a period of 7 days, and a period of one week in a statute, and that in terms of the Fourth schedule, an employer must '*pay the amount so deducted or withheld to the commissioner within seven days after the end of the month during which the amount was deducted or withheld*."

13.2 The court erred in law by interpreting section 244(1) of the Tax Administration Act to operate in determining the manner of computation of any statutory period of time prescribed in days in the Tax Act within which a payment, submission or other action must be made by a taxpayer;

13.3 The court incorrectly interpreted s 244(1) of the Tax Administration Act by not finding that s 244(1) only applies to a deadline, being the last day of any statutory period of time in a tax act within which a payment, submission or other action must be done by a taxpayer, which deadline has already been reckoned, using the legal rules for the calculation of time periods prescribed in statutes applicable to the relevant deadline, and if that deadline falls on a Saturday, Sunday or a public holiday, then s 244(1) requires that the taxpayer make the payment, submission or other action no later than the last business

day before the deadline, which deadline was calculated using the normal rules.

13.4 The incorrect interpretation of s 244(1) resulted in the court failing to apply the relevant legal rules to compute the last day within which the Appellant was allowed to make payment of the declared amount, which was 8 January 2018.

[14] It argued that the court incorrectly found[1] that the intention of the legislature was that a deadline should be reckoned in days, inclusive of Saturdays, Sundays and Public holidays and that the legislature intended that the period within which an action is to be done by a taxpayer should not be extended beyond 7 calendar days, and accordingly, that s 244(1) excludes the operation of s 4 of the Interpretation Act 33 of 1957 when calculating any period prescribed in days within which an action is to be done in terms of the Income Tax Act.

[15] They argue that the court erred by not finding that s 4 of the Interpretation Act was applicable to the reckoning of the period of days within which the Appellant was allowed to make payment of the declared amount in terms of paragraph 2(1) of the Fourth Schedule of the Income Tax Act and accordingly, that the payment was due on or before 8 January 2018.

[16] Section 213 of the Tax Administration Act is titled "Imposition of percentage-based penalty" and it is common cause that SARS imposed the penalty appealed against in this matter in terms of sub-section 213(1) which provides that "*If SARS is satisfied that an amount of tax was not paid as and when required under a tax Act, SARS*

[1] At paragraphs 26 and 27 of the judgment

must…impose a 'penalty' equal to the percentage of the amount of unpaid tax as prescribed in the tax Act".

[17] Paragraph 2(1) of the Fourth schedule of the Income Tax Act requires payment of declared amounts *"within seven days after the end of the month during which the amount was deducted or withheld".* According to paragraph 6(1) of the Fourth schedule of the Income Tax Act, the failure by an employer to pay any amount of tax within the period allowable for such payment will result in the imposition of a penalty equal to 10 per cent of such amount, and SARS imposed a penalty of R 1,064,834 on the Appellant in terms of section 213 of the Income Tax Act, on 6 January 2018.

[18] The Appellant argues that whenever a period is prescribed by statute (or contract) within which a certain act must be performed, or after expiry of which a legal disability is imposed, or before the expiry of which a legal step is incompetent, the legal rules relating to the computation of time is relevant.

[19] The general rule is that the ordinary civilian method of computation of time is applicable regarding the calculation of time, unless a period of days is prescribed by law. In that case, the provisions of s 4 of the Interpretation Act, the so-called **"**statutory method"**,** applies.

[20] The statutory method will not apply to the calculation of a period of days prescribed by a law only where there are clear indications by the legislator that it intended another method of calculation to be used, or where its application will result in a repugnancy[2].

[2] Section 1 of the Interpretation Act.

[21] It argues that the civilian method is applied in construing statutory provisions referring to days where the language or context contains a repugnancy, or where the legal provision demonstrates an intention that the statutory method ought not to be used. The Supreme Court of Appeal has however warned that in the interest of legal certainty, in the absence of repugnancy, the application of the statutory method is generally required.[3]

[22] Applying the general rule, the Appellant submits that the last day of the 7-day period ought to be reckoned using the *statutory* method. The Appellant also submits that due to the use of the word "*after*" in paragraph 2(1) of the Fourth Schedule, the first day of the 7-day period is 1 January 2018.[4]

[23] Section 4 of the Interpretation Act provides that where any particular number of days are prescribed for the doing of any act, the days must be counted exclusive of the first and inclusive of the last day of the period within which to do so, unless the last day happens to fall on a Sunday or a public holiday. In that case that last day must be excluded from the reckoning and the next Monday or ordinary day counted as the last day.

[24] The Appellant submits that in applying ss1 and 4 of the Interpretation Act to the wording of paragraph 2(1) of the Fourth Schedule when one calculates the seven-day period within which payment of the declared amount were to be made, one would clearly exclude the last day of December 2017, starting the calculation of the seven days on 1 January 2018. Thus, the counting of the seven-day period

[3] Nedcor Bank Ltd v Master of the High Court and others [2002] 2 All SA 281 (A) para [12].

[4] *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C) at 496.

starts on 1 January 2018, and the last day of the seven-day period in this case, thus, the seventh day after the last day of December 2017, is Sunday 7 January 2018.

[25] Applying the latter portion of s 4 of the Interpretation Act, Sunday the 7th of January 2018 must be excluded from the counting of the seven-day period, as it is the last day of the period which happens to fall on a Sunday. The immediately following "*ordinary*" day is then inclusively taken to be the last day of the period, being Monday 8 January 2018, when the Appellant made the payment of the declared amount.

[26] Thus the Appellant argues that the declared payment was not made outside of the seven-day period within which the Appellant was allowed to pay the amount to SARS, and accordingly the Appellant was at all times compliant with the provisions of the Fourth Schedule and the Tax Administration Act and the penalty should not have been imposed at all.

[27] It is apparent that the Tax Court reasoned that s 244 of the Tax Administration Act titled "*Deadlines*", demonstrates a clear intention that the legislature intended that a method other than the statutory method of computation must be adopted in reckoning the 7-day period allowed for payment of payroll taxes in terms of paragraph 2(1) of the Fourth schedule.[5]

[28] The relevant part of s 244 states that "*If the last day of a period within which payment under a tax act must be made falls on a Saturday, Sunday or public*

[5] Judgment paras [26] and [27]

holiday, the action must be done the last business day before the Saturday, Sunday, or public holiday."

[29] It was argued that the Fourth schedule does not require payment by employers within a week. They state that the language of the legislature is clear, the period is defined as 7 days.

[30] Section 244 of the Tax Administration Act does not deal with the computation of time at all; it deals with deadlines that have already been computed in terms of the appropriate method – which they argue is the civilian method for periods calculated in months, weeks or years, or the statutory method in the case of periods calculated in days that happen to fall on Saturdays, Sundays and public holidays. Accordingly, where the deadline for payment calculated in terms of the statutory method falls on a Saturday, the payment must be made on the last business day before that Saturday.

[31] The Tax Court inferred the intention of the legislature to exclude the use of statutory computation from further inferences of fact regarding the legislature's intention, such as the intention not to extend the 7-day period beyond 7 days as defined in the dictionary, and a finding of misdirection of fact finding that there is no prejudice to employers should the 7-day period be curtailed.

[32] They submit that the Tax Court erred in the above analysis and failed to apply the relevant legal principles. If the Tax Court had done so, it was argued, then it is clear that the statutory method is the correct method of computation to be adopted in reckoning the 7-day period allowed for payment of the declared amount. The court's

finding that the clear days method is applicable[6] and the decision that the statutory method was inapplicable, was in conflict with the policy requirement of legal certainty.

[33] In my view, there is no repugnancy, and no indication from the context or circumstances, clear or otherwise, that the legislature intended that another method of computation was intended to be used, and if so, which method.

[34] Section 244(1) of the Tax Administration Act deals with the calculation of days specified in the Tax Act for payment, submission or any other action under the Tax Act. It clearly states that if the last day of a period in which the taxpayer is meant to *inter alia* make payment falls on a Saturday, Sunday or public holiday; such payment should be done no later than the last business day before such Saturday, Sunday or public holiday. Thus, in my view, the legislation is very clear.

[35] The second step is to determine the calculation of said days. According to the Appellant, s 4 of the Interpretation Act should be applied in the calculation of the time periods. If this approach is adopted, then the computation of the time periods will exclude weekends and public holidays for purposes of the calculation and if this is the case, then 7 days when calculated from when the payment fell due, would be on Monday 8 January 2018.

[36] It is trite that for purposes of computing days in a statute, ordinary calendar days are included in the calculation of such time periods. It is also trite that s 4 of the Interpretation of Statutes Act only becomes applicable if the statute is silent about

[6] Judgment paragraph [21]

the method of computation of days. If the applicable statutes are clear and unambiguous, then s 4(1) finds no application.

[37] According to the Appellant, if one applies ss 1 and 4 of the Interpretation Act to the wording of paragraph 2(1) of the Fourth Schedule when calculating the seven-day period, the last day of December 2017 should be excluded and the date of payment would only fall due the following Sunday; and if one applies s 4, then that payment would only be due the following business day, being the Monday, 8 January 2018. If this is the case, then payment was made on time and the penalty thus falls away.

[38] This argument however flies in the face of the clear provisions in the statute. Section 244 clearly makes a provision for eventualities where payments fall due on such days, and specifically states that in such event, it calls for payment on the last day preceding such a day, be it a weekend or public holiday. There is nothing ambiguous about this provision; it creates certainly for the tax payer. The Respondent contends that payments of amounts declared as PAYE to SARS must be paid within 7 (seven) days after month end. In other words, the calculation of the seven-day period was supposed to commence from 1 January 2018 and end on 7 January 2018. According to s 244(1) of the Tax Administration Act, the Appellant was supposed to pay the declared PAYE on Friday 5 January 2018. Thus the provisions of s 244(1) do not become triggered since that provision is only relevant to time periods which fall due on weekends and public holidays.

[39] The Tax court concluded that the intention of the legislature with regard to deadlines envisaged that a deadline should be calculated in days, inclusive of

weekends and public holidays and directs that in the event of a payment falling on such days, that such payment should be made on the last day before the weekend or public holiday.

[40] I am in agreement that the intention of the legislature is clear and that there is no ambiguity in the interpretation of the computation or formulation of the calculation of the time periods which would warrant the activation of s 4 of the Interpretation Act. In other words, s 4 of the Interpretation Act finds no application in this instance and accordingly, this ground of appeal must fail.

Further grounds of appeal – Reasonable grounds

[41] Turning to the second ground of appeal, that the Tax court erred in its finding that the Appellant had failed to show that reasonable grounds exist for making the late payment to SARS in contravention of the Income Tax Act:- In its heads of argument the Appellant contends that, should this court uphold the court a *quo's* finding that the declared amount was due on Saturday 8 January 2018, hence payment was due on the Friday 7 January 2018, and that it was indeed out of time, then the Appellant submits that it has provided reasonable grounds for its late payment, and is therefore entitled to the relief as provided in s 217(3) of the Tax Administration Act.

[42] Section 217 (3) provides as follows:

> **"217. Remittance of penalty for nominal or first incidence of non-compliance**
>
> (1) If a 'penalty' has been imposed in respect of—
>
> *(a)* a 'first incidence' of the non-compliance described in section 210, 212 or 213; 40 or
>
> *(b)* an incidence of non-compliance described in section 210 if the duration of the non-compliance is

less than five business days,

SARS may, in respect of a 'penalty' imposed under section 210 or 212, remit the 'penalty', or a portion thereof if appropriate, up to an amount of R2 000 if SARS is satisfied that—

(i) reasonable grounds for the non-compliance exist; and

(ii) the non-compliance in issue has been remedied.

(2) In the case of a 'penalty' imposed under section 212, the R2 000 limit referred to in subsection (1) is changed to R100 000.

(3) In the case of a penalty imposed under section 213, SARS may remit the 'penalty', or a portion thereof, if SARS is satisfied that—

(a) the 'penalty' has been imposed in respect of a 'first incidence' of the non compliance described in section 210, 212 or 213, or involved an amount of less than R2 000;

(b) <u>reasonable grounds for the non-compliance exist</u>; and

(c) the non-compliance in issue has been remedied. ("Own emphasis")

[43] The Tax Administration Act provides for the remittance of administrative penalties for non-compliance under very specific and limited circumstances. Penalties can be waivered in 'exceptional circumstances'. 'Exceptional circumstances' are defined in s 218(2) of the Tax Administration Act to include, *inter alia*, natural or human-made disasters, disruptions in services, such as natural disasters, civil disturbance, serious illness or accident, serious emotional or mental distress, SARS errors and serious financial hardship, such as, in the case of a business, an immediate danger that the continuity of business operations and the continued employment of its employees are jeopardised.

[44] A taxpayer can make a request for remission of penalties imposed for non-compliance including, *inter alia* for penalties levied for Pay-As-You-Earn ("PAYE"). Penalties which are levied are done in accordance with paragraph 14(6) of the Fourth Schedule of the Income Tax Act and are equal to 10% of the total amount of employees' tax for the period relating to the outstanding return.

[45] In terms of s 213 of the Tax Administration Act, the late payment of a tax debt attracts a percentage-based penalty. In the case of late payments of, *inter alia,* PAYE, late payment penalties amounting to 10% of the amount that is unpaid will be imposed. Such penalties may be remitted in circumstances where the penalty has been imposed in respect of a '*first incidence'* of non-compliance, in other words, where no other fixed-amount or percentage-based administrative penalty has been used during the preceding 36 months, or, where exceptional circumstances exist, which rendered the taxpayer incapable of complying with the relevant obligation under the relevant tax Act.

[46] Sections 89 and 89*bis* of the Income Tax Act also allow SARS a broad discretion to remit or reduce interest after having regard to the circumstances of the case in question.

[47] Under the regulations issued in respect of s 75B of the Income Tax Act, SARS has a discretion to remit the whole or a portion of an administrative non-compliance penalty imposed for a first incidence of non-compliance, or if the incidence of non-compliance was remedied within seven days, in terms of s 217 of the Tax Administration Act, SARS may only remit administrative non-compliance penalties up to an amount of R 2 000.00. The remittance is further subject to being imposed in respect of the first instance of non-compliance or that the duration of the non-compliance is less than five business days.

[48] The limited remittance in terms of the Tax Administration Act is further subject to SARS being satisfied that reasonable grounds for non-compliance exist and that the non-compliance has been remedied. In respect of percentage based penalties,

the amount is also limited to R 2 000.00, that is, if SARS is satisfied that the penalty has been imposed in respect of a first incidence or involved an amount of less than R2 000.00, provided further that reasonable grounds for the non-compliance exist and the non-compliance in issue has been remedied.

[49] SARS may also remit the administrative non-compliance penalty or a portion thereof if SARS is satisfied that one or more of the listed exceptional circumstances are present and rendered the taxpayer incapable of complying with the relevant obligation under the relevant Tax act.

[50] The Appellant contends that it immediately remedied its non-compliance and in fact, has never in the past been late in paying its payroll taxes, or been non-compliant. It relied on the case of *Attieh v The Commissioner for the South African Revenue Service [2016] ZAGPJHC 371* for the proposition that reliance by a taxpayer on the expert advice of a tax practitioner, which proved to be wrong, could amount to 'reasonable grounds' to justify a taxpayer's non-compliance. In *casu*, the Appellant contends that the taxpayer relied upon the company's book-keeper, given her 8-year experience in preparing cash-flow forecasts for the Appellant, and her predictions of cash inflows for the period of the first week of January 2018. It was argued that her behaviour was not risky or unreasonable but based on her historic cash flow methodology which had not failed the company in the eight years of her employment. In any event, it argued that despite the fact that the predictions were inaccurate in this instance, that her decisions were not unreasonable. Trade debtors paid less than R 200 000.00 to the Appellant on 5 January 2018. This eventuality, it argued, while not impossible, was highly improbable.

Nature of the relationship between SARS and the Taxpayer

[51] The Respondent advanced two arguments in opposition to the contention that reasonable grounds exist which would entitle the Appellant to a reprieve in terms of s 217(3)(b) of the Income Tax Act. In the first instance, the Respondent argued that paragraph 2(1) of the Fourth Schedule establishes a fiduciary relationship between SARS and an employer. This is so because the salient points of the provision provide that an employer, who is a South African Resident, and who is liable to pay remuneration to an employee, is duty bound to deduct or withhold PAYE from such remuneration so paid to an employee; secondly, to pay such amounts to SARS within a stipulated period. It is common cause that the amounts so deducted or withheld are collected on behalf of and for the benefit of SARS.

[52] The Respondent argued that the Appellant failed to act in a manner of the highest degree of care in so collecting and paying over the amounts due to SARS, because the Appellant failed to insulate the PAYE amounts collected from its employees, from the business income; the said amounts were mixed with business income arising from business operations; the PAYE amounts deducted or withheld were exposed to risks associated with non-payment by third parties; the non-payment of PAYE amounts to SARS was subjected to trade debtors' behaviour, predictions of weekly cash inflows and other cash flow models and ultimately, borrowing money from third parties to facilitate the payment of PAYE to SARS. The Respondent argued that the Appellant cannot state that 'reasonable grounds exist' in circumstances where it treated PAYE amounts deducted or withheld, as its own and subjected such funds to the whims of its own business. Such conduct, it argued, was unreasonable and unacceptable.

[53] The Respondent contends that paragraph 2(1) of the Fourth Schedule establishes a relationship between the Respondent and various taxpayers who happen to be employers. It provides that an employer who is a South African resident and who is liable to pay remuneration to an employee/s is duty bound to deduct/withhold from such remuneration so paid to the employee, and to pay such amount to SARS within a stipulated period. The amounts so deducted or withheld are collected on behalf of and for the benefit of SARS.

[54] The Respondent also argued that the relationship between the taxpayer and SARS is akin to a fiduciary relationship in that the taxpayer is required to act for the benefit of SARS. Counsel for Respondent relied on Bryan A Garner, in Black's Law Dictionary's definition of the word 'fiduciary' as follows: *'A person who is required to act for the benefit of another person on all matters within the scope of their relationship… one who owes another the duties of good faith, trust, confidence and candour and one who must exercise a high standard of care in managing another's money or property*." They argue that all of these relationships require an unusually high degree of care. Accordingly, the Respondent argued, the Appellant and SARS were in a relationship that resembled a fiduciary relationship in material respects and that the Appellant failed to observe the highest degree of care in relation to PAYE amounts deducted or withheld from the employees and retained on behalf of SARS by failing to insulate the PAYE amounts collected from its employees, from its business income; mixing it with business income arising from its income earning operations; exposing the amounts so deducted to risks associated with non-payments by third parties and finally, borrowing money from third parties to facilitate the payment of PAYE to SARS. The core of the Respondent's argument is that money collected on behalf of SARS cannot be utilised as cash flow, and that such

money should be insulated. Furthermore, the specific directives with regard to obligations of an Employer in s 217(b) is that paragraph 2.1 directs that the money should be paid over within 7 days after deduction, and that there is a fiduciary relationship to collect money on behalf of another.

[55] I am not in agreement that the relationship between an employer and SARS is akin to a fiduciary relationship which would elevate the obligation by an employer to pay over monies that is collected on behalf of it to SARS – to that of, for example, principal and agent. There have been various distinctions between the accountability of a trustee to his beneficiary and the accountability of a debtor to his unsecured creditor. Under a trust-type of relationship, the beneficiary is given an equitable proprietary interest in some specific trust property or at least the right to have specific trust property administered according to the terms of a trust or legislation, whereas an unsecured creditor only has a personal right against the debtor which is unrelated to any property in the hands of the debtor. [7]

[56] There have been instances where parties have stipulated that monies received on behalf of another should be received in a separate account, and this would be construed as a trust. See *In Re Nanwa Gold Mines Ltd [1955] 1 W.L.R 1080*.

[57] Sometimes the payee occupies a special position with such well defined incidents that a payment to him is governed by a standard contract implied by law. Thus, a deposit of money with a banker, on current account, will create the relationship of debtor and creditor between the bank and the person to whose credit

[7] See generally *Principles of the Law of Trusts*, HAJ Ford, WA Lee (1st Ed) at [123] to [126].

the money is paid. The banker does not hold the sums in a bank account on trust for his customer. Instead, the relationship between them is that of debtor and creditor. When the customer deposits money in the account, it becomes the bank's money and the bank's obligation to repay an equivalent sum (and any agreed interest) to the customer. See *Foley v Hill (1848) 2 HLC 28,9 ER 1002*, where the House of Lords stated:

> *"The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own, he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, in all intents and purposes, the money of the banker, to do with it as he pleases: he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation: he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into is hands.*

[58] This principle was reiterated in *Grayston Technology Investment (Pty) Ltd and Another v S [2016] 4 All SA 908 (GJ)*, where the full bench, per Spilg J, opined that a different legal situation arises where funds standing to the credit of someone's account have either entered that account by reason of a special relationship in terms of which the holder of the account is in fact a nominee, trustee or agent in respect of monies.[8] It may occur where the holding of the funds in the account are to be treated as transferred to another, although they may only be paid out at some future

[8] At para 32

date.[9] The court was of the view that *Grayston* stood in the shoes of an agent in respect of either a statutory or civil law obligation of debtor and creditor, pursuant to which relationship it attracted an obligation to pay over in specie to SARS or to account for the money actually received or its proceeds.[10]

[59] The court in *Grayston* also noted instances in which an agent has a contractual obligation to account to the principal for all amounts received, even though the funds may be turned over to purchase other items for resale, or to cover overheads (in its business) which portion need eventually be paid over at the end of the agreed period[11]. In this case, the money would not be received as agent for collection, nor would any portion have to be earmarked and set aside for the principal. The agent could utilise the amount received as he wished as there was no special property or interest in the funds when received, or at any time thereafter. The court held that since the principal does not acquire any rights in the funds paid by the customer, or in their proceeds, but only enjoys a personal right against the agent arising out of their agency agreement, a proper accounting, (in that case) would discharge the agent from liability for theft.[12]

[60] I am therefore not persuaded by the Respondent's argument that the relationship between the parties can be elevated to that of a fiduciary relationship which would preclude the Appellant from utilizing the money or obliging it to be ring-fenced.

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[9] At para 32

[10] At para 105

[11] At para 47

[12] At paras 47 - 48

Appropriateness of the proportionality of the penalty imposed

[61] The Appellant further submitted that a penalty of 10% in the context of its non-compliance, which was the next business day after the due date, was not proportionate to the seriousness and duration of the non-compliance. The Respondent contends that it matters not whether the Appellant was late by one day or twenty days, for, as long as the as the Appellant had failed to pay the declared PAYE amounts within the stipulated seven-day period, the imposition of the 10% penalty is triggered.

[62] Section 213 directs that SARS must, if satisfied that amounts due were not paid within the required period, as is required by the relevant provisions of the Income Tax Act, a 10% penalty must be implemented. The Respondent contends that SARS is directed, in a peremptory manner, to impose a penalty without any discretionary powers. I agree. In my view, if one starts to implement various degrees of penalties in relation to the various degrees of lateness, this would cause uncertainty and confusion in the office of the SARS and it would potentially expose them to a plethora of litigation and open a flood gate of challenges to reviews of decisions taken exercising discretionary powers in evaluating an appropriate penalty for the degree of lateness.

[63] As the legislation now stands, there is certainty amongst tax-payers, that in the event of non-compliance, a penalty of 10% is levied on the amount owing to SARS, irrespective of the degree of lateness.

[64] It is evident that on SARS's own approach to remission of penalties in the imposition of percentage based penalties, that *all* penalties can be waivered in the event of a first incidence of non-compliance. The Appellant argued that it had a clean record with the SARS and that this would qualify under a first incidence of non-compliance. This contention was not disputed by the Respondent.

[65] In my view, the facts relied upon by the Appellant in *Attieh* are distinguishable from this matter. *Attieh* relied on the expert advice of a tax consultant in the determination of his liability for capital gains tax to SARS. In *casu*, given the fact the Appellant knew that payment to SARS fell at a particularly precarious time of the year, when people notoriously have fewer rand to spare after the holiday period, that they should have in fact predicted that payment by their trade debtors would be sporadic and the probabilities existed to the contrary of what the book-keeper might have predicted or anticipated. Her reliance on payments from third parties to ensure sufficient cash flow to comply with its payment obligations with SARS, was therefore unreasonable. However, that in my view is not the end of the matter.

[66] In my view, s 217(3) envisages a mechanism to come to the assistance of an aggrieved first incidence non-complying tax payer, who has in addition, satisfied two further requirements, most notably, that they have satisfied SARS that reasonable grounds exist for the non-compliance. In my view, in this instance, a factor which SARS failed to consider, which could, in my view, render it as a reasonable ground,

is the *manner* in which the Appellant, when it realised that it would be unable to comply with the payment instruction on 3 January 2018, attempted to rectify the deficiency.

[67] According to the Appellant, the instructions were given to their bank to process the payment on 3 January 2018. The Appellant was able to raise in excess of R 5million to settle its liability to SARS. Naturally, given that the process of the payment occurred over a weekend, it was delayed. The Appellant could therefore only effect payment on the first business day thereafter, which it duly did. There was no prejudice to SARS and neither was there any *mala fides* indicated; to the contrary, every effort was made by the Appellant to comply with its obligations to SARS. This, in my view, evidences reasonable grounds for the penalty imposed to be have been remitted, especially given the fact that it was a first incidence of non-compliance. In the circumstances, I am of the view that the appeal must succeed.

Should the matter be remitted back to SARS for reassessment and further investigation?

[68] At the end of the hearing, the parties were requested to provide further submissions as to whether an appropriate order might be to refer the assessment back to SARS for "*further investigation and assessment*" of appellant's penalty terms of s129(2)(c) of the Tax Administration Act, rather than setting it aside, or altering it.

[69] The Appellant submitted that based on the principles set out by the Appellate Division (as it then was) in *SIR v De Costa* [1985] 2 All SA 335 (A) , that it would not be appropriate to remit the matter to SARS for reconsideration. It argued that the Appellant is entitled, in the circumstances, to this court's exercise of the discretion

provided for in s 217(3), should this court find that the penalty was correctly imposed, and find reason to interfere with the Tax Court's exercise of its discretion.

[70] In *De Costa* the Court discussed the view that, as SARS deals with large numbers of applications for remissions of penalties, and that SARS has yardsticks by which to go by, SARS is in a far better position to decide on an appropriate remission of a tax penalty than a Tax Court (or an Appeal Court). The proposition advanced was that an appeal tribunal ought only to interfere with SARS' discretion regarding the remission of a penalty on narrow grounds, such as where it has been done on an incorrect basis or where there has been an unreasonable exercise of the discretion by SARS. The determination of whether the remission is unreasonable would, of course, require an Appeal tribunal to make its own value judgment as to what a reasonable remission is.[13]

[71] The Court in *De Costa* however rejected the proposition that a Tax Court only had limited power to interfere with the exercise of a discretion by SARS, and found it irreconcilable with the nature of a Tax Court as a court of revision, as opposed to a court of appeal, which entails a taxpayer's right to a rehearing of the whole matter by the Tax Court. The Tax Court is required to substitute its own "fresh" exercise of discretion on the record before it, for that of SARS, and a taxpayer is entitled to such a review of SARS' decision.[14]

[72] Accordingly, the Appellant submits that, *in casu*, should this Court find that the Tax Court had failed to properly exercise its discretion regarding the remission of the

[13] De Costa At 337

[14] AB p18.

penalty in terms of s 217(3), the correct order would be to alter the determination of the extent of the penalty determined by the court *a quo*.

[73] I am in agreement that a remittance of the matter to SARS would only serve to delay the matter. In any event, since I have found that there has been an unreasonable exercise of the discretion by SARS, this court is obliged to uphold the appeal and it is so ordered.

Costs

There is no reason why costs should not follow the result.

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DS KUSEVITSKY

Judge of the High Court, Western Cape Division

I agree, and it is so ordered: __________________________________

NC ERASMUS

Judge of the High Court, Western Cape Division

I agree:

____

ET STEYN

Judge of the High Court, Western Cape Division

Counsel for the Applicant: Advocate R Marais

Instructed by: Barnaschone Attorneys

Counsel for the Respondent: Advocate O Mokgatle

Instructed by: Tax Court Litigation