IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 3280/2017

In the matter between:

NAUSHAAD HAMID **APPLICANT**

and

SOUTH AFRICAN REVENUE SERVICES **RESPONDENT**

O R D E R

The following order is granted:

The application is dismissed with costs.

J U D G M E N T

HENRIQUES J

Introduction

[1] 'Render unto Caesar the things that are Caesar's, and unto God the things that are God's.'[1] A failure to pay one's taxes and argue later will most certainly result in

[1] Matthew 22:21. This arose from a question put to Jesus about whether it was lawful for Jews to pay taxes to Caesar.

the South African Revenue Service (SARS) invoking s 114 of the Customs and Excise Act 91 of 1964 (the Act). This is the situation which the applicant found himself in, resulting in this rescission application.

Issues

[2] The issues for determination are whether the filing of a debt management certified statement with the registrar of the high court in terms of s 114(1)(*a*)(ii) of the Act results in a civil judgment in the ordinary sense which can be rescinded in terms of the rules of court or in terms of common law, and if so, whether the applicant has made out a case for such relief.

Background facts to the application

[3] In the notice of motion, the relief which the applicant seeks is for the judgment granted on 24 March 2017 to be rescinded, and that he be given leave to defend the action. In support of the application, he indicates that he became aware of the judgment via an e-mail from the respondent on 27 March 2017. He denies his tax liability and indebtedness to the respondent in the amount of R4 432 070.93 and claims to be unaware of the cause of action for the amount claimed.

[4] He indicates that on numerous occasions from December 2016 onwards, he and his tax consultant engaged in correspondence with representatives of the respondent's collections department in respect of his alleged indebtedness. He informed such representatives that he was disputing the amount owing. Whilst they attempted to resolve such issues, he undertook to make monthly 'good faith' payments, which in no way constituted an admission of liability for the amount owing. The applicant had also requested a suspension of payment of the amount owing.

[5] Meetings were held which involved discussions in relation to his application for the suspension of payment of the amount owing. During such meetings, he confirms that documents and information were requested by the respondent's representatives in order to substantiate his assertions that the calculations by the respondent of his tax indebtedness arising from the customs duty and customs VAT were incorrect.

[6] Furthermore, he alleges that he supplied all of the documentation and information requested by the respondent, and the only response he received from the respondent's representatives via e-mail was that the documents which he had submitted were incomplete and that information was outstanding.

[7] Insofar as his defence is concerned, he confirms receipt of the final letter of demand from the respondent on 12 August 2016 and sought advice from his tax consultant. Such letter of demand also constituted a notice of intention by the respondent to institute legal proceedings in terms of s 114 of the Act.

[8] He was advised by his tax consultant, that the internal procedures of the respondent provided for an internal administrative appeal process to settle disputes. As a consequence, correspondence was despatched by his tax consultant to the respondent on 21 September 2016. Such correspondence contained a request for settlement processes to be held in terms of the Act. In such correspondence, he requested an explanation from the respondent's representative as to what valuation method was used in determining his tax liability.

[9] He was required to submit a DA 51 form and other documentation but indicates that he was unable to do so without the information being provided by the respondent. His objection to the tax liability was that the respondent's assessment of his tax obligations was based on the incorrect method of valuation in determining the customs duties and customs VAT payable on the value of his stock.

[10] Despite his numerous requests for reasons and his interaction with the respondent's representatives regarding the method of valuation used, no reasons were provided nor were the workings of the respondent in support of the assessment raised provided. Finally, he submits that he was not in wilful default and it was always his intention to deal with the matter.

Respondent's opposition

[11] In summary, the respondent opposes the application on the following basis:

(a) By raising a point *in limine* that there is 'technically no judgment to be rescinded';

(b) The applicant is indebted to it in the amount claimed;

(c) Although it admits that its representatives engaged with the applicant's representatives, it avers that the applicant was fully aware of the case against him prior to the 'judgment' being granted and even after it was granted;

(d) The applicant was provided with documentation on 9 December 2016 and further documentation on 27 March 2017. The final demand and notice of intention to institute legal proceedings dated 20 October 2016, indicating his indebtedness, was despatched to the applicant, which he acknowledged receipt of. The s 114 certified debt management statement was filed by the Commissioner as the amount of R4 233 499.36 was and is due and payable to the respondent;

(e) Despite the engagements, the applicant and his tax consultant did not submit all the documentation requested, specifically the DA 51 form, to the respondent;

(f) Some of the discussions which ensued related to the collection information statement and the request by the applicant for the suspension of payment due to the respondent. The 'good faith' payments were made pending the outcome of the suspension of payment application and such agreement was concluded on 9 December 2016. The suspension of payment application was unsuccessful and because the applicant violated the terms of the agreement, the respondent invoked the provisions of s 114 of the Act.

(g) The documents and information submitted by the applicant were insufficient for consideration. In addition, the applicant failed to submit all the documentation requested. Apart from not submitting the DA 51 form, the applicant had outstanding tax returns and as a consequence, the respondent could not agree to the suspension of payment request made by the applicant.

(h) The respondent disputes the assertion that the incorrect valuation method was used. Such method was utilised by it as the applicant did not provide the necessary documentation to support the low values of the goods imported and could not discharge the onus imposed by s 102(4) of the Act.

(i) The applicant is not entitled to the rescission of the 'judgment' and neither can the Commissioner withdraw the certified statement in terms of s 114 of the Act, as the applicant still has outstanding customs duty and customs VAT payable and has not made payment thereof.

Applicant's submissions

[12] A summary of the applicant's submissions, as contained in the heads of argument and advanced at the hearing, are the following:

(a) The applicant concedes that the reliance by the respondent on the judgment of *Singh v Commissioner, South African Revenue Service*[2] supports the respondent's contention that this is not a 'judgment' which can be rescinded in the ordinary sense.

(b) The judgments relied on by the respondent are judgments not granted in this division and are judgments of the Constitutional Court in *Metcash Trading Ltd v Commissioner, South African Revenue Service, and another*[3] and the Western Cape Division of the High Court in *Capstone 556 (Pty) Ltd and another v Commissioner, South African Revenue Service and another.*[4] The interpretation followed by Binns-Ward J is at odds with the dicta of the Appellate Division in *Kruger v Sekretaris van Binnelandse Inkomste.*[5]

(c) The starting point is the Act itself and the words used. In interpreting the provisions of the Act, one must apply the principles of interpretation as enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[6] If one does so, then the section provides that the statement lodged by SARS will have the effect of a judgment and any proceedings may be taken thereon as if it were a civil judgment lawfully given in court, in favour of the Commissioner for a liquid debt of the amounts specified in the statement.[7] Consequently, a reading of the section suggests that the lodging of the statement is indeed a civil judgment capable of rescission.

(d) The applicant relies on two decisions of the KwaZulu-Natal Division of the High Court of HA De Beer AJ in *Kadodia v Commissioner for South African Revenue Service*[8] and the unreported judgment of Mnguni J in *Far Eastern Garments Manufacturers (Pty) Ltd v South African Revenue Services*.[9] The courts in this division

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[2] *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA) para 9.
[3] *Metcash Trading Ltd v Commissioner, South African Revenue Service, and another* 2001 (1) SA 1109 (CC).
[4] *Capstone 556 (Pty) Ltd and another v Commissioner, South African Revenue Service and another* 2011 (6) SA 65 (WCC).
[5] *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A).
[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[7] Section 114(1)*(a)*(ii) of the Act.
[8] *Kadodia v Commissioner for South African Revenue Service* (2013) 75 SATC 313 (N).
[9] *Far Eastern Garments Manufacturers (Pty) Ltd v South African Revenue Services* [2009] ZAKZPHC 64.

have found that 'judgments' granted in terms of s114 of the Act are capable of rescission.

(e) Although there are judgments in other divisions which support the respondent's contention, the applicant submits that this court ought to have regard to the judgments in this division which allow for the rescission of the 'judgment', not on the basis of Uniform rules 42(1) and 31(2) but rather in terms of the common law.

(f) Recent legislation, namely s 174 of the Tax Administration Act 28 of 2011 (the TAA) provides that a certified statement filed in terms of s 172 of the TAA must be treated as a civil judgment.

(g) The applicant submits that the respondent has not advanced any defence on the merits of the rescission application and has pegged its mast to the point *in limine* and bare denials.

(h) There are material disputes of fact on the merits, like *inter alia* whether or not the applicant submitted the DA 51 form and complied with the respondent's requirements for the submission of documentation and information, whether the applicant breached the agreement in respect of the good faith payments and whether the correct valuation method was used, which is linked to whether the applicant failed to discharge the onus and rebut the presumption contained in s 102(4) of the Act. The applicant maintains that as a consequence of these material disputes of fact, these are issues which ought to be ventilated by the hearing of oral evidence.

The respondent's submissions

[13] The respondent's submissions in support of the point *in limine* are the following:

(a) The Commissioner filed a debt management certified statement in terms of the provisions of s 114(1)(*a*)(ii) of the Act with the registrar in an amount of R4 432 070.93 in respect of outstanding customs duty and customs VAT due by the applicant.

(b) Such debt management certified statement was not a judgment in the ordinary sense of the word but is a recovery or collection mechanism.

(c) The debt management certified statement has all the effects of a judgment but is not in itself a judgment in the ordinary sense and does not determine any dispute or contest between the taxpayer and SARS.

(d) Such debt management certified statement can be withdrawn by the Commissioner in terms of s 114(*a*)(iii)(*aa*) of the Act by notice in writing addressed to the clerk of the court or registrar of the high court, upon which such statement ceases

to have any effect. The Commissioner may then institute proceedings afresh under the sub-section in respect of any duty, interest, penalty or forfeiture referred to in the withdrawn statement.

(e) The applicant still has an outstanding liability for customs duty and customs VAT payable, and as a consequence the Commissioner may not withdraw the certified debt management statement.

(f) Having regard to the language used in the section, once such debt management certified statement has been filed with the registrar, it is deemed to be a civil judgment, although it is not a civil judgment in the ordinary sense. It is for these reasons that the respondent submits there is no 'judgment to be rescinded'.

[14] I agree with the respondent's submissions in its heads of argument that the *in limine* issues to be decided are the following:

'1. Is the debt management certified statement issued in terms of section 114 of the Customs Act, a 'judgment' in the ordinary sense of being a civil judgment?;

2. Can the debt management certified statement be rescinded or can it be withdrawn by the Commissioner in terms of s 114(1)(*a*)(iii)(*aa*) of the Customs Act by notice in writing addressed to the clerk or registrar upon which the statement ceases to have any effect.'[10]

In the event of point *in limine* failing and this court determining that the 'judgment' is a judgment in the ordinary sense capable of rescission, then the question to be asked is whether the applicant has made out a case for rescission.

Late filing of the respondent's answering affidavit

[15] Prior to dealing with an analysis of the issues and the respective submissions of the parties, a preliminary matter must be resolved. This concerns a complaint raised by the applicant, only in his heads of argument, in which he takes issue with the respondent's alleged late filing of its answering affidavit and its failure to apply for condonation.

[16] In response to this complaint, the respondent filed a further affidavit by its attorney of record and supplementary heads of argument. Having regard to the contents of the further affidavit and the annexures thereto, it appears that this

[10] Heads of Argument para 3, at indexed page 125, bundle 3.

complaint by the applicant is without merit as the parties' representatives had agreed that the *dies* for the filing of the answering affidavit would be extended by consent. In addition, the matter was enrolled by the respondent as the applicant had not filed any replying affidavit. This complaint ought properly to have been dealt with in a replying affidavit but is only being dealt with in the heads of argument. In my view, there is no need for the respondent to bring an application for condonation of the late filing of its answering affidavit.

Analysis

[17] The starting point in my view is the applicable section in the Act and the interpretation thereof.

The applicable section

[18] The relevant provisions of s 114 read as follows:

'**114 Duty constitutes a debt to the State**

(1) (*a*) (i) Any amount of any duty, interest, penalty or forfeiture incurred under this Act and which is payable in terms of this Act, shall, when it becomes due or is payable, be a debt due to the State by the person concerned and shall be recoverable by the Commissioner in the manner hereinafter provided.

(ii) If any person fails to pay any amount of any duty, interest, fine, penalty or forfeiture incurred under this Act, when it becomes due or is payable by such person, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were a civil judgement lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.

(iii) (*aa*) The Commissioner may by notice in writing addressed to the clerk or registrar, withdraw the statement referred to in subparagraph (ii), and such statement shall thereupon cease to have any effect: Provided that the Commissioner may institute proceedings afresh under the subsection in respect of any duty, interest, penalty or forfeiture referred to in the withdrawn statement.

(*bb*) Notwithstanding anything contained in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), a statement for any amount whatsoever may be filed in terms of subparagraph (ii) with the clerk of the magistrate's court having jurisdiction in respect of the person by whom such amount is payable in accordance with the

provisions of this Act.

(*cc*) Pending the conclusion of any proceedings, whether internally or in any court, regarding a dispute as to the amount of any duty, interest, fine, penalty or forfeiture payable, the statement filed in terms of subparagraph (ii) shall, for purposes of recovery proceedings contemplated in subparagraph (ii), be deemed to be correct.'

Interpretation

[19] The rules in relation to the interpretation of statues and documents are clearly defined.[11] In order to fully understand what is meant by the statutory provisions, the correct starting point is to understand the language used. In *Commissioner, South African Revenue Service v Bosch and another,*[12] the court held the following:

'The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA referred to as "excessive peering at the language to be interpreted without sufficient attention to the [historical] contextual scene".' (Footnotes omitted.)

[20] In *Cool Ideas 1186 CC v Hubbard*[13] the Constitutional Court held that there are three important inter-related riders to the general principles of interpretation, which are that

'(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.' (Footnotes omitted.)

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[11] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) paras 10-12; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[12] *Commissioner, South African Revenue Service v Bosch and another* [2014] ZASCA 171; 2015 (2) SA 174 (SCA) para 9.

[13] *Cool Ideas 1186 CC v Hubbard and another* [2014] ZACC 16; 2014 (8) BCLR 869 (CC) para 28.

[21] In *Endumeni* the court held as follows

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’[14] (Footnotes omitted.)

[22] In my view, when interpreting legislation such as the present, one must be cognisant that there is a public interest element in obtaining the full and speedy settlement of a tax debt, and the mechanisms employed by SARS serve a public interest to have tax and other revenue debts collected swiftly. In addition, most if not all of the legislation in place for the collection of revenue, have statutory mechanisms available for an aggrieved person to object, appeal or review the decision of the revenue collecting authority. However, the overriding principle remains ‘pay now argue later’.

[23] The considerations underpinning the ‘pay now argue later’ principle are an overriding factor and are important when contextualising tax, customs and VAT legislation. The legality of the principle of ‘pay now argue later’ has survived the scrutiny of the Constitutional Court in the context of VAT legislation, when it was

[14] *Endumeni supra* para 18.

contended that it was incompatible with s 34 of the Bill of Rights.[15] In light of the decision in *Metcash,* this principle in my view is the overriding factor when one considers legislation involving the respondent, given the internal mechanisms in place to protect a taxpayer.

[24] In *Capstone 556 (Pty) Ltd and another v Commissioner South African Revenue Service and another*,[16] Binns-Ward J dealt with the considerations underpinning such concept as follows:

'The considerations underpinning the "pay now, argue later" concept include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes.'

Is the 'judgment' a 'statutory judgment' in the true sense capable of rescission or is it a recovery mechanism in terms of s 114 of the Act and not rescindable?

[25] The facts which gave rise to the filing of the certified debt management statement in terms of s 114 of the Act are not disputed. Having regard to the contents of the respondent's answering affidavit, which are unchallenged, the applicant has outstanding customs duty and customs VAT due to the respondent and consequently, the Commissioner may not withdraw the certified statement because of that reason. In addition, the applicant has outstanding tax returns and has not provided all the information and documentation requested by the respondent.

[26] Of further relevance is the fact that the application by the applicant, for the suspension of payment in respect of his tax liability, was not granted as a consequence of his failure to provide outstanding documentation and information. In addition, although the applicant has indicated that he disputes the method of calculation used by the Commissioner in calculating his liability, he has not been cooperative with the respondent in assisting it in dealing with his query and establishing whether as a matter of fact its method of calculation was incorrect or not. At present, there is a liability which remains unpaid and which is extant.

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[15] *Metcash Trading Ltd v Commissioner, South African Revenue Service, and another* 2001 (1) SA 1109 (CC).

[16] *Capstone 556 (Pty) Ltd and another v Commissioner, South African Revenue Service and another* 2011 (6) SA 65 (WCC) para 9.

[27] A civil judgment in the true sense is final in effect and may not be *mero motu* amended and the presiding officer becomes *functus officio*. There are exceptions to this rule, as envisaged in Uniform rules 42 and 31, and the equivalent provision in the Magistrates' Court rules, however, in this instance, they do not apply.

[28] Section 114(1)*(a)*(iii)*(aa)* of the Act allows the Commissioner to withdraw a certified debt management statement at any stage, by notice in writing to the clerk of court or the registrar and such statement ceases to have any effect. In addition, the same section allows the Commissioner to institute proceedings afresh in respect of any duty, interest, penalty or forfeiture referred to in the withdrawn certified debt management statement.

[29] Most notably, if one considers the language used in s 114(1)*(a)*(ii), it reads '…such statement shall thereupon *have all the effects of,* and any proceedings may be taken thereon *as if it were a civil judgement* lawfully given in that court in favour of the Commissioner'. (My emphasis.) The wording of the section clearly indicates that it is not a civil judgment in the true sense but is to be treated as such.

[30] In my view, this 'statutory judgment' is not a final judgment in the true sense as used in civil matters. The fact that this section allows a Commissioner to withdraw it at any stage and re-file and institute proceedings afresh, for any outstanding duty, interest, penalty or forfeiture means that the 'judgment' is not final in effect and cannot be rescinded.

[31] On a proper interpretation of the section, in my view, the language used by the legislature is indicative that the certified debt management statement must be deemed to be a civil judgment but it is not a civil judgment in the ordinary sense of the word. It does not have the final effect which a civil judgment has nor is it determinative of the rights of the parties.

[32] I am fortified in this view, having regard to a number of decisions which are instructive and have dealt with similar provisions in revenue legislation involving the Commissioner.

[33] The first of these being the decision in *Metcash Trading Ltd v Commissioner, South African Revenue Service, and another*.[17] The Constitutional Court had cause to consider the effect of the recovery provisions of s 40 of the Value-Added Tax Act 89 of 1991 (VAT Act),[18] in the context of ss 40(2)*(a)* and 40(5) of the VAT Act which provisions are similar to s 114. The court held the following:

'What then of the other two impugned provisions, ss 40(2)*(a)* and (5)? Subsection (2)*(a)*, it will be recalled, allows the Commissioner to file a document with the clerk or Registrar of a competent court, which then has the effect of a civil judgment in the Commissioner's favour for a liquid debt. Undoubtedly the provision creates a short-cut. The Commissioner need not cause the issue of court process initiating a claim for judicial enforcement of a debt, as is normally the case where a creditor seeks to recover a debt. There need not be service of process summoning the debtor to court to answer to the claim, as happens in ordinary litigation. There is no scope for opposition, nor for a hearing of sorts to resolve disputes.'[19]

[34] The criticism of s 40 in *Metcash* was that the procedure in s 40(2)*(a)* allowed the Commissioner to employ 'self-help' as a measure which bypasses judicial oversight, similar to that which was frowned upon in *Chief Lesapo v North West Agricultural Bank and another*.[20] In *Lesapo,* the statutory provision in question empowered a bank, without recourse to a court of law, to attach and sell assets of its defaulting debtors by means of its own conditions and agents. Mokgoro J found such provisions invalid as it infringed on s 34 of the Constitution and breached the rule of law by sanctioning self-help.

[35] In deciding whether or not the provisions of s 40 of the VAT Act were constitutionally acceptable, the court in *Metcash* considered the provisions of s 40, together with the limitation in s 40(5), in line with the public interest in obtaining full and speedy settlement of tax debts and ensuring prompt payment as serving an important public purpose. In addition, the court one again endorsed the 'pay now argue later' principle, which was necessary to ensure that the rule was efficacious and allowing for immediate execution against a taxpayer.[21]

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[17] *Metcash Trading Ltd v Commissioner, South African Revenue Service, and another* 2001 (1) SA 1109 (CC).
[18] Section 40 has subsequently been repealed by the Tax Administration Act 28 of 2011.
[19] *Metcash supra* para 49.
[20] *Chief Lesapo v North West Agricultural Bank and another* 2000 (1) SA 409 (CC).
[21] *Metcash supra* para 60.

[36] The Constitutional Court found no merit in the submission that it was akin to 'self-help' and indicated that 's 40(2)*(a)* of the [Value-Added Tax] Act is a far cry from the kind of open ticket to self-help condemned in the *Lesapo* and kindred cases'.[22] In addition, it found that even if it is argued that s 40(5) limits access to the courts, such limitation is justified in terms of s 36 of the Constitution.[23]

[37] In *Capstone 556 (Pty) Ltd and another v Commissioner, South African Revenue Service and another*,[24] in considering whether the statement filed in terms of s 91(1)*(b)* of the Income Tax Act 58 of 1962 (the Income Tax Act)[25] was a judgment or not and in concluding it was not a judgment in the true sense, Binns-Ward J held the following: '[37] . . . Although a statement filed by the Commissioner in terms of s 91(1)*(b)* has all the effects (ie consequences) of a judgment, it is nevertheless not in itself a judgment in the ordinary sense. It does not determine any dispute or contest between the taxpayer and the Commissioner. It has the effect of a judgment, however, in enabling the Commissioner to obtain a writ to attach and sell in execution the taxpayer's assets to exact payment of an amount that is payable. . .

[38] Once it is accepted that the filing of a statement in terms of s 91(1)*(b)* is nothing more than an enforcement mechanism, as distinct from a means of determining liability, there is no basis for distinguishing it from any of the other recovery mechanisms, such as the appointment of an agent in terms of s 99, resort to which, by the Commissioner, the judgment in *Mokoena* held to be unexceptionable in the face of a pending appeal by the taxpayer against liability. . .'[26]

[38] I have considered the submissions of the applicant and his reliance on the decision in *Mokoena v Commissioner, South African Revenue Service*.[27] I am of the view that the reliance on such decision is misplaced. One of the issues which arose in *Capstone*[28] related to the applicant's reliance on *Mokoena* in which the taxpayer applied for rescission of what he referred to as a 'judgment'. The matter came before

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[22] *Metcash supra* para 51.
[23] Ibid para 72.
[24] *Capstone 556 (Pty) Ltd and another v Commissioner, South African Revenue Service and another* 2011 (6) SA 65 (WCC).
[25] Section 91(1) has subsequently been deleted by the Tax Administration Act 28 of 2011
[26] *Capstone supra* paras 37 and 38.
[27] *Mokoena v Commissioner, South African Revenue Service* 2011 (2) SA 556 (GSJ).
[28] *Capstone 556 (Pty) Ltd and another v Commissioner, South African Revenue Service and another* 2011 (6) SA 65 (WCC).

Spilg J. In *Mokoena*, the Commissioner withdrew a statement in terms of s 91(1)*(bA)* which had been filed under s 91(1)*(b)* in terms of which a judgment had been granted against the taxpayer.

[39] The taxpayer applied for the rescission of the judgment on the basis that he had not previously been aware of it. The taxpayer had objected to the additional assessment on 27 June 2005 and despite the objection the Commissioner had in terms of s 91 of the Income Tax Act filed the statement on 7 November 2005 without notice to the taxpayer and had obtained judgment on 1 December 2005. It is common cause that the taxpayer's objection to the additional assessment was allowed by the Commissioner on 29 August 2007 and that the Commissioner only withdrew the statement in 2010.

[40] In determining the matter, Spilg J in *Mokoena* proceeded from the premise that rescission was competent in the circumstances, having regard to the decisions in *Kruger v Commissioner for Inland Revenue*[30] and *Metcash*.[31] In granting the rescission, he held the following:

'[16] It is self-evidently incompetent, having regard to the rights of objection and appeal, to obtain judgment in the interim. It is inconsistent with the framework of the Act and its provisions, eg the express right to collect tax despite an objection and appeal would be unnecessary if judgment could be obtained in the interim. See also *Metcash* in para 58, as well as the general principles regarding a right of hearing and access to courts (again *Metcash* in para 58), and the safeguards that objection and appeal provide within the context of the administrative exercise of the Commissioner's powers.

[17] Since the judgment could not be lawfully obtained, having regard to the objection that was noted and not finalised, it is a nullity and falls to be set aside.'

[41] He did not consider whether the judgment was a judgment in the true sense. I align myself with the criticisms of such finding as expressed by Binns-Ward J in *Capstone*, and his reference to the decision in *Singh*.[32] Paragraph 38 of *Capstone* warrants mentioning:

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[30] *Kruger v Commissioner for Inland Revenue* 1966 (1) SA 457 (C) at 462A.

[31] *Metcash Trading Ltd v Commissioner, South African Revenue Service, and another* 2001 (1) SA 1109 (CC) paras 65 and 66.

[32] *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA).

'It seems to me that the learned judge went awry in *Mokoena* by apparently regarding the filing of a statement in terms of s 91(1)*(b)* as having the rights-determining character of a judicially delivered judgment. It plainly does not. That much was confirmed by the Supreme Court of Appeal in a consideration of the equivalent provisions of the VAT Act in *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA).'

[42] I agree with the reasoning of Binns-Ward J that the noting of the appeal is not a bar to the Commissioner proceeding in terms of s 91 Income Tax Act. Binns-Ward J held as follows:

'[36] . . . I find myself unable to agree with the statements at para 16 of *Mokoena.* In my judgment Spilg J's view that the Commissioner cannot have resort to s 91(1)*(b)* when an appeal is pending is not supported by a proper construction of the pertinent provisions of the statute, or by relevant precedential authority.

[37] The point of departure must be an acceptance that the tax in issue is payable on the date fixed in terms of s 89 of the IT Act. The effect of s 88 is that the noting of an appeal does not suspend the taxpayer's obligation to make payment: see *Commissioner for Inland Revenue v NCR Corporation of South Africa (Pty) Ltd* supra at 775E – F. The Act contains a number of provisions of which the Commissioner may make use to exact the payment which the taxpayer is obliged to make. . .'

[43] *Capstone* left open the question and this is evident from paragraph 35 of the judgment where the court held 'It is unnecessary for present purposes to investigate or reach any conclusion whether those cases in fact afford authority for the proposition that a 'judgment' that had already been withdrawn in terms of s 91(1)(*b*A) (and thereupon 'ceases to have any effect') is susceptible to rescission by a court.' In my view, in terms of s 91(1)*(bA)*, the withdrawal of the statement by the Commissioner meant it ceased to have any effect and therefore there was no 'judgment' to rescind. It was deemed to have been a civil judgment for purposes of enforcement.

[44] In *Kadodia v Commissioner for South African Revenue Service,*[33] the applicant was an importer of tobacco products and cigarettes into South Africa. He had attempted to import goods into South Africa from Namibia which were subsequently seized and impounded in terms of the Act. SARS notified the applicant of the detention

[33] *Kadodia v Commissioner for South African Revenue Service* (2013) 75 SATC 313 (N).

of the goods in writing. The applicant was requested to comply with the provisions of s 102 of the Act to produce proof of payment of duties payable. The applicant was subsequently advised by SARS that there had been an underpayment of customs duty and VAT, and demanded payment thereof.

[45] The applicant had accepted that he had contravened the relevant sections of the Act but proposed that the impounded goods be disposed of to offset the amounts claimed. Alternatively, the applicant had requested that the goods be released to him to be disposed of and thereafter to pay to the respondent the full admitted debt from the amount realised. The parties came to an impasse in relation to the amount due, and subsequently in July 2007, SARS sent the applicant a final demand for payment of the outstanding custom duties, VAT and penalties and his attention was drawn to the provisions of s 114 of the Act.

[46] SARS subsequently lodged a statement in terms of s 114(1)(*a*)(ii) of the Act with the registrar of the high court and obtained a judgment in terms thereof. Subsequently, the applicant then applied for the rescission of the judgment but such application was not brought in terms of the Uniform Rules of Court, but rather in terms of the common law. The court rejected the applicant's submission that good cause existed to rescind the judgment, and was of the view that as the applicant had not shown any defence to the respondent's claim which he had admitted, there was no dispute for a court to decide. It was for these reasons that the court dismissed the application for rescission as the court was of the view that the object of rescinding a judgment was to 'restore a chance to air a real dispute'.[34]

[47] Having regard to the judgment, it is distinguishable on the facts from the current matter. The court dealt with the matter on the assumption that the judgment was rescindable in terms of common law. Consequently, in my view, it is not supportive of the applicant's submissions raised in this matter. In addition, the decision in *Kadodia* has been the subject of much criticism.[35] Among the criticisms levelled, were that the

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[34] Ibid para 26, quoting from *Saphula v Nedcor Bank Ltd* 1999 (2) SA 76 (W) at 79C.
[35] PwC '2317. Applications to rescind a "judgment"' (2014) 177 *Integritax Newsletter* 16 (https://www.saica.co.za/integritax/Archive/Integritax_June_2014_Issue_177.pdf, accessed on 18 November 2021).

acting judge did not cite any authority for his reasons or conclusions, although the author accepted that he was correct in his conclusion that the taxpayer's application for rescission had to be dismissed, but the reasons provided by him have been criticised especially in light of the decisions in *Metcash* and *Capstone*.

[48] It is for these reasons that the author submitted that the court in *Kadodia* ought to have dismissed the application on the basis that it was ill-fated in law, not due to the fact that there was no defence. I am of the view that given the reasoning in *Metcash, Singh* and *Capstone*, the applicant cannot rely on *Kadodia.*

[49] In *Far Eastern Garments Manufacturers (Pty) Ltd v South African Revenue Services*,[36] the parties were *ad idem* that the statements submitted by SARS to the registrar were civil judgments, and that the applicant could bring an application for rescission.[37] In addition, the parties were also *ad idem* that Uniform rules 42 and 31 did not apply to the proceedings, and consequently the court had 'inherent jurisdiction to grant a rescission of one of its own judgment on sufficient cause being shown under common law'.[38]

[50] The court found that as both the VAT Act and the Act made no provision for any of the ordinary procedures applicable to civil litigation, the court was 'entitled to exercise its discretion to rescind a judgment granted against a taxpayer in terms of these sections provided that sufficient cause has been shown'.[39] The court then applied the principles applicable to rescission in terms of the common law, as set out by Miller JA in *Chetty v Law Society, Transvaal,*[40] and ultimately refused the application as no bona fide defence existed.

[51] In my view, the applicant's reliance on and submission that this decision likewise is authority for the proposition that the statement constitutes a 'judgment' in the true sense and is capable of rescission, is also misplaced. Mnguni J in *Far Eastern*

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[36] *Far Eastern Garments Manufacturers (Pty) Ltd v South African Revenue Services* [2009] ZAKZPHC 64
[37] Ibid para 7.
[38] Ibid.
[39] Ibid para 8.
[40] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765A-C.

Garments was not called upon to consider whether the judgment was a judgment in the true sense as the parties were *ad idem* it was.

[52] In *Singh v Commissioner of South African Revenue Services*,[41] judgment had been obtained by the Commissioner in terms of s 40(2)(*a*) of the VAT Act. In relation to the provisions of s 40, and the filing of the statement by the Commissioner with the clerk or registrar of a court, the following was held:

'The section is a recovery provision and nothing more. It does not empower the Commissioner to determine whether an amount is payable (or due). The jurisdictional element is that the tax must be payable before the Commissioner can invoke the procedure for which the section provides. When that element exists the Commissioner can rely on ss (5) and recover an amount which he certifies as (already) due or payable, despite the fact that an objection has been lodged or an appeal may be pending.'[42]

[53] In considering the provisions of s 40, the court found that s 40 provided 'the means for summary recovery of VAT, penalty, interest and additional tax which have become due or payable'.[43] The correctness of the assessment on which the certified statement, which the Commissioner files, is based, cannot be questioned.

[54] The applicant also submits that the interpretation of Binns–Ward is at odds with the dicta of the court in the decision of *Kruger.* In my view this submission is without merit. The decision in *Capstone* was based on what was decided in *Singh.* In addition the context in which *Kruger* was decided was very different from the current one and also different from the issues decided in *Capstone.*

[55] Insofar as the applicant relies on judgments in this division as authority for the submission that the statement is a judgment in the ordinary sense, the judgments relied on are distinguishable on the facts and his reliance on them is misplaced. The statement is a recovery provision and the 'judgment' does not have the 'rights determining character of a judicially delivered judgment.'[44]

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[41] *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA).
[42] Ibid para 9.
[43] Ibid para 4.
[44] *Capstone 556 (Pty) Ltd and another v Commissioner, South African Revenue Service and another* 2011 (6) SA 65 (WCC) para 38.

Is the Commissioner required to provide notice of his intent to file the statement?

[56] One of the complaints which the applicant raises is that he had no notice of the intention of the Commissioner to file the statement, and more importantly, has no knowledge of 'what the case is against me' and has never received a summons regarding the outstanding debt nor any communications from the respondent.[45]

[57] The Supreme Court of Appeal had cause to consider whether or not the VAT Act requires that a notice of assessment must be given to a taxpayer before the Commissioner files the certified debt management statement. In *Singh v Commissioner, South African Revenue Service* the court held the following:

'The Act contains no express requirement that notice of the assessment must be given to the taxpayer before the Commissioner files the statement which has the effect of a civil judgment in terms of s 40(2)*(a)*. The question is whether such notice is a necessary implication.'[46]

The court took the view that because no notice of the assessment had been sent to the taxpayer, the 'statutory judgment' had to be rescinded.

[58] The applicant's complaint in this regard is without foundation. It is not disputed that during the course of the discussions, a final demand and notice of the respondent's intention to proceed with the institution of legal proceedings was despatched to the applicant. Paragraph 3.2 of such correspondence pertinently drew the applicant's attention to the provisions of s 114 of the Act, and the applicant is being disingenuous when he indicates he did not know what the case against him was.

Sections 172 and 174 of the Tax Administration Act (TAA) in proper context

[59] The applicant submits that the passing of the TAA, which came into operation on 1 October 2012, makes provision in terms of s 172 for the Commissioner, after providing a person with ten (10) days' notice, to file a certified statement with the clerk of court or registrar. Section 174, which must be read with s 172, makes provision for the certified statement to be treated as a civil judgment, lawfully given in the relevant court in favour of the respondent for a liquid debt for the amount specified in the statement.

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[45] Founding Affidavit para 3, at indexed page 4, bundle 1.
[46] *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA) para 5.

[60] Section 172 reads as follows:

'**172. Application for civil judgment for recovery of tax.**—(1) If a person has an outstanding tax debt, SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct.

(2) SARS may file the statement irrespective of whether or not the tax debt is subject to an objection or appeal under Chapter 9, unless the period referred to in section 164 (6) has not expired or the obligation to pay the tax debt has been suspended under section 164.

...'

[61] Section 174 is titled 'Effect of statement filed with clerk or registrar' and provides:

'A certified statement filed under section 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.'

[62] The first thing to note in respect of these sections, and as conceded by the applicant, is that this relates to tax and does not apply to the Act. In addition, what is most notable about these provisions is that s 174 indicates that the statement filed under s 172 must be treated as a 'civil judgment' lawfully given. To my mind, this implies that the certified statement which is filed under s 172, does not have the cloak of a civil judgment in the ordinary sense. From the clear language used in the TAA, s 174 explicitly requires such certificates to be treated as though they are civil judgments lawfully given. In addition, in terms of s 172(2) of the TAA, these certificates can be filed irrespective of whether or not the taxpayer disputes his or her liability and irrespective of whether the liability is subject to an objection or an appeal.

[63] The effect of s 174 is to have such certificate treated as a civil judgment, even though it may subsequently be altered or withdrawn. Section 176 of the TAA also caters for a situation where the Commissioner is permitted to withdraw the certified statement which is filed under s 172, by filing a notice of withdrawal to the relevant clerk or registrar. It also further permits the Commissioner to file a new statement thereafter. Arguably, in my view, this results in such certified statement not being final

in form and not having the effects of a final judgment in the ordinary sense.

[64] If a civil judgment is final in nature, the fact that s 174 was enacted in relation to a statement filed in terms of s 172 of the TAA, demonstrates that such judgment is not a civil judgment in the true sense and is not final in effect. I am fortified in this view in light of the fact that a Commissioner may withdraw such certified statement at any stage and reissue a new one.

[65] Although the applicant raised the provisions of the TAA, the applicant did concede that it did not apply to the provisions of the Act.

Are there disputes of fact warranting the matter being referred for oral evidence?

[66] The applicant contends that there are material disputes of fact warranting a referral for the hearing of oral evidence. He is correct when he indicates that motion proceedings are inappropriate to resolve factual disputes. Harms DP held in *National Director of Public Prosecutions v Zuma*:[47]

'Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[67] I do not agree with the applicant's submission that the respondent has not advanced any defence to the rescission application and that there are material disputes of fact. The difficulty which the applicant faces is its failure to file a replying affidavit. The respondent avers that the applicant did not submit the DA 51 form and did not comply with its requirements for the submission of documentation and information. The respondent indicates that the s 114 certified statement was filed as the applicant breached his agreement insofar as monthly payments were concerned.

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[47] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.

This too, likewise, is unchallenged. The respondent's submission that it utilised a particular valuation method as the applicant did not submit the necessary documents and did not rebut the presumption contained in s 102(4) of the Act similarly remains unchallenged.

[68] In my view, consequently, the respondent's version does not consist of bald denials nor does it raise fictitious disputes of fact and its version is not implausible or far-fetched that this court can reject them. There are, in my view, no material disputes of fact on the papers warranting this court referring the matter for the hearing of oral evidence. In any event, such request was not persisted with at the hearing of the matter.

[69] In summary, I am of the view that the filing of the statement in terms of s 114 of the Act does not amount to a judgment in the ordinary sense capable of rescission. If I am wrong in that conclusion, I now consider whether the requirements for rescission in terms of common law, or rule 31 or rule 42 have been met.

Rescission in terms of the common law, Uniform rules 31(2)(b) and rule 42

[70] A party seeking to rescind a civil judgment in terms of common law must show good cause. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*,[48] the court provided guidance in respect of the rescission of judgments under common law prior to the introduction of the rules.

[71] The court held the following:

'…The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own judgment (*Firestone SA (Pty) Ltd v Genticuro AG)*. That is the function of a Court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, *justus error*. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause.'[49] (Footnotes omitted.)

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[48] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA).
[49] Ibid para 4.

[72] In my view, the applicant has not satisfied the requirements of good cause nor has he provided a reasonable explanation for his default. There is a debt owing to the respondent and despite having been given an opportunity to dispute and challenge the determination, the applicant failed to provide the necessary documentation to the respondent to do so. The debt management certified statement is not dispositive of the dispute between the parties as it can be withdrawn at any time by the Commissioner. In addition the applicant does not allege the 'judgment' was obtained by fraud or *justus error*.

Rule 31(2)(b) of the Uniform Rules of Court

[73] Rule 31 deals with judgments on confession and by default, and rule 31(2)*(b)* (prior to its amendment with effect from 11 March 2019) provided as follows:

'A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.'

[74] For reasons already mentioned in this judgment, the starting point is whether there is in fact a judgment to be rescinded. If there is, then the next question to be answered is whether or not the application for rescission was brought within 20 days after the applicant had knowledge of such judgment. In light of the conclusion I have reached that the certified debt management statement is not a judgment and is not final in form, there is no judgment to be rescinded in terms of the provisions of rule 31(2)*(b)*.

[75] If I am wrong in this conclusion, then even applying rule 31(2)*(b)*, the application must fail. The applicant has not shown good cause for the rescission of the judgment. There is no dispute that monies are owing and have not been paid, and the application for a suspension of payment was not granted. In addition the 'pay now argue later' principle applies. In any event, the applicant has not invoked any of the internal dispute mechanisms available in terms of the Act to warrant this court exercising any discretion and finding that good cause has been shown.

Rule 42 of the Uniform Rules of Court

[76] Rule 42(1) of the Uniform Rules of Court deals with the variation and rescission of orders and makes provision for a court to *mero motu* or on application of any affected party, to rescind or vary:

'(*a*) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(*b*) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(*c*) An order or judgment granted as the result of a mistake common to the parties.'

[77] It goes without saying that there must be an order or judgment capable of being rescinded. For reasons already mentioned, there is no order or judgment final in form which is capable of being varied and rescinded under the provisions of rule 42. Consequently, the application for rescission must fail on this basis as well.

Costs

[78] I see no reason to depart from the usual rule in relation to costs, nor were any such reasons advanced at the hearing of the matter.

Conclusion

[79] In conclusion, the debt management certified statement is not a judgment in the ordinary sense capable of rescission. The Act and the authorities make it clear that it must be regarded as a civil judgment. Even if I am wrong in this conclusion, then the applicant has not made out a case either in common law or in terms of rule 31 or rule 42 for rescission. He does not have a bona fide defence, nor has he demonstrated a triable issue warranting ventilation, nor has he established good cause for rescission.

Orders

[80] In the result the following order will issue:

(a) The application is dismissed with costs.

HENRIQUES J

CASE INFORMATION

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Date of Hearing	:	11 November 2019
Date of Judgment	:	30 November 2021

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand down is deemed to be 09h30 on 30 November 2021.