IN THE HIGH COURT OF SOUTH AFRICA, NORTH GAUTENG DIVISION

HELD AT PRETORIA

CASE NO 23533/2013

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED. ✓

30.9.2013 .....

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **Applicant**

and

MILES PLANT HIRE (PTY) LTD **Respondent**

Date heard: 13 September 2013

Judgment delivered: 3 October 2013

JUDGMENT

A VAN NIEKERK AJ

Introduction

[1] These proceedings have their origin in an urgent application filed in April 2013, in which the applicant *inter alia* sought an order to set aside a resolution adopted by the respondent to file for voluntary business rescue and for the final winding-up of the respondent. On 10 May 2013, the application was postponed on the basis that it would be dealt with on a semi-urgent basis, with the respondent's agreement to interim anti-dissipation relief.

[2] Subsequent to the postponement, the business rescue practitioner whose appointment was in part the subject of the application has filed a notice in terms of s 132(2) (b) of the Companies Act, with the result that the only remaining issue for adjudication is the winding-up. In addition, the respondent has filed a notice of its intention to argue a question of law concerning the interpretation of s 177(3) of the Tax Administration Act, 28 of 2011. The respondent contends that the section required the applicant to seek leave to institute the present application for winding-up, since there is a disputed tax debt in respect of which an appeal is pending.

[3] After the filing of the notice of intention to argue a point of law, the applicant filed a notice to amend its notice of motion by adding a prayer in terms of which it seeks leave to institute the winding-up proceedings. The respondent did not oppose the amendment. Shortly before the hearing of the application, the parties agreed that if the question of law is decided in favour of the applicant, then the respondent will concede the merits of the application; if the respondent succeeds, the application stands to be dismissed. The application was argued on that basis.

The legislation

[4] Section 177 reads as follows:

> **'177 Institution of sequestration, liquidation or winding up proceedings**
>
> (1) SARS may institute proceedings for the sequestration, liquidation or winding-up of a person for a tax debt.
>
> (2) SARS may institute the proceedings whether or not the person-
>
> a. is present in the Republic; or
>
> b. has assets in the Republic.
>
> (3) If the tax debt is subject to an objection or appeal under Chapter 9 or a further appeal against the decision by the Tax Court under section 129, the proceedings may only be instituted with leave of the Court before which the proceedings are brought.'

[4] It is common cause that the respondent has submitted objections against certain assessments raised by the South African Revenue Services (SARS), that the objections were disallowed and that an appeal is pending. The appeal is to be heard in the Tax Court during November 2013. The respondent submits that the provisions of s 177(3), properly construed, required the applicant to seek the court's leave to institute the winding-up proceedings prior to the winding-up proceedings being instituted by way of notice of motion. Since the applicant omitted to do so, the respondent contends that the winding-up application is premature and that it stands to be dismissed on that basis.

[5] The primary basis for this submission is that the intention of the legislature is to be divined by reference to the ordinary grammatical meaning of the words used. These envisage that an application for winding-up may '*only be instituted*' with the leave of the court before which the proceedings are to be brought, i.e. that an application for winding-up may be instituted if and only if prior leave has been granted by the court before which any winding-up proceedings are ultimately brought. The respondent makes reference to the Oxford Advanced Learner's Dictionary (7th ed.) which defines 'institute' to mean '*To introduce a system,*

policy, etc. or start a process: to institute criminal proceedings against...'.[1] To the extent that the subsection admits of any necessity to look beyond the plain meaning of the words used, the respondent contends that the concept of immunity from suit (which is what it says s 177(3) seeks to establish) is not uncommon. Reference was made in this regard to *inter alia* to s 47(1) of the Superior Courts Act, 10 of 2013, and s 2(1)(b) of the Vexatious Proceedings Act, 3 of 1956. In the former case, the Act provides that '*no civil proceedings by way of summons or notice of motion may be instituted against any judge of a superior court...except with the consent of the head of that court...*'. The constitutionality of the concept of immunity from suit has been endorsed as justifiable limitations on the entrenched right of access to courts. (see, for example, *Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T), *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC)).

[6] The applicant argues for an interpretation of s 177(3) that accounts more clearly for context and purpose and which would result in the following reading:

> '(3) If the tax debt is subject to an objection or appeal under Chapter 9 or a further appeal against a decision by the tax court under section 129, the [*sequestration, liquidation or winding up*] proceedings may only be instituted with leave of the court before which the [*sequestration, liquidation or winding-up*] proceedings are brought.

On this reading, it is open to an applicant in those instances where an appeal against a tax debt is pending, to bring winding-up proceedings before a court and to seek leave from that court to pursue the application.

Evaluation

[7] What is undisputed is that s 177(3) confers a discretion on the court, when there is a pending tax dispute, to permit a tax debt to be recovered in sequestration, liquidation or winding-up proceedings. What is in issue is when that discretion must be exercised.

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[1] The Shorter Oxford English Dictionary (5th ed.) refers in this context to 'Set in operation; initiate; start.'

[8] The principles of interpretation to be applied were recently affirmed in *Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012 (4) SA 593 (SCA). What the judgment underscores is that the exercise of interpretation does not require a court to discern the intention of the legislature only by reference to plain meaning of words with a deferential nod, if so required, in the direction of the OED. Wallis JA said the following:

> '[18]...The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words use 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....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...
>
> [25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning, a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an

unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.' [2]

[9] Starting with the language of the subsection, to 'institute' a proceeding is not necessarily limited to the act of service of a notice of motion; proceedings are equally capable of being instituted in the sense of 'initiated' or 'started' (*Shorter Oxford English Dictionary*) or 'commenced' (see B. Garner, *Black's Legal Dictionary*) once a matter serves before a court and after any required preliminary matters have been dealt with. In other words, the limitation in the language is one which precludes a court, when sequestration, liquidation or winding-up is sought in the face of a pending objection or appeal, from exercising its discretion in relation to the merits of the application unless and until all of the facts and circumstances relevant to the pending tax appeal are considered. This does not require the court to determine the appeal; what it requires is a

[2] At pages 609-610, footnotes omitted.

consideration of the grounds of appeal and a consideration of whether they might reasonably disclose any merit. If leave to institute the proceedings is refused, the proceedings are discontinued, whether by way of postponement pending the outcome of the appeal or some other appropriate outcome. This meaning is sustained by the words '*...with leave of the court before which the proceedings are brought*'. "Proceedings' in this context can only mean the proceedings referred to in subsection (1), i.e. the sequestration, liquidation or winding-up proceedings. The tense employed ('*are brought*') indicates that it is the court before which the proceedings serve that is enjoined to grant or refuse leave, not a court before which at some future date the proceedings are *to be* brought.

[10] Turning next, to the extent that it is necessary, to the context in which the section occurs, its purpose, and the potential consequences that might flow from each of the interpretations proffered, it should be recalled that s 177(3) is located in chapter 11 of the Act, headed 'Recovery of tax.' More specifically, Part C of the chapter empowers SARS, as one of the means available to it to recover a tax debt, to institute sequestration, liquidation or winding-up proceedings. Section 164 provides that ordinarily, any obligation to pay tax and the right of SARS to receive and recover tax is not suspended by any objection or appeal against an assessment (the 'pay now, argue later rule'). The interpretation contended for by the respondent would require the applicant first to apply to court to obtain permission to institute sequestration, liquidation and winding-up proceedings, as the case may be. At that stage, the issue before the court would be limited to whether the applicant ought to be afforded leave to commence winding-up proceedings by way of notice of motion, notwithstanding the fact of a pending objection or appeal. It might be assumed that a respondent in such proceedings would seek to make out a case to the effect that the assessments in question are incorrect, to the extent that once corrected, the entity concerned would not be insolvent. Should leave to institute the proceedings be granted, a further application would then have to be prepared and brought before a different judge. There is nothing in the subsection, on the respondent's interpretation, that would preclude a respondent from again raising, in relation to the merits of the

application, the fact of a pending objection or appeal, the merits of the appeal or, for example, from seeking a postponement of the winding-up proceedings pending the outcome of the ruling by the commissioner or the Tax Court, as the case may be. This would lead to an absurd result, where the discretion exercised in the first application potentially fetters the court before which the subsequent, substantive application is served. A discretion is best exercised once, with full knowledge of all of the relevant facts and circumstances.

[11] In short, in my view, the words '*the proceedings may only be instituted with the leave of the Court before which the proceedings are brought*' mean that the disputed tax debt is not recoverable under the 'pay now, argue later' rule during winding-up proceedings, unless the court before which those proceedings serve, permits it. Such an interpretation affirms the court's inherent discretion in winding-up proceedings, and empowers the court to evaluate all of the appropriate facts and circumstances (including the merits of any objection and pending appeal), and to make an appropriate order.

[12] To the extent that the respondent in the present instance submits that the applicant has failed to establish sufficient grounds for the granting of leave to institute winding-up proceedings, the respondent does not seriously dispute the applicant's averments that when the tax debt owed by the respondent to the applicant is taken into account, the respondent is hopelessly insolvent. The respondent's tax debt is R 37 441 091.55. In its challenge to the assessments under appeal, the respondent's does not directly challenge the quantum of the tax debt, which is the subject of a certificate filed in terms of s 172 of the Act as outstanding, and therefore a civil judgment in favour of the applicant for a liquid debt. It should be noted too that on 20 November 2012, the respondent's sole shareholder entered a plea of guilty to fraud and tax evasion, being income tax and VAT for the 2007 and 2008 tax years, and that returns for the 2010, 2011 and 2012 tax years remain outstanding. The primary basis of the respondent's objection is that the penalty in the circumstances is 'inordinate and harsh' and that it has 'never been the intention of [the respondent's sole shareholder] to

avoid her tax obligations or to defraud SARS in any manner' and that she is an 'honest and good citizen of South Africa'. The respondent's notice of appeal blames its internal accountant for the state of the respondent's financial affairs and comprises general queries regarding the SARS audit and a plea of mitigation. Even if one were to grant the applicant the burden of showing only that the grounds for disputing the assessment are unreasonable, there is nothing in the papers that persuades me that there are any grounds in terms of which the court should be inclined to refuse leave to institute winding-up proceedings on account of the pending appeal. On the contrary, the grounds for appeal are clearly intended only to further delay the inevitable. It is just and equitable that the respondent's affairs be wound up and that an independent liquidator be appointed to conduct an investigation into the respondent's financial affairs.

[13] Given the parties' agreement on the future course of these proceedings in the event that the question of law is decided in the applicant's favour, and given further that all of the other formal requirements relevant to the application have been met, in my view, the applicant has made out a case for a final winding-up order.

I make the following order:

1. The applicant is granted leave to institute these winding-up proceedings.

2. The respondent is placed under a final order of winding-up

3. The costs of the application are to be costs in the winding-up.

ANDRE VAN NIEKERK

ACTING JUDGE OF THE HIGH COURT

APEPARANCES:

For the applicant: Adv. Etienne Coetzee SC, with him Adv. L Sigogo, instructed by Edelstein-Bosman Inc. 012 452 8900 (Ref A Jogi/H Struwig)

For the respondent: Adv. PA Swanpoel, instructed by JI van Niekerk Inc (tel 086 126 8268)