REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21164/2017

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

In the matter between:

AGRICULTURAL AND INDUSTRIAL MECHANISATION (PTY) LTD Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

VICTOR, J:

[1] This application concerns a review and setting aside of a decision taken by the respondent on 1 December 2016 when it declined the Applicant's request to compromise and permanently write off an amount it owed to the respondent.

[2] The applicant is Agricultural and Industrial Mechanisation (Pty) Ltd and the respondent is the Commissioner for the South African Revenue Services (SARS). It is the applicant's case that when the business plan was accepted and adopted by the creditors of the applicant on 19 June 2013 this was a form of compromise distinguishable from the statutory compromise found in section 200 of the Tax Administration Act No 28 of 2011 (TAA).[1] A further issue for determination is whether the application lodged by the applicant on 3 October 2015 seeking a compromise and permanent write off of its debt complied sufficiently with sections 200 to 203 of the TAA.

Relevant background facts

[3] The background facts are as follows. Mr Aucamp deposed on affidavit on behalf of the applicant He is a director and sole shareholder of the applicant. The applicant is a private company which conducted business in the industrial and mining sector. It supplies agricultural equipment and delivered waste management services to local farmers, municipalities and mines.

[4] Central to the applicant's argument is the fact that in February 2013 the applicant commenced voluntary business rescue in terms of the provisions of section 129 of the Companies Act with the intention of settling its debts due to SARS and other creditors. Mr Stian Smith was appointed as the acting business rescue practitioner. On 19 June 2013 Mr Smith convened a meeting of creditors where the applicant's business rescue plan was presented and accepted by the majority of the applicant's creditors. It bears mention that SARS did not attend the meeting. At the meeting it was resolved that SARS be paid 10 cents in the Rand on the outstanding debt of approximately R5.3 million and that that had to be paid by 31 August 2013. The reason for the immediate payment of SARS was that the applicant required a tax clearance certificate to continue as a going concern and it was important that SARS accepted the rescue plan so as to enable the applicant to continue trading with a tax clearance certificate.

[5] Proper notice was given to SARS of the meeting and of the majority decision taken by the applicant's creditors. SARS however failed to submit a claim against the applicant despite the business rescue practitioner's repeated attempts to do so in order for the applicant to obtain the tax clearance certificate.

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[1] **Compromise of tax debt**

s 200. A senior SARS official may authorise the 'compromise' of a portion of a tax debt upon request by a 'debtor', which complies with the requirements of section 201, if—

(*a*) the purpose of the 'compromise' is to secure the highest net return from the recovery of the tax debt; and

(*b*) the 'compromise' is consistent with considerations of good management of the tax system and administrative efficiency.

[6] On 25 March 2014 Dr Gerhard Holtzhauzen was appointed as the official business rescue practitioner in terms of section 131(5) of the Companies Act replacing Smith. It was only after a lengthy period of approximately two years that is on 13 July 2015 that SARS finally accepted the business rescue plan and completed the necessary claim form. However, SARS refused to accept a payment on its system made by the business rescue practitioner to settle the applicant's indebtedness in terms of the business rescue plan.

[7] During this period SARS also failed to issue the applicant with the tax clearance certificate which was critical to its ongoing business. On 19 January 2016 almost three years after the launch of the business rescue plan SARS notified the applicant's business rescue practitioner of the debt and that it would accept the sum of R341 188.60 in payment of the settlement amount.

[8] As a result of SARS not issuing the tax compliance certificate the applicant was forced to obtain a debt loan from Nedbank in the amount of R6 000.00 so as to enable it to operate and Nedbank has taken a notarial bond over the applicant's stock.

[9] On 3 October 2016 the applicant made a motivated application to SARS for a compromise of its post-business rescue debt in terms of section 201 of the TAA.[2] It is a lengthy document setting out all the details and on 21 October 2016 after a number of follow-up calls Ms Rebecca Mathebule in the Debt Management Division of SARS at Alberton indicated that there were VAT returns that were outstanding in respect of odd

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[2] **Request by debtor for compromise of tax debt**

s 201.—(1) A request by a 'debtor' for a tax debt to be 'compromised' must be signed by the 'debtor' and be supported by a detailed statement setting out—

(*a*) the 'assets' and liabilities of the 'debtor' reflecting their current fair market value;

(*b*) the amounts received by or accrued to, and expenditure incurred by, the 'debtor' during the 12 months immediately preceding the request;

(*c*) the 'assets' which have been disposed of in the preceding three years, or such longer period as a senior SARS official deems appropriate, together with their value, the consideration received or accrued, the identity of the person who acquired the 'assets' and the relationship between the 'debtor' and the person who acquired the 'assets', if any;

(*d*) the 'debtor's' future interests in any 'assets', whether certain or contingent or subject to the exercise of a discretionary power by another person;

(*e*) the 'assets' over which the 'debtor', either alone or with other persons, has a direct or indirect power of appointment or disposal, whether as trustee or otherwise;

(*f*) details of any connected person in relation to that 'debtor';

(*g*) the 'debtor's' present sources and level of income and the anticipated sources and level of income for the next three years, with an outline of the 'debtor's' financial plans for the future; and

(*h*) the 'debtor's' reasons for seeking a 'compromise'.

(2) The request must be accompanied by the evidence supporting the 'debtor's' claims for not being able to make payment of the full amount of the tax debt.

(3) The 'debtor' must warrant that the information provided in the application is accurate and complete.

(4) A senior SARS official may require that the application be supplemented by such further information as may be required.

months for the years of assessment 2014, 2015 and 2016. It is noted that the applicant is registered as a Category B VAT vendor and is only required to submit returns on the even months of the year. Therefore it is quite clear that SARS at that stage having requested the VAT returns had overlooked the fact that the applicant was in the Category B VAT vendor section. However, the applicant in order to comply with Ms Mathebule's request accepted nil VAT returns for the requested months.

[10] On 17 November 2016 SARS through Ms Mathebule informed one of the applicant's shareholders who had personally attended the SARS office to get feedback that the compromise application would be presented to the committee on 22 November 2016 and a decision would be conveyed on 23 November. She was clear that the issue concerning the tax clearance certificates would also be addressed.

[11] On 21 November 2016 one day before the scheduled presentation Ms Mathebule again contacted the applicant's attorneys and requested clarity on certain points in respect of the applicant's 2015 financial statements. She also requested financial statements for 2013 and 2014 and these were provided to her. In other words the applicant did whatever it could to provide the necessary documentation so that SARS could consider the matter appropriately.

[12] The outstanding documentation was provided on 1 December 2016 and on the very same day just a short while later SARS declined the applicant's proposal and provided the following two reasons: that it had demonstrated a history of non-compliance and that a compromise had already been granted in terms of the business rescue plan. Lengthy argument was addressed to me in respect of those two points. The applicant's submission is that the business rescue plan is not a compromise in terms of the Tax Act. The submission is that a compromise is a contract. Consequently its offer and acceptance must be proved as a compromise contract. The parties to the compromise must reach agreement on the term of the compromise.

[13] Section 192[3] of the TAA provides that an agreement entered into between SARS and the debtor in respect of a tax debt in which (a) the debtor undertakes to pay an amount which is less than the full amount of the tax due by the debtor in full satisfaction of the tax debt and (b) SARS undertakes to permanently write off the remainder portion of the debt on the condition that the debtor complies with the undertaking referred to in paragraph (*a*) and any further conditions that may be imposed by SARS.

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3 'write off' means to reverse a tax debt either in whole or in part.

[14] The applicant's argument is that the compromise agreement is one in terms of the common law and when a senior SARS official authorised to compromise in terms of section 200 of the TAA the senior SARS official and the debtor must sign an agreement setting out the terms of the compromise provided for in section 204 of the TAA.[4]

[15] The applicant submits that there is no signed compromise between it and SARS and a senior SARS official may not compromise any amount of tax debt where the debtor was a party to the agreement within the three years immediately before such a request. The adoption of a business rescue plan in my view is not the same compromise as the compromise referred to in the TAA. The TAA is clear in its terms. A contractual compromise can never amount to the statutory compromise which SARS relies upon to justify its decision not to grant the compromise requested by the applicant.

[16] The compromise between a company and its creditors as provided for in section 155 of the Companies Act and compared with section 152(4) of the Companies Act is not the same as the compromise referred to in terms of the TAA.

[17] These two forms of compromise are clearly distinguishable in particular SARS did not attend the meeting of creditors on 19 June 2013 and did not vote on the business rescue plan it provided for in terms of section 152(4) of the Companies Act. Its acquiescence some two years was an acceptance in terms of the business plan. Therefore the submission by SARS that it accepted the business rescue plan and this was a compromise in accordance with the TAA is fatally flawed. The argument by SARS that it had already accepted a compromise and could not accept a second compromise conflates two separate acts.

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[4] **Procedure for compromise of tax debt**

204.—(1) To 'compromise' a tax debt, a senior SARS official and the 'debtor' must sign an agreement setting out—

(*a*) the amount payable by the 'debtor' in full satisfaction of the debt;

(b) the undertaking by SARS not to pursue recovery of the balance of the tax debt; and

(*c*) the conditions subject to which the tax debt is 'compromised' by SARS.

(2) The conditions referred to ln subsection (1)(*c*) may include a requirement that the 'debtor' must—

(*a*) comply with subsequent obligations imposed in terms of a tax Act;

(*b*) pay the tax debt in the manner prescribed by SARS; or

(*c*) give up specified existing or future tax benefits, such as carryovers of losses, deductions, credits and rebates.

[18] The applicant submits that s 197 of the TAA[5] clearly sets out a procedure as to how a senior SARS official may write off its debts and this did not occur when the statutory business rescue compromise was reached. In addition there is nothing in s 197 that suggests of solely one compromise. Be that as it may in this case the procedure for the statutory comprise was not followed. It follows therefore the decision based on an already accepted compromise in terms of the Companies Act by SARS is reviewable. The decision did not take into account the difference between the two sets of compromise.

[19] The further point for setting aside the decision of SARS is that SARS failed to apply is mind to the documentation presented on 1 December. The documentation could not have been studied since the decision followed virtually immediately. The documentation was voluminous and complex and counsel on behalf of SARS was driven to concede that a proper inspection and assessment of the documents could not take place within that very short period of time.

[20] A primary argument on behalf of SARS was that when there is a compromise there has to be a compromise of an amount. In this case the applicant sought to compromise the entire debt and not make any payment at all and by virtue of the very structure of the compromise sought it had to be refused because of the fact that a compromise involves a reduced amount of what is owing. Upon a proper interpretation of the s 197 of the TAA this is not so. A textual and business-like interpretation is necessary when interpreting a statute. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

> '...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.'

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[5] **Permanent write off of tax debt**

197.—(1) A senior SARS official may authorise the permanent 'wrlte off' of an amount of tax debt—

(*a*) to the extent satisfied that the tax debt is irrecoverable at law as referred to in section 198; or

(*b*) if the debt is 'compromised' in terms of Part D.

(2) SARS must notify the 'debtor' in writing of the amount of tax debt 'written' off.

[21] A further submission by SARS was that the amount involved the outstanding tax involved was VAT and PAYE and in those circumstances the applicant could not succeed with a setting aside of the tax owed since the money in question did not belong to the applicant. It was submitted on behalf of SARS that there has to be exceptional circumstances to warrant an order of substitution. No authority was presented to me on this point.

[22] The applicant of course sought that this Court order the compromise as contemplated and the case law is clear in this regard and that is that it can only be done in exceptional circumstances. It was submitted on behalf of SARS that the application to compromise was inadequate and that it lacked merits, that SARS had taken into account certain important features and the failure to consider the papers fully on 1 December when it gave its decisions within hours of the lodging of those papers really shows that even before the decision was made SARS had already adopted an attitude of refusing the application for the writing off of the tax debt. It was also submitted on behalf of SARS that the business rescue proceedings constituted a proper compromise as envisaged in the provisions of section 192 of the TAA[6] and that therefore the decision that was made should not fall to be set aside.

[23] In lengthy heads of argument SARS tried to demonstrate that in respect of each aspect relied on in terms of PAJA the applicant had failed to prove the jurisdictional facts justifying the setting aside of their decision. SARS continued to submit that all the relevant information was taken into account as provided for in terms of section 6(2)(*e*)(ii) of PAJA and that the applicant's application was baseless in that regard. In its answering affidavit SARS did accept that it did not consider the financial statements for the period when the applicant was under business rescue because the applicant's application for a compromise failed to satisfy the basic jurisdictional requirements that are necessary for granting the compromise.

[24] In my view the applicant placed all the relevant information before the SARS committee when it considered the compromise. It is quite clear that based on the cursory manner in which the voluminous information was placed before the SARS committee it could not in those few hours have considered the question. A further factor which justifies the setting aside of its decision is that SARS failed to take into account that the applicant was a

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6 'Companies Act' means the Companies Act, 2008 (Act No. 71 of 2008); 'compromise' means an agreement entered into between SARS and a 'debtor' in terms of which—

(*a*) the 'debtor' undertakes to pay an amount which is less than the full amount of the tax debt due by that 'debtor' in full satisfaction of the tax debt; and

(*b*) SARS undertakes to permanently 'write off' the remaining portion of the tax debt on the condition that the 'debtor' complies with the undertaking referred to in paragraph (*a*) and any further conditions as may be imposed by SARS; 'debtor' means a taxpayer with an outstanding tax debt; and 'write off' means to reverse a tax debt either in whole or in part.

Category B VAT vendor and accordingly did not have to submit its VAT returns every month but only every second month. So when SARS found that the applicant was not tax compliant that compliant in this regard it was clearly wrong and did not investigate whether the applicant was a Category B or Category C VAT vendor. The applicant relied on an agreement between a deceased director who had negotiated directly with SARS that the applicant would be a Category B VAT vendor obviously it was not able to call this evidence. However the court has regard to the number of years that SARS allowed the applicant to pay VAT every alternate month which is consistent with the B Category VAT vendor and in this regard it is clear that had the applicant been formally categorised as a Category C VAT vendor SARS would have made demands far earlier.

[25] I therefore accept that it was reasonable for the applicant to continue in the belief that it was a Category B VAT vendor and that SARS incorrectly drew an adverse inference in this regard. In my view based on the precipitous decision taken by SARS without considering all the information before it this was a decision which should be set aside in terms of PAJA he applicant has asked the court to extend the 180 day period because it was 15 days late.

[26] In this regard I do grant that extension. I make an order in terms of the prayers sought in the notice of motion as to the question of costs section 130 of the TAA deals with costs orders made by a Tax Court. This is a matter of review and not something and I am not sitting as a Tax Court. A Tax Court may in terms of section 130 grant an order for costs in favour of the party if SARS grants an assessment or decisions are held to be unreasonable if the appellant's grounds of appeal are held to be unreasonable and a number of other aspects which relate really to a decision by a Tax Court and not a decision with me sitting as a High Court. Unfortunately this is not an aspect that was fully traversed by counsel. I did not ask them to traverse it. In a draft order prepared on behalf of the applicant Adv Dreyer did ask that the costs of the application are to be paid by the respondent. She handed up two draft orders the one related to the setting aside of the decision and that the matter be referred back to the respondent for reconsideration with the specific directive that SARS take into account that the business rescue plan dated 19 June 2013 was not a compromise agreement under section 197 and 200 of the Tax Act. As indicated I have not heard argument on the question of costs specifically and it was for that reason that I reserve the question and costs and direct that the parties must come and argue the question of costs of this application as soon as possible and certainly within the next few weeks before the end of term and it is for that reason that I reserve the costs. The order that I make is contained in the draft order save for the deletion of prayer 6 and the amendment to prayer 5 that the costs are reserved.

[27] In the result I make an order in terms of the draft where the matter must be referred back to the respondent for consideration and taking into account that I make an order that the approved business rescue plan adopted by the creditors is not a compromise as set out in terms of the TAA.

I make the draft marked “A” an order of court.

M VICTOR
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

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