IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 54038/20
DATE: 30 September 2022

REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES / NO
REVISED

In the matter between:-

MARTIN FRASER WINGATE-PEARSE Applicant

V

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT

KOOVERJIE J

THE APPLICATION

[1] In this matter this court is required to firstly determine an interpretation to the settlement agreement entered between the parties on 20 March 2009. The issue in dispute is whether the payment in an amount of R336,374.98 constituted payment towards the tax debt or payment as security (in *securitatim debiti*).

[2] Secondly, whether the applicant, Mr Wingate-Pearse, has made out a case for the return and delivery of the material and goods seized during the search and seizure operation conducted in April 2005 in terms of Section 66 of the Tax Administration Act ("TAA").

[3] Thirdly, the applicant further sought the striking out of certain portions of SARS's affidavit. Its contention is that SARS presented extrinsic evidence which in law is prohibited.

[4] For the purposes of this application, the applicant will also be referred to as "Mr Wingate-Pearse" and the respondent as "SARS".

[5] The parties have been litigating against each other for almost two decades. SARS raised assessments from the 1998 to 2005 income tax years. There had been numerous court proceedings between the parties, which included:

(i) an application for search and seizure by SARS in April 2005;

(ii) an urgent application in 2009 to interdict SARS from enforcing the pay-now-argue-later principle;

(iii) the taxpayer's tax appeal in the Tax Court. The appeal did not proceed, since the matter was eventually settled as per court order of 1 June 2020.

[6] Both parties agreed that the two salient agreements which has relevance to the matter are both the 2009 and 2020 settlement agreements. The said agreements emanated from the settlement of the respective court applications of 2009 and 2020. The interpretation dispute in issue pertains to clause 1.1.1 of the 2009 agreement.

2009 AGREEMENT

[7] On 20 March 2009 the parties settled the urgent application and the review application in terms of a written settlement agreement which was made an order of court ("2009 agreement").

[8] The preamble of the 2009 agreement reads:

> *"Whereas the Commissioner has sought to collect the capital portion of the tax obligation in the sum of R4,394,811.28 and has on 12 March 2009, taken judgment against Wingate Pearse in the Gauteng High Court. Wingate Pearse in the Gauteng High Court under case number 13684/2009 and has appointed KWP Attorneys as an agent in terms of the provisions of Section 99 of the Act to pay the proceeds of the sale of Section [....] V[....], M[....], Cape Town held on behalf of Wingate Pearse to the Commissioner.*
>
> *Whereas Wingate Pearse instituted an urgent application against the Commissioner in the Gauteng South High Court under case no: 2009/10991 for an interim interdict, preventing the Commissioner from collecting the tax obligation pending finalisation of the review of the Commissioner's refusal to exercise his discretion in terms of Section 88(1) of the Act."*

[9] Clause 1.1.1 of the settlement agreement reads[1]:

> *"Pending determination of the tax appeal against the assessments raised by the Commissioner for the 1998 to 2005 years of assessment;*

[1] Annexure 'WP2' (my emphasis on underlining)

1.1 Wingate-Pearse and

1.1.1 shall forthwith pay over to the Commissioner the balance of the proceeds of the sale of its immovable property, section 8-51 V[....], M[....], Cape Town, currently held by KWP Attorneys in the sum of R336,374.98.

1.1.2 cedes to the Commissioner in securitatim debiti his right, title and interest in and to the shareholdings and members' interest as well as any or all loan accounts held by him in 12 identified entities.

1.1.3 tenders as security for the tax obligation three identified properties …

1.1.4 undertakes not to dispose of or encumber or in any other way diminish the value of any of his personal assets otherwise than in the ordinary course of business and without giving the commissioner 10 (ten) days' notice of his intention to do so.[2]

6. The deed of cession in securitatim debiti by Wingate Pearse referred to in paragraph 1.1.2 hereof is marked as Annexure 1C."

[10] It is not in dispute that the payment of R336,374.98 was, in fact, made to SARS on 27 March 2009.

2020 SETTLEMENT AGREEMENT

[11] Thereafter a further settlement agreement was entered into in 2020, disposing of the disputes between the parties. Clause 2.9 of the 2020 settlement agreement set out the terms upon which the parties were amenable to settle upon:

[2] 002-2822 to 2824 of the record

"2.9 The parties acknowledge that the contents of this agreement represents the final agreed position between them in respect of the relevant (income tax) years of assessment (1998 – 2005) and in particular in respect of the remaining disputes between the parties in the aforementioned Income Tax Appeal and will be in full and final settlement of all such issues in dispute."

[12] Clause 4.1 and 4.2 of the said settlement agreement made provision for the payment of R3 million to SARS within 7 business days from the effected date of the agreement in full and final settlement of all the applicant's alleged payment obligations.

Clause 4.1, 4.2 and 4.3 read as follows:

"4.1 The taxpayer shall make payment in the amount of R3,000,000.00 (three million rand) to the Commissioner within seven business days from the effective date of this agreement."

4.2 The amount in clause 4.1 above constitutes a full and final payment by the taxpayer to the Commissioner in settlement of all the taxpayer's alleged outstanding payment obligations (as was in dispute between the parties before the conclusion of the settlement agreement) in respect of the aforementioned relevant income tax years of assessment (1998-2005) and in terms of the pending Tax Court Appeal under case number 12547/2008. For the avoidance of any doubt is recorded herein that pursuant to payment of the amount stated in clause 4.1 above, the taxpayer has no further indebtedness towards the Commissioner and/or SARS in respect of any outstanding capital, and/or understatement penalty(ies), and/or interest in respect of both income tax years of assessment.

4.3 The parties agree that no payment by the taxpayer to the Commissioner in terms of the settlement will have the effect that all that remain in dispute in the pending Tax Court Appeal under case number 12547/2008 will be resolved."

[13] Clause 4.7 particularly read:

"4.7 The Commissioner agrees to release any and all security held by the Commissioner forthwith after receipt of payment by the Commissioner of the amount referred to in clause 4.1 above."

[14] Clause 6.5 of the agreement read:

> *"6.5 The Commissioner agrees and undertakes that –*
>
> *6.5.1 this agreement is irrevocable and unconditional;*
>
> *6.5.2 this settlement as set out herein, is in full and final settlement of any and all fiscal claims which the Commissioner may have against the taxpayer in regard to the relevant issues for the relevant years of assessment as stated herein."*

APPLICANT'S INTERPRETATION

[15] The applicant's salient points of argument regarding the interpretation of clause 1.1.1 are the following:

(i) In having regard to the ordinary language of clause 1.1.1 and considered against the background to the settlement agreement as set out in the preamble read with the remaining clauses, the only interpretation that can be afforded is that the payment served as security pending the determination of the Tax Court Appeal.

(ii) The wording of clause 1.1.1 specifically does not state that the payment would be made in part satisfaction of the disputed tax debt. In other words, that payment was made pending the determination of the Tax Appeal.

(iii) The 2009 settlement agreement was concluded by the parties pursuant to the applicant's proceedings to interdict collection of the disputed tax debt (the subject of a pending Tax Court appeal). The application was necessitated as SARS sought to enforce the "pay-now-argue-later" principle.

(iv) It was only the 2020 settlement agreement that made provision for payment of the debt. In fact, it was expressed in such agreement that the amount was fully paid and the agreement constituted the full and final settlement with the taxpayer having no further indebtedness. It was further pointed out that the only time that the issue regarding the settlement of the debt was raised, was in the 2020 agreement. In this context, the 2009 payment therefore served as security.

(v) By SARS having independently allocated the amount and set it off against the income tax debt, could be of no consequence as SARS did so on its own volition.

(vi) Furthermore, the "pay-now-argue-later" rule which the respondent relied on has no merit.

(vii) It is not disputed that the 2009 agreement came to light when the respondent sought to enforce the "pay-now-argue-later" principle. This is set out in the preamble of the 2009 agreement. The preamble set the basis for entering into the agreement.

(viii) The applicant opposed the extrinsic evidence relied upon in interpreting clause 1.1.1. It sought the striking off of those portions in the affidavit. It was further argued that the applicant remains prejudiced if such extrinsic evidence is taken into consideration. Extrinsic evidence in law is inadmissible.

SARS' CASE

[16] SARS, on the other hand, argued that the applicant's interpretation regarding clause 1.1.1 is untenable. In essence, SARS' contentions were that:

(i) The interpretation must be considered in the context of both the 2009 and 2020 agreements. The extrinsic evidence, namely the surrounding circumstances and documents which preceded both the 2009 and the 2020 settlements, has relevance to the interpretation and are permissible in law.

(ii) The amount was paid on the basis of the "pay-now-argue-later" rule. Hence it was treated as a tax debt and it was on this basis that it was taken into account when calculating the remaining debt referred to in the 2020 agreement, namely the R3 million.

(iii) Considering the ordinary language in clause 1.1.1, it should be noted that no mention of the word "security" is made. Clause 1.1.1 of the settlement agreement must be considered in the context of the agreement as a whole, more specifically, the other terms thereof.

(iv) Furthermore, clause 1.1.1 must be read in the context of clauses 1.1.2 and 1.1.5 and 6, where mention is made of the assets offered as security:

(a) Clause 1.1.2 reads:

> *"Cedes to the Commissioner <u>in securitatim debiti</u> his right, title and interest in and to the shareholding's and member's interest as well as any or all accounts held by him in the following entities:*
>
> *Bedfin, Costa Verde, Denim, Blitz, Factoprops, Mag, Ming's Distributors, Ming's Trading, Replay, Tradepost and Thorwyn (the entities) as well his right, title and interest in and to the member's interest as well as any or loan accounts held by him in Bridgewater Investment CC, and Erf 30 as at 28 February 2009."*

(b) Clause 1.1.3 reads:

> *"Tenders as security for the tax obligation the immovable properties described"*.

(c) Clause [6] reads:

> *"The deed of cession insecuritatim debiti by Wingate-Pearse referred to in paragraphs 1.1.2 hereof is annexed mark C."*

On the reading of the said clauses, it is only clauses 1.1.2 and 1.1.3 of the 2009 settlement that made reference to assets put up as security. There is no mention of "security" in paragraph 1.1.1.

EXTRINSIC EVIDENCE

[17] As this matter is based on an interpretation of clause 1.1.1 of the 2009 settlement agreement, I am firstly required to make a determination if extrinsic evidence can be relied upon. The applicant's contention is that extrinsic evidence is impermissible and contrary to the *parol evidence* rule.

[18] In this regard the applicant relied on the *parol evidence* rule and relied on the ***De Klerk*** matter, where the court stated that *"where a contract has been reduced to writing, the written document is regarded as the sole memorial of the transaction and deprives all previous inconsistent statements of their legal effect. The document becomes conclusive as to the terms of the transaction which it was intended to recall. The result is that the previous statements by the parties on the subject can have no legal consequences and are accordingly irrelevant and evidence to prove them is inadmissible"*. [3]

[3] De Klerk v Old Mutual Insurance Co Ltd 1990 (3) SA 34 E 39 D-E

[19] I find this submission of the applicant to be untenable, particularly if we have regard to the emerging trend to interpreting contracts and agreements. The leading authority is the matter of ***Endumeni***,[4] which introduced the triad approach – emphasizing that the text, context and purpose must be considered holistically.

[20] The ***Endumeni*** principle on interpretation is well known and has been often quoted in matters concerning interpretation.

[21] I, however, find it appropriate to set out the principles therein. The unitary tenets to interpretation are text, context and purpose. At paragraph 18 of ***Endumeni*** the court explained that:

> (i) 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.
>
> (ii) 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.
>
> (iii) The process is objective. A sensible meaning is to be preferred.
>
> (iv) In summary, the 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.

[4] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA at 603

[22] ***Endumeni*** particularly expressed that this principle is consistent with the "emerging trend" in statutory construction and the prior approaches to interpretation are therefore outdated.

[23] The ***Endumeni*** principle was more recently adopted in both the ***UJ***[5] and ***Capitec***[6] matters. In essence, it was emphasized that the text, context and purpose must be considered holistically. In the ***UJ*** matter at paragraph [67], the court found it acceptable for the parties to adduce evidence to establish the context and purpose of the relevant contract provision. It found that the evidence could include pre-contractual exchanges between the parties leading to the conclusion of the contract and evidence in the context in which the contract was concluded.

At paragraph 69 the court stated:

> *"… context must be considered when interpreting any contractual provision and it must be considered from the outset as part of the unitary exercise of interpretation …".*

[24] Notably, and of significance, the SCA in ***UJ*** warned against a carte blanche approach. It appreciated that extrinsic evidence is not always admissible. It held that a court's recourse to extrinsic evidence is not limitless because interpretation is a matter of law and not of fact and it is for the court to interpret. It is also true that *"to the extent that evidence may be admissible to contextualize the document (since context is everything) to establish its factual matrix or for purposes of identification, one must use it as conservatively as possible …"*.

[25] The text has to be considered together with the context and circumstances that led to the existence of the agreement. Context particularly becomes relevant where the ordinary grammatical wording is not conclusive or helpful. More importantly, contextual

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[5] University of Johannesburg v Auckland Park Theological Seminary and Another 2021 (6) SA 1 CC
[6] Capitec Bank Holdings Ltd & Another v Coral Lagoon Investment 194 (Pty) Ltd 2022 (1) SA 100 (SCA)

interpretation requires that regard be had to the setting of the word or provision to be interpreted with particular reference to all the words, phrases around the word[7].

[26] In these circumstances when more than one interpretation is possible, I am required to objectively weigh the interpretation proffered in light of all the facts, more particularly, "text, context and purpose".

[27] By merely considering the plain wording in the 2009 agreement, it is noted that no reference is made to the word "security". When read with the other clauses, it is clear that the latter clauses make reference to the assets being put up as "security".

[28] I am directed by ***Endumeni*** to have regard to the extrinsic evidence to the extent that such evidence would contextualize clause 1.1.1. In its papers, the respondent made reference to extrinsic evidence in an attempt to set the context and purpose that caused the wording of clause 1.1.1.

[29] The extrinsic evidence the court was requested to have regard to:

> (i) I was referred to correspondence between the parties pursuant to the launching of the urgent application, as part of the settlement negotiations pertaining to the 2009 proceedings. The applicant stated therein:
>
> *"We were instructed to offer that pending finalisation of the Tax Appeal (the applicant) will:*
>
> > *4.1 Pay to [SARS] the balance of the proceeds of the sale of his immovable property, Section [....] V[....], M[....], Cape Town which proceeds are currently held in the KWB trust account in the amount of*

[7] Afriforum and Another v University of the Free State 2018 (2) SA 185 CC at page 200H-201A at par 43

R336,374.98. These monies are currently held in Section 78(2) account (in terms of the provisions of Section 78(2) of the Attorneys' Act 1979" [8]*;*

Further on in the same letter, the applicant listed the assets tendered as security at paragraph 4.2. It was pointed out that the amount tendered was not identified to be "security".

[30] The applicant particularly objected to the reliance on the said letter. It was pointed out that this was part of the without prejudice negotiations between the parties. I have taken their objection into consideration.

[31] I was further referred to paragraph 53.2 of the replying affidavit in the urgent application[9] where it illustrated that the applicant made proposals in settling the debt and offering security. The applicant alleged[10]:

"I have made proposals to [SARS] in respect of payment of the Tax obligation, as well as offering security to the respondent."

This illustrates that two aspects were considered as part of the settlement process, namely payment and security.

[32] Reference was also made to the judgment of ***Prinsloo*** at paragraph [25] where the judge referred to the 2009 settlement and stated:

"The urgent application was settled pending determination of the tax appeal … against the assessments raised by SARS for the relevant years. In terms of the settlement, [SARS] would hold back recovery steps pending the outcome of the tax appeal and the applicant would make a certain interim payment. The applicant would also seek, in securitatim debiti his right, title and interest and to

[8] SARS 14 Caselines 005-199, particularly 005-202
[9] Par 70 of the answering affidavit, Caselines 005-28
[10] Par 72 of the answering affidavit, Caselines 005-29

his shareholding and member's interest in some eleven closed corporations who were parties in the settlement agreement which is part of the record."[11]

It was pointed out that the said undertaking recorded by the Judge, is in accordance with the 2009 settlement agreement.

[33] In paragraph 59 of the applicant's founding affidavit, in the second review application launched on 17 August 2015, the applicant made no reference to the fact that the amount was paid as part of security:[12]

"On 20 March 2009, SARS agreed not to apply the "pay-now-argue-later" rule on condition that I, inter alia, ceded as security my interests in various memberships, shareholdings and immovable properties which agreement was concluded in settlement of the urgent application."

[34] It was also pointed out that the amount was set off against the outstanding tax debt on the statement of account. The amount was therefore not held in *securitatim debiti.*[13] From the statement of account, appearing as 'SARS 10', it has not been disputed that the R336,374.98 was taken into account when the final figure of R3 million was computated. It was argued that if the R336,374.98 was only held as security, the amount would then not have been deducted from the outstanding debt.

[35] On the further reading of the correspondence between the parties, it was submitted that no mention is made that the amount of R366,374.98 was to serve as security.[14]

[36] In regard to the events that led up to the 2020 settlement, SARS further pointed out that no mention was made that the R336,374.98 had to be repaid to the applicant. Even the KWP letter of 10 June 2020, does not mention the repayment of R336,374.98.

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[11] 005-29 of the record
[12] 005-30 of the record
[13] 'SARS 10' p 005-171
[14] 'SARS 14' 005-199 read with 005-27 to 005-30

In fact, in such letter it was stated that the applicant relied on the terms of the settlement that is, SARS on receipt of the R3 million payment would furnish the settlement journals on the taxpayer's income tax account to reflect the result of the settlement. SARS was required to undertake to release the securities held and provide evidence to that effect.[15]

[37] This was followed by two correspondences from SARS' instructing attorneys of record where it was confirmed that SARS complied with its obligations in terms of the settlement. KWP was furnished with the applicant's statement of account reflecting a NIL balance.

[38] SARS further informed the applicant, through its attorneys, that the caveats registered over the immovable properties would be lifted. It further advised that the security ceded to SARS in terms of the 2009 settlement agreement be cancelled.

[39] The issue of the repayment of the amount and its states as status as security was for the first time raised in KWP's response of 26 June 2020.[16]

[40] In addition, I have noted from one of the previous matters namely: ***Wingate Pearse v Commissioner of SARS 2019 (6) SA 196 GJ*** the presiding judge at paragraph 8 of his judgment recorded:

"On 13 March 2001, Mr Wingate-Pearse launched an urgent application against SARS in this court under case number 10991/09, inter alia, seeking an order interdicting SARS from taking collection steps based on the tax judgment. The matter was settled and the written settlement agreement made an order of court on 20 March 2009. In terms of the settlement, SARS would hold back recovery steps pending the outcome of the tax appeal and Mr Wingate Pearse <u>would make an interim payment and cede, in securitatim debiti</u>, his right title and interest in and to his shareholding and members

[15] 'WP6' of the founding affidavit -002-2867-2871 of the record
[16] 'WP9'-002-2911-2913 of the record

interest in some eleven closed corporations, which were also parties to the settlement agreement." (my emphasis)

Once again the inference one draws from the aforesaid is that the amount could not have been intended as security.

[41] In reasonably applying an objective approach in interpreting clause 1.1.1, I am required to consider the factual matrix, the context namely the circumstances that led to the conclusion of the said agent. On the evidence before me, considered holistically, I find that the amount referred to in clause 1.1.1 was not tendered as security. Even if I exclude the without prejudice settlement negotiations, the rest of the evidence, in my view, does not illustrate that the amount was not tendered as security. Consequently, the applicant's request for the striking out of those portions of the record of SARS' answering affidavit has no merit, as such evidence may be considered by this court.

RETURN OF THE SEIZED GOODS AND DOCUMENTS

[42] I have considered the contentions of both parties pertaining to the seized material. The applicant seeks an order in terms of Section 66 of the TAA for the return of the seized material. I have noted that there are material disputes of fact which includes not only whether the applicant has *locus standi* to seek the relief sought but various material factual disputes which included issues as to: whether the seized items were in fact returned to the applicant; whether SARS lawfully disposed of the goods; whether the goods were seized in terms of the customs and excise legislation.

[43] From the affidavit I have further noted that there are allegations that proper inventories/indexes of the seized material were not kept. In my view, these are material disputes of fact which cannot be resolved on the papers.

[44] This is clearly not an instance where there is a bare denial on the part of the respondent. I have a version that is not farfetched nor is it untenable so as to warrant a rejection on the papers.

[45] In fact, there are two conflicting versions which I am unable to determine without the benefit of oral evidence and without the issues in dispute properly identified. The parties are required to define the salient points in dispute and identify the relevant material documents which has a bearing on the issues.

[46] By referring this matter for oral evidence, I am aware that I have a wide discretion and which discretion should be exercised judicially. Since the material disputes of fact are evident and which cannot be satisfactorily determined on the papers, I am of the view that the matter should be properly referred to oral evidence.

[47] Motion court proceedings could never have been the appropriate forum to ventilate these issues. In light thereof, the relief sought by the applicant, more specifically in prayers 3.3.1 and 3.3.2 in terms of Section 66 of the TAA for the return of the items seized and removed by the respondent during April 2005 is referred to oral evidence. The issue for determination whether an order in terms of Section 66 of the TAA for the return of the seized material is justified or not, is referred to oral evidence.

COSTS

[48] On the issue of costs, since SARS is successful on the first issue, namely that the payment in an amount of R336,374.98 constituted payment towards the tax debt, there is no reason why SARS should not be entitled to costs in its favour. However, since the second issue regarding the return of the seized material has not been finalized, SARS is not entitled to its full costs.

[49] In exercising my judicial discretion, I am of the view that awarding SARS 30% of the costs in its favour is appropriate and justified. Furthermore, such costs should only be taxed and executed upon finalisation of the second issue.

[50] I have further, in awarding the costs order, taken into consideration the extent of the arguments in respect of the various issues, the pleadings as well as the record in

this matter. A substantive portion of the court record constituted documents pertaining to the second issue.

[51] Since the second issue, namely the return and delivery of the material goods seized in terms of Section 66 of the TAA has been referred to oral evidence, the appropriate order would be that costs be costs in the cause.

[52] In the premises I make the following order:

1. The payment of R336,374.98 constituted payment towards the tax debt.

2. The applicant is ordered to pay 30% of the costs of this application.

3. The relief sought in terms of Section 66 of the Tax Administration Act 28 of 2011 for the return of the items seized and removed by SARS during April 2005 is referred to oral evidence.

4. The costs pertaining to prayer 3 are costs in the cause.

H KOOVERJIE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv PA Swanepoel SC

	Adv CA Boonzaaier
Instructed by:	KWP Attorneys
Counsel for the Respondent:	Adv HGA Snyman SC
Instructed by:	MacRobert Inc
Date heard:	27 July 2022
Date of Judgment:	30 September 2022