IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 45008/2021

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED.

DATE: 24/07/2023

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES (Respondent in the counter-application)	**APPLICANT**
and	
ANGELO AGRIZZI (First applicant in the counter-application)	**FIRST RESPONDENT**
DEBORAH CINDY AGRIZZI (Second applicant in the counter-application)	**SECOND RESPONDENT**

JUDGMENT

BASSON, J

Introduction

[1] There are two applications under case number 45008/2021. The first is the application brought by the Commissioner for the South African Revenue Services (SARS - the applicant) in terms of section 186(2) of the Tax Administration Act (TAA)[1], for the compulsory repatriation of foreign assets held by the respondent in Italy. I will refer to this as the "repatriation application". The repatriation application is against Mr Angelo Agrizzi (first respondent) and his wife Mrs Deborah Cindy Agrizzi (second respondent). No relief is sought against the second respondent, she is only joined to the extent that she may have a direct interest in the outcome of the application.[2] I will therefore only refer to Mr Agrizzi as the respondent.

[2] The second application is a review application brought by the respondent as a counter-application in the repatriation application. The review is against SARS's decision to refuse the respondent's application in terms of section 164 of the TAA for a suspension of payment of tax assessed or outstanding income tax liability. I will deal with the repatriation application first.

COMPULSORY REPATRIATION APPLICATION[3]

[3] This is an application for an order compelling the respondent to repatriate all his assets located outside the Republic of South Africa (most notably Italy) within three months from the date of the order sought in this application in order to satisfy his outstanding tax debts.

[4] The order is sought in terms of section 186(2) contained in Part F of Chapter 11 of the TAA. An order is also sought that the respondent discover on affidavit within 10 days from the date of the order, a full and verifiable description and details including values of the said assets' whereabouts. The assets specifically listed in the Notice of Motion are: (i) the immovable property situated in Italy to the estimated Rand value of R15 259 400.00; (ii) BMW X5 to the estimated value of R1767 660.00; (iii) funds held in the respondent's bank account at Intesa Sanpaolo, Italy with a Rand value of R398018.11; (iv) funds held in cryptocurrency to an unknown

[1] Act 28 of 2011.
[2] Although in the Notice of Motion SARS also seeks an order directing the second respondent to repatriate funds held in her bank account to the value of R10 968 696.30.
[3] It is not in dispute that SARS may bring a repatriation order. Firstly, the TAA provides for such a procedure and secondly, the Court in Metlika Trading Limited and others v Commissioner, South African Revenue Services 2005 (3) SA 1 paras 36, 49 and 51 held that it was competent for a court to grant such an order where assets of a taxpayer are held outside of South Africa.

value; (v) funds held in a bank account by the second respondent with a Rand value of R10 9868 696.30. To the extent that the assets in question do not comprise of cash (held in a bank or crypto currency accounts) which are not easily or at all capable of being repatriated, for instance fixed property, the order sought provides that the assets be converted into cash and the funds be repatriated whereafter such funds will be deposited into the trust account of SARS's attorney of record ("VZLR").

Brief overview of some of the relevant background facts

[5] As a result of evidence led before the Zonda Commission (including the evidence led by the respondent), SARS became aware of a large scheme of fraud, money laundering, racketeering and tax evasion involving the respondent's former employer (the African Global Group of Companies previously known as BOSASA). At the relevant time, the respondent was the group's Chief Operating Officer (COO). As a result, SARS investigated the allegations and on 29 March 2019 obtained an order in terms of section 51 of the TAA authorising a tax enquiry into the finances of BOSASA and various related individuals and companies. BOSASA was eventually wound up.

[6] Subsequently, a tax enquiry was convened and the respondent was called to testify. As a result of his testimony and subsequent investigations, SARS formed the view that the respondent received "gross income" as defined in section 1 of the Income Tax Act (ITA)[4], which he failed to declare in his annual income tax return.

[7] On 7 December 2020 SARS issued a letter of audit findings to the respondent. and, on 11 March 2021, SARS raised additional income tax assessments assessing the respondent's tax for the years 2006 to 2019 in terms of the ITA read with the TAA (the assessments)[5]. SARS also issued notices of assessment to the respondent. In terms of these assessments, SARS assessed an amount of R 196 050 232.83 as undeclared taxable income. The tax liability was assessed as amounting to R230 166 728.55. This amount comprised of the normal tax income, understatement penalties in terms of section 222 of the TAA at a rate of 150%; penalties in terms of paragraph 20 of the fourth schedule to the ITA and interest on

[4] 58 of 1962.
[5] In terms of s 91 and 92 of the TAA: Chapter 8: Assessments.

the underpayment of provisional tax. The due date for the full payment of the assessed indebtedness of the first respondent in terms of the IT34 notice[6] was 18 March 2021.

[8] SARS submitted that, in terms of section 162 of the TAA read with the definition of "outstanding tax debt", an outstanding tax debt[7] means a tax debt not paid by the day referred to in the notice (IT34) and must be paid as a single amount (section 162 of the TAA). I will return to this issue.

[9] Correspondence was exchanged regarding certain documents such as bank statements on which the assessments were based. Ultimately, the legal representatives of SARS and the respondent agreed that the first due date for payment of the assessed tax amount would be 1 April 2021 and the second due date would be 30 April 2021. As at that date, the respondent, according to the IT35 had an outstanding tax debt.

[10] On 28 April 2021, two days prior to the second due date for payment of the assessed tax debt, the respondent delivered a request to SARS for an extension of the period to lodge an objection to 10 June 2021. The extension request was granted. The respondent requested a second extension to deliver his objection on 13 August 2021. This request was also granted.

The suspension application: 28 April 2021

[11] On 28 April 2021, the respondent submitted a section 164 request for the suspension of payment (which forms the subject matter of the review application). SARS's Tier 3 Debt Management Committee met on 14 July 2021 to discuss the suspension of the payment request. In a letter dated 26 July 2021, SARS declined the respondent's request for a suspension of payment of the assessed amount and directed that the payment of his tax debt be made within 10 business days namely on or before 10 August 2021. I will refer to the suspension of payment application in more detail. SARS pointed out that, in terms of section 164 of the TAA, an objection does not suspend the obligation to pay unless a senior SARS official suspend payment of the tax or a portion thereof. Consequently, the full amount thus

[6] In terms of s 96 of the TAA: Chapter 8: Assessments.
[7] Section 1 of the TAA.

remained due and outstanding. I will return to this issue.

Objection: 13 August 2021

[12] On 13 August 2021 (after his request for a suspension of payment was declined) the respondent submitted his objections against the assessments (relating to the tax periods 2006 to 2019) in terms of section 104 of the TAA.

[13] SARS considered the objections and on 9 February 2022 communicated to the respondent that the objections were partially allowed and that the assessed amount was reduced from R230 million to R174 million which amounts to an approximate 25% reduction in liability. According to SARS the respondent's tax liability, despite the reduction, still exceeded the value of his known assets particularly those in Italy in respect of which SARS now seeks an order in terms of section 186 of the TAA.[8] As already stated, at the time when the request for a suspension was considered, the outcome of the objection that resulted in a 25% reduction in the tax debt, was not yet known.

[14] The respondent indicated that he intended to follow the statutory appeal process against SARS's decision to disallow the remainder of his objections and submitted (with reference to the application for a suspension of payment) that a sensible approach would be to defer the enforcement of the payment whilst the full objection procedure runs its course including the statutory appeal process. SARS on the other hand insists that the respondent pays the full amount, hence this application for a repatriation order under section 186 of the TAA.

The arrest of the respondent

[15] On 14 October 2020 the respondent was arrested for crimes other than tax offences. He was charged with fraud and corruption which resulted in him launching a bail application. On 30 October 2020, the respondent was released on bail. Some of his bail conditions are relevant to this application. The bail amount set is equal to the value of his fixed property situated in Castel Del Piano in Italy. The respondent is required in terms of the bail order to hand over the original title deed of the said property. In addition, the respondent must furnish the National Prosecuting

[8] The request for a suspension was made on 8 April 2021 and declined on 26 July 2021.

Authority (NPA) with a signed guarantee secured by the said property. The respondent must also make a full and frank disclosure of all its foreign assets belonging to himself and his wife including the nature, value and location, account numbers and/or vehicle numbers.

[16] Pursuant to the bail conditions, the respondent signed a Guarantee in terms of which the respondent's fixed property in Italy was bound in *securitatem debiti* to the NPA for purposes of his bail. In terms of this agreement, the property is held as "collateral security for the discharge of the obligations assumed by me [the respondent] in terms hereof'. The respondent ceded over to the State all his rights, title and interest in the property to be held as security pending the said discharge his obligations.[9] And, "no variation of this Guarantee shall be of any force or effect unless reduced to writing, signed by me [the respondent] and confirmed by the State in writing"[10].

[17] According to SARS, although the foreign assets form part of his bail conditions, those assets remain those of the respondent. The bail is merely an incentive for an accused to attend the criminal trial and as such do not indemnify the property against execution from creditors. I will return to this argument.

Section 186 of the TAA

[18] Section 186 of the TAA falling under Chapter 11 of the TAA which deals with the recovery of tax, more specifically Part F, dealing with remedies in regard to foreign assets, sets out the jurisdictional ambit within which such an order may be sought. This section, which must be considered in the context and purpose of this chapter, reads as follows:

"Part F

Remedies with respect to foreign assets

186. Compulsory repatriation of foreign assets of taxpayer

(1) To collect *an outstanding tax debt,*[11] a senior SARS official may apply for an order referred to in subsection (2), if-

[9] Clause 3 of the agreement: Guarantee and Cession in Securitatem Debiti.
[10] Ibid clause 5.
[11] My emphasis.

(a) the taxpayer concerned does not have sufficient assets located in the Republic to satisfy the tax debt in full; and

(b) the senior SARS official believes that the taxpayer-

(i) has assets outside the Republic; or

(ii) has transferred assets outside the Republic for no consideration or for consideration less than the fair market value, which may fully or partly satisfy the tax debt.

(2) A *senior* SARS *official*[12] may apply to the High Court for an order compelling the taxpayer to repatriate assets located outside the Republic within a period prescribed by the court in order to satisfy the tax debt.

(3) In addition to issuing the order described in subsection (2), the court may-

(a) limit the taxpayer's right to travel outside the Republic and require the taxpayer to surrender his or her passport to SARS;

(b) withdraw a taxpayer's authorisation to conduct business in the Republic, if applicable;

(c) require the taxpayer to cease trading; or

(d) issue any other order it deems fit.

(4) An order made under subsection (2) applies until the tax debt has been satisfied or the assets have been repatriated and utilised in satisfaction of the tax debt."

[19] SARS contended that it is entitled to an order in terms of section 186(2) of the TAA in that it has satisfied the jurisdictional requirements of such an order in that -

(i) The respondent has an "outstanding tax debt" as envisaged in section 186(1) of the TAA read with the ITA.

(ii) Mr Pieter Engelbrecht (Engelbrecht), who deposed to the founding affidavit in the compulsory repatriation application on behalf of the SARS, is a "senior SARS official" as defined in section 1 read with section 6(3)(c) of the TAA for purposes of an application in terms of section 186(2) of the TAA.

(iii) The respondent does not have sufficient assets located in the Republic of South Africa to satisfy the outstanding tax debt in full or in part as envisaged in section 186(1)(a) of the TAA; and

(iv) Engelbrecht holds the view that the respondent has assets outside the Republic of South Africa or has transferred assets outside the Republic of

[12] Ibid.

South Africa for no consideration or for a consideration less than the fair market value which may fully or partly satisfy the outstanding tax debt (section 186(1)(b)(i) and (ii) of the TAA).

[24] The respondent raised three objections against the compulsory repatriation application. The first is that there is no "tax debt". I have decided the point in favour of SARS. The second is that Engelbrecht is not a "senior SARS official" and therefore not authorised to bring the repatriation application. I have likewise decided this point in favour of SARS. The third point is that the order sought in the repatriation application is "legally impermissible" as it would be contrary to the respondent's bail conditions. I have decided this point in favour of the respondent having had regard to the bail conditions set for the respondent and the terms of the Guarantee and Cession Agreement. In my view, the latter finding is dipositive of the compulsory repatriation application. I will commence with the authority of Engelbrecht to bring the application.

Designation of the deponent (Engelbrecht) of the founding affidavit as a *"senior SARS official"*

[25] One of the jurisdictional requirements is that only a "senior SARS official" may apply for a compulsory repatriation order. On behalf of the respondent it was submitted that SARS did not place sufficient evidence before the court of Engelbrecht's authority or seniority as required by the TAA to depose to the founding affidavit.

[26] The TAA defines a "senior SARS official" as "a SARS official referred to in section 6(3) of the TAA:

"Part B

Powers and duties of SARS and SARS officials (ss 6-9)

(6) ***Powers and duties***

(3) Powers and duties required by this Act to be exercised by a senior SARS official must be exercised by-

(a) the Commissioner;

(b) a SARS official who has specific written authority from the Commissioner to do so; or

(c) a SARS official occupying a post designated by the Commissioner in writing for this purpose."

[27] In the founding affidavit Engelbrecht describes himself as a "Stream Lead: Illicit Economy Unit" and states that he is a senior SARS official as envisaged in s 1 read with section 186 of the TAA. The point is taken by the respondent in the answering affidavit that there is no evidence that the deponent to the founding affidavit is a senior SARS official. Responding to this point, Engelbrecht, in the replying affidavit attached a document (Annexure "RA1"), albeit illegible, which, according to him, shows that he is indeed a senior SARS official. Only in the answering affidavit to the counter- application, did Engelbrecht attach a more legible copy of the said annexure. He explains that his post is indeed that of a senior SARS official and that he reports to the Head of the Criminal and Illicit Economic Activities Division of SARS, Mr Baloyi (Baloyi). Baloyi confirms in his confirmatory affidavit that he is the Head of SARS's Criminal and Illicit Economic Activities Division and that Engelbrecht, who is an Executive, reports to him. He therefore confirms that Engelbrecht is a senior SARS official for purposes of an application for repatriation made in terms of section 186 of the TAA.

[28] Although it is ordinarily irrelevant whether the deponent to a founding affidavit has been authorised to depose to an affidavit,[13] it is relevant where the authority is one of the jurisdictional requirements for bringing an application such as a compulsory repatriation application in terms of section 186 of the TAA. If it turns out that Engelbrecht is not a senior SARS official, then there has been non-compliance with one of the jurisdictional requirements of section 186 of the TAA and the application would then have to fail on that basis.

[29] Having regard to the papers, I am satisfied that Engelbrecht is a senior SARS official as claimed in the founding affidavit and that he did have the necessary authority to launch the compulsory repatriation application in terms of section 186 of the TAA.

There is no "tax debt"

[13] Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624G -1.

The respondent's submissions

[30] This objection focusses on the interpretation of the words "outstanding tax debt". With reference to the TAA, the respondent submitted that a "tax debt" is defined (in section 1 of the TAA) as an amount referred to in section 169(1). Section 169(1) in turn refers to "[a]n amount of tax due or payable in terms of a tax Act". An assessment, so the argument goes, is not "due and payable" until it is final. Reference is also made to section 100 of the TAA which deals with the finality of assessments or decision. This section falls under Chapter 8: Assessments. This section provides that, an assessment is "final" only if, amongst other things, "no objection has been made". The respondent points out that such an objection has in fact been made to SARS and that such objection was partially upheld and resulted in a reduction in the amount of R56 million. Furthermore, the respondent has a right to appeal the decision taken in respect of his objection or, at least in respect of those parts of the objection that SARS did not uphold, which he did. Consequently, because the respondent has not yet exhausted his internal right to an appeal, the assessments are not yet "final". Finality, so it was submitted, is particularly important before resorting to the extraordinary step of a forced repatriation.

How does the TAA define a "tax debt" and an "outstanding tax debt"?

[31] The TAA is divided into different chapters and parts and, as the parties correctly submitted, context is everything. Section 186(1) must therefore be considered in the context of Chapter 11 which is concerned with the recovery of tax. So also, must the disputed words "outstanding tax debt" be considered in the context of Chapter 11.

[32] An "outstanding tax debt" is defined in section 1 of the TAA as –

> *"[means] a tax debt not paid by the day referred to in section 162."*

Section 162(1) (Chapter 11, Part B - Payment of tax) reads as follows:

Determination of time and manner of payment of tax

> *"(1) Tax must be paid by the day and at the place notified by SARS, the*

Commissioner by public notice or as *specified be paid* as a *single amount in terms of an instalment payment agreement under section 167"*

[33] A "tax debt" is defined as -

"[means] an amount referred to in section 169(1)"

Section 169(1) of the TAA (Chapter 11: Recovery of tax: Part A: "Debt due to SARS") in turn reads as follows:

"(1) An amount of tax due or payable[14] *in terms of* a *tax Act is* a *tax due to SARS for the benefit of the national revenue fund."*

[34] In as far as the respondent relies on section 100 of the TAA, SARS submitted, that that the section deals with "assessments" and has nothing to do with the liability to pay an assessed amount. It has, so it is argued, to do with whether or not a taxpayer may dispute the correctness of an assessment. I agree with the submission,

[35] In keeping with the view that the context is important in the TAA, it is important to note that section 186 (which is the relevant section in terms of which SARS is bringing the compulsory repatriation application), refers to an "outstanding tax debt" and not to a "tax debt" as defined in section 169(1). The express wording of these sections cannot be ignored. Relying on the definition of a "tax debt" as referred to in section 169(1) is therefore misplaced as it effectively ignores the clear wording of the definition of an "outstanding debt" as referred to in section 186 of the TAA.

[36] Accordingly, I am of the view that the adjusted amount assessed is an outstanding amount (tax debt) that must be paid by the day and place notified by SARS. This was done in terms of the IT34 furnished to the respondent.

Impossibility of the order

[37] The respondent submitted that the relief sought by SARS is legally impossible as it would be contrary to his bail conditions. Also, as part of his bail conditions, the

[14] My emphasis.

respondent ceded *in securitatem debiti* the property in Italy to the NPA.

Non-joinder of the NPA

[37] It is common cause that neither the **NPA** nor the South African Reserve Bank was joined as a respondent to these proceedings. SARS tried to downplay this omission by submitting that, in as far as the NPA has an interest in the outcome of this application, SARS did make the papers available to the office of the NPA and if they had wanted to intervene, they had the opportunity to do so. They chose not to do so.

[38] Does the NPA have a direct and substantial interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court? SARS submitted that the only interest that the NPA has is that the respondent keeps to his obligation to attend his trial. Although this is undoubtedly so, this is not, in my view, the only interest that the NPA may have in the outcome of this matter. The NPA has, in my view, a substantial interest in the outcome of these proceedings, particularly in circumstances where the effect of a compulsory repatriation order will significantly interfere with the terms or bail conditions set in an order to which the NPA was a party.

[39] SARS acknowledges that the respondent's non-compliance with his bail conditions will result in his bail to be automatically revoked and that he will be remanded to custody within 48 hours of the breach of "any of these conditions". The only response to this eventually from SARS is that the respondent will have to renegotiate his bail conditions with the NPA. This is untenable. By not joining the NPA to these proceedings, this court is left to its own devices to speculate as to what the attitude of the NPA might be to a request from the respondent to renegotiate his bail conditions should he be ordered by this court to sell the property held in Italy. Also, although the bail conditions do allow for the respondent to sell his property on notice to the NPA,[15] this court is left in the dark as to whether the NPA will consent thereto and whether the NPA would be willing to release the property deed to the respondent.

[40] There was a debate about the effect of the bail condition which required the respondent to hand over the title deed for his property in Italy to the NPA which resulted in the conclusion of the Guarantee and Cession in *securitatum debiti.* The respondent contended that he ceded his property to the NPA and having done so, he is

[15] Clause 4 of the bail conditions.

unable to alienate the property and doing so would be contrary to his bail conditions. SARS disputed this contention and submitted that the pledge theory applies and that dominium did not pass to the NPA but remained with the respondent.

[41] I have considered the submissions but do not deem it necessary to enter into an academic debate as to what the cession entails. The fact of the matter is that the bail conditions precludes him (except for what is stated in paragraph 4) from selling his property as this will result in a breach of his bail conditions which in turn will result in his arrest and incarceration. Moreover, SARS conceded that he "will probably have to renegotiate his conditions with the NPA and obtain the original title deed of the immovable property". But, as already pointed out, the NPA is not before this court and the court therefore is not informed as to whether the NPA would be willing to do so and if it was, what the renegotiated bail conditions might be.

[42] In summary. I agree with the submission that the relief sought in this application is legally impossible. Not only will such an order result in a variation of a material bail condition, but such an order may also result in the arrest and incarceration of the respondent as the respondent's bail conditions specifically require of him to cede as security of his obligations to the State his Italy property.

ORDER: COMPULSORY REPATRIATION APPLICATION

[43] In the event the following order is made:

> "The application in terms of section 186 of the Tax Administration Act, 28 of 2011 is dismissed with costs including the costs consequent to the employment of two counsel."

THE COUNTER-APPLICATION

[44] In the counter-application, the respondent (the applicant in the counter-application) seeks an order reviewing and setting aside the decision of SARS (the respondent in the counter-application) refusing his request for a suspension of payment of his assessed outstanding income tax liability which was brought in terms of section 164 of the TAA pending the finalisation of an objection or appeal against SARS' assessments. I will continue to refer to the parties as they are cited in

the main
application.

[45] Section 162 of the TAA provides for the default position in respect to the obligation to pay tax.[16] The default position is that the obligation to pay will not be suspended by an objection or appeal or pending a decision of a court of law pursuant to an appeal. Only a senior SARS official considering the factors set out in section 164(3) of the TAA *may* authorise the suspension of payment of a disputed tax. These factors include (but not limited to) -

(i) Whether the recovery of the disputed tax will be in jeopardy or whether there will be a risk of dissipation of assets;
(ii) The taxpayer's compliance history;
(iii) Whether fraud is *prima facie* involved in the origin of the dispute;
(iv) Whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS of the fiscus if the disputed tax is not paid or recovered, or
(v) Whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus.

[45] In the counter-application, the respondent submitted that the request for a suspension should have been granted under section 164(3) of the TAA considering the following factors:

(i) The respondent undertook to pay any amount due to SARS once the dispute about the correctness of the assessment has been finalised and the actual correct indebtedness has been quantified.
(ii) There is no prejudice to SARS if the respondent ultimately fails in his assessment particularly because interest will accrue in favour of SARS.
(iii) Other than the most recent assessments (which the respondent disputes), he has been tax compliant.
(iv) The respondent is unable to pay the disputed tax.
(v) The respondent cannot dissipate assets in that he has furnished the NPA with the title deed of the property in Italy.
(vi) The respondent submitted that there is no fraud involved in the origin of

[16] This section is included in paragraph 32 supra.

the dispute.

(vii) The respondent submitted that his objection is not frivolous or vexatious nor is he employing dilatory tactics in launching the objection.[17]

(viii) Not suspending payment of the disputed tax will cause him "irreparable hardship" (section 164(3)(d)) particularly in light of his illness that resulted in him having had to incur substantial medical expenses and his medical aid benefits having been depleted. He submitted that he will be severely prejudiced should it eventuate that his objection is allowed and that he does not owe the disputed tax.

[46] Despite these submissions, SARS, declined the request. In a letter dated 26 July 2021, SARS offered three reasons for its decision. The first is that, although SARS acknowledged that there is no risk of dissipation of assets due to the security provided to the NPA (the assets held in Italy), it nonetheless held the view that the recovery of the debt is in jeopardy (section 164(3)(a)). Secondly, SARS acknowledged that payment of the full debt will result in irreparable hardship but notwithstanding claimed that the substantial assets held abroad will satisfy either the full payment of the debt or at least a portion thereof. Thirdly, the respondent is not in a position to provide SARS with any security. The respondent was therefore requested to make full payment within 10 business days from the date of the letter.

[47] The reasons for the refusal of the suspension are set out in more detail in the minutes of the Tier 3 Debt Management Committee ("committee") held on 14 July 2021. The minutes record the background facts that gave rise to the assessment and the results of the additional assessments. It is recorded, *inter alia,* that the respondent is indebted to SARS in the amount of R241 858 984.98 for the income tax period 2006 to 2019 of which the capital amount was R84 332 468.01. It is recorded that the suspension was requested because the respondent intended to dispute his tax liability to pay the tax due relating to the 2006 to 2019 tax period. SARS has not commenced with the collection steps as the taxpayer applied for a suspension of payment prior to the debt becoming due and payable.

[48] The committee considered the various factors that must be considered in terms

[17] The outcome of the objection that that had resulted in a partial reduction of the assessed tax, only became known after Tier 3 Debt Management Committee had considered the request for a suspension of payment. To recap the decision to refuse the request was made on 14 July 2021. The respondent was informed of the decision on 26 July 2021. The objections were only submitted on 13 August 2021 and the Notice of Partial Allowance of Objective was emailed to the respondent on 9 February 2022.

of section 164(3):

(i) In respect of the consideration "whether the recovery of the disputed tax will be jeopardy or there will be a risk of dissipation of assets of R301 million which flowed into his bank account and other amounts" the committee considered that over the period of 2013 to 2021, an amount of R311 million had flowed out of the respondent's bank account leaving a deficit of more than a R9 million. SARS also noted that the bulk of the respondent's funds and assets were dissipated during 2019 to 2020. However, notwithstanding concluding that the respondent cannot dissipate his assets in Italy and that the bail order only provides for security over his assets in Italy and not for security over his South African assets, SARS concluded that tax collection is in jeopardy. Yet elsewhere in the reasons, SARS acknowledges that the respondent has no assets in South Africa and is therefore unable to provide such security.

(ii) Under the consideration that the respondent is tax compliant, it is noted that, although he is currently tax compliant, he failed to declare an amount of R20 million received from AGO as either severance pay or a restraint of trade which he was obliged to have done.

(iii) Regarding the consideration whether fraud is involved in the origin of the dispute, the committee recorded that the current criminal trial against the respondent does not involve a charge that the respondent committed fraud against the fiscus. But the committee also noted that SARS had levied 150% USP on the basis that the conduct of the taxpayer indicated intentional tax evasion.

(iv) Regarding the consideration that the payment of the outstanding tax amount would result in "irreparable hardship" to the respondent, the committee records that the respondent had submitted that he suffers from medical problems; that he had incurred substantial medical expenses; and that his medical aid benefits have already been depleted. The respondent argued that he will be severely prejudiced should the outstanding tax amounts be paid immediately. SARS seems to accept that the respondent has no fixed property registered in his name and that due to his ill health, he had to convert assets into cash to sustain himself and material medical expenses. He also cannot realise the Italian assets because he has given it up as security for his bail conditions. Having regard to all of these factors, SARS concludes that "it is possible that the taxpayer would suffer irreparable hardship should the debt be paid in full". SARS then come to the startling conclusion that "SARS therefore has

no assets to execute against and whether the payment is suspended or not, on the face of it, makes no difference to the taxpayer, depending on what SARS' next step will be".

(v) The respondent submitted that the objection that he intended to submit against the notice of additional assessments has merit, is not frivolous or vexatious nor is he employing dilatory tactics in conducting the objections. SARS disagreed and found that the respondent was employing dilatory tactics. More in particular, the Committee concluded that, even in a best- case scenario, the respondent will owe SARS a considerable amount, which will be far in excess of the assets in South Africa.

Pay- now-argue-later principle

[49] As already pointed out, section 162 of the TAA establishes the default position requiring the taxpayer to pay his or her outstanding tax on the date notified by SARS, even if he or she wishes to dispute the assessed tax later (the so called pay- now-argue-later principle). This principle was recognised by the Constitutional Court in in *Metcash Trading Ltd v Commissioner, South African Revenue Service, and another*[18] and by the court in *Capstone 556 (Pty) Ltd and another v Commissioner, South African Revenue Service and another.*[19] SARS is therefore enabled to execute against a taxpayer "without having first to air the subject-matter of the objection which will be adjudicated upon by the Special Court in due course. There is therefore a close connection between the overall purpose of the 'pay now, argue later' rule and the effect of section 40(5) of the VAT Act [equivalent to section 162 of the TAA].[20] The pay-now- argue-later rule is premised on the principle that it is in the public interest to obtain full and speedy settlement of tax debts.

[49] Because of the potential harsh effects to the taxpayer, a senior SARS official is afforded a discretion in terms of section 164(3) of the TAA to depart from the pay-now-argue-later rule by considering various factors listed in section 164(3). Having regard to the factors listed in section 164(3), it is clear that a request for a suspension of payment will not be granted if there is some pressing need for SARS to collect the disputed tax immediately instead of waiting for the objection procedure to run its course.

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[18] 2001 (1) SA 1109 (CC).

[19] 2011 (6) SA 65 (WCC). Although it is accepted that the principle of pay now argue later applies to taxpayers, I agree with the view held in Capstone that this principle may not necessarily apply to the same extent (as it does in the context of vat vendors in terms of the VAT Act) in the case of the ordinary taxpayer because of the differences between the position of VAT vendors and taxpayers.

[20] Ibid para 60.

Promotion of Administrative Justice Act (PAJA) or legality review

[50] There was some debate about whether this is a PAJA or a legality review. Although SARS conceded that a decision to deny a suspension may in certain instances constitute administrative action under PAJA, SARS submitted that the decision in this instance did not constitute administrative action because the decision did not "adversely affect Mr Agrizzi's rights".

[51] I do not agree. On SARS's own version, this argument has no merit. SARS had in fact conceded that the decision not to suspend will cause the respondent irreparable hardship. Secondly, the notion that decisions that do not adversely affect a person do not amount to administrative action, is misplaced, and has been dispelled by the court in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*[21]

[52] The decision in the present matter has the capacity to affect the respondent's rights and is made by a "bureaucratic functionary... carrying out the daily functions of the State".[22] Moreover, these types of decisions by SARS has been regarded by the Constitutional Court in *Metcash*[23] as administrative action capable of being reviewed in terms of PAJA.

The grounds of review

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[21] 2005 (6) SA 313 (SCA): ""[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals. [24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."

[22] Ibid.

[23] Metcash Trading Ltd supra note 18 paras 40 - 42.

[53] The respondent raised various grounds of review on which he assails the decision of SARS to refuse to suspend payment of the tax debt pending the outcome of further objections and an appeal.

[54] Before turning to these grounds, just a few brief remarks as the principles are trite. The basis of a judiciary review is where the administrative action is not lawful, reasonable or procedurally fair. A decision will be unlawful if, for example, the decision maker considered irrelevant considerations or failed to take into account relevant considerations. With regard to the reasonableness of the decision, a decision will be unreasonable and therefore reviewable if, as stated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others*[24] (with reference to section 6(2)(h)of PAJA) "is one that a reasonable decision-maker could not reach". Also, bearing in mind the distinction between a review and an appeal, the question is not whether the decision is capable of being justified. The question is whether -

> "[31] …*the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process and on the way in which the decision-maker came to the challenged conclusion. This is not to lose sight of the fact that the line between review and appeal is notoriously difficult to draw. This is partly because process-related scrutiny can never blind itself to the substantive merits of the outcome. Indeed, under PAJA the merits to some extent always intrude since the Court must examine the connection between the decision and the reasons the decision-maker gives for it and determine whether the connection is rational. That task can never be performed without taking some account of the substantive merits of the decision.*
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> *[32] But this does not mean that PAJA obliterates the distinction between review and appeal. As this Court has observed: 'In requiring reasonable administrative action, the Constitution does not … intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high* a *threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as*

[24] 2004 (4) SA 490 CC para 44.

substantively unreasonable "[25]

[55] Having regard to the general principles of judicial review, I will now briefly consider whether the decision taken by SARS falls within the bounds of reasonableness as required by the Constitution.

SARS' decision is ultra vires

[56] In a letter dated 26 July 2021, the respondent was informed of the outcome of his suspension application. The two signatories to the letter are Ms Naidoo (operational specialist) and Ms Coetzee (operational manager).

[57] The respondent submitted that the decision was *ultra vires* because neither of the two signatories are senior SARS officials. Moreover, the letter informing the respondent of the refusal to grant the suspension application was signed on 26 July 2021 whereas the minutes of the committee at which the decision was taken to refuse the suspension application was signed on 30 August 2021 by Mr Madima (Madima), the chairperson of the committee. Therefore, having regard to the fact that the minutes of the meeting were signed on 30 August 2021 which is well after the date on which the respondent was informed of the decision, the timeline does not support the contention by SARS that the decision was actually taken by Madima. Accordingly, the decision was not taken by an authorised official and therefore ultra vires. In the alternative, the decision taken by the authorised official (Madima), was taken only after SARS had already pre-judged the request on 26 July 2021.

[58] SARS contended that this ground of review is "evidently self-serving", as the decision was clearly taken by Madima, the chairperson of the committee. In his affidavit, Madima explains that his post within SARS is designated as a senior SARS official and that he had chaired the committee convened on 14 July 2021 at which the application to suspend was considered. He explains that, premised on the documents presented to him, he declined the suspension application.

[25] Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others 2007 (1) SA 576 (SCA) para 31-32.

[59] Regarding the purported discrepancies in the time-line, SARS submitted that it is clear on the face of it that the committee's meeting took place on 14 July 2021 prior to Naidoo and Coetzee preparing the letter to the respondent.

[60] Having regard to the affidavit filed by Madima, I am not persuaded that there is merit in this objection. The decision clearly was taken by Madima and the fact that the minutes were signed a month after the letter was sent to the respondent, is a red herring particularly in light of the explanation tendered by SARS that the minutes were not always signed immediately. There is no reason to doubt this.

Decision to refuse the request for a suspension

[61] The respondent raised only one factor in support of the contention that he will suffer irreparable financial harm if he is forced to make payment of the outstanding tax debt and that pertains to his medical condition. He submitted that, if he is compelled to make a payment now, he will be severely prejudiced should it eventuate that his objection is allowed and that he does not owe the disputed tax.

[62] Although SARS refers to this factor, no attempt is made to engage with the merits of this contention nor is any finding made by SARS as to why this factor (the respondent's health) should not weigh in favour of a suspension of payment. SARS seemingly ignores this factor and instead focuses on the respondent's inability to pay his outstanding tax debt and the perceived reasons (not relating to his medical condition) for not being able to do so.

[63] Once it is accepted by SARS (as it did) that there are no realisable assets to execute against; that the payment will result in irreparable hardship; that there is no risk of asset dissipation, that the respondent is fully tax compliant (except for the current dispute); that no fraud is involved in the origin of the dispute; that the objection is not frivolous or vexatious (although it was found that the respondent was employing dilatory tactics in conducting the objection or appeal); and the fact that the respondent is unable to provide any security as he has offered security to the NPA in terms of his bail conditions, there appears to be no rational basis for refusing to suspend the payment of his outstanding tax debt. It is furthermore inherently contradictory to find, on the one

hand that the respondent has no assets to execute against, but, on the other hand, to find that the recovery of the tax debt is in jeopardy.

Other irrational decisions

[64] Firstly, it is not a rational justification to refuse the suspension of payment on the ground that it would make no difference to the respondent whether or not the suspension is granted, as he, in any event, does not possess any assets against which SARS can execute. Conversely, it would equally make no difference to SARS if payments were suspended as the respondent lacks the means to pay the outstanding tax debt. Secondly, it is not rational to reject the suspension of payment based on the perceived subjective view held by the decision maker suggesting that "[I]t could be argued that this [referring to the fact that payment will result in irreparable hardship] was self-inflected based on the assets dissipated and repatriated to Italy". Thirdly, it not rational to conclude, as the decision maker did, that the suspension of payment should be declined on the basis that the "recovery of the tax debt was in jeopardy" because the taxpayer "intentionally transferred assets to a different country". The fact of the matter is that the respondent has no assets in South Africa against which SARS can execute.

[65] Considering all the reasons presented by SARS justifying the refusal to grant the request for a suspension, it becomes evident that irrelevant factors have been considered while relevant factors such as the respondent's medical condition and its impact on his ability to pay, were ignored.

[66] In conclusion, the decision by SARS to refuse the suspension lacks a rational connection to the underlying purpose of section 162 of the TM, which is to ensure prompt payment of the assessed tax without first having to consider any objections raised against the assessments (pay-now-argue-later). Considering the facts, there is no pressing need for SARS to collect the disputed tax particularly as it is accepted that the respondent will suffer irreparable hardship, lacks funds to pay the outstanding tax debt and that there is no risk of dissipation of assets.

[67] For all of these reasons, the decision of SARS is reviewed and set aside under section 6(2)(d), 6(2)(e)(vi), 6(2)(f)(ii) or 6(2)(i) of PAJA.

Remedy

[68] The respondent submitted that this court substitute[26] SARS's decision and grant the suspension application. Although he acknowledges that such an order is exceptional, he nonetheless contended that this court is in as good position as SARS to consider and decide the request for a suspension of payment.

[69] In keeping with the principle that due deference[27] must be given to the decision maker; the fact that substitution is an extraordinary remedy; and that such an order will only be granted in exceptional circumstances if it would be just and equitable,[28] I have decided not to substitute the decision of SARS. I am of the view, that in light of the events that have emerged subsequent to the suspension decision was taken and the fact that the respondent's objection had been partially successful and resulted in a reduction of his outstanding tax debt, the matter should be remitted to SARS for a reconsideration of the suspension application. As regards to costs, the respondent was substantially successful and therefore costs should follow the result.

ORDER: COUNTER APPLICATION

[70] In the event the following order is made:

"1. The counter-application is granted with costs including the costs consequent to the employment of two counsel.

"2. The matter is remitted to the Tier 3 Debt Management Committee for a reconsideration of the application for a suspension of payment in terms of section 164 of the Tax Administration Act 28 of 2011.

JUDGE A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

[26] In terms of s 8(1) (c) (ii) (aa) of PAJA.
[27] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another 2015 (5) SA 245 (CC) para 42.
[28] Ibid para 35.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 24 July 2023.

Appearances:

For the applicant	A Subel SC and Adv J Mitchel Instructed by VZLR Attorneys
For the respondent	HGA Snyman SC and Adv K Ramaila Instructed by Witz Incorporated