HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 37766/2021
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 13 DECEMBER 2023
SIGNATURE

In the matter between:

CRRC E-LOCO SUPPLY (PTY) LTD Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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ORDER

The application for leave to appeal is refused with costs, including the costs of two counsel.

J U D G M E N T

This matter has been heard on a virtual platform and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] On 18 July 2022 this court dismissed an application by CRRC E-Loco Supply (Pty) Ltd (CRRC) to have the recovery by SARS of unpaid taxes by way of the issuing of notices to CRRC's bankers in terms of section 179(6) of the Tax Administration Act 28 of 2011 (the TAA) reviewed and set aside.

[2] On 27 July 2022 CRRC served an application for leave to appeal on SARS and "uploaded" it unto Caselines. It appears, however, that the application was never served on the registrar and, more particularly, never brought to the attention of the relevant appeals section. The application was therefore never properly "delivered" as contemplated in the Uniforms Rules.

[3] Despite heads of argument having been filed on behalf of CRRC some six months later and responded to on behalf of SARS shortly thereafter, the matter languished without attention for an inordinately long period.

[4] It was only when enquiries were made by the parties late in 2023 that the application came to the attention of this court, whereafter it was expeditiously enrolled for hearing on 12 December 2023.

[5] Despite the improper delivery of the application and the delay caused thereby, in the interests of justice and finality, this court resolved to hear the matter, which it did.

Grounds

[6] In its notice of application for leave to appeal CRRC raised a number of grounds on which it sought to rely in terms of Section 17(1)(a)(i) of the Superior Courts Act[1] for the argument that it would have a reasonable prospect of success on appeal.

[7] In heads of argument filed on behalf of CRRC, these grounds were distilled to the following: (1) that the court had incorrectly interpreted section 179(6) of the TAA,

[1] 10 of 2013.

(2) that there was a factual absence of any prejudice to the collection of the tax debt, (3) that the so-called *Hindry* judgment had no bearing on the case and (4) that the decision sought on appeal would have a practical effect.

The interpretation of section 179(6) of the TAA

[8] Section 179(1) of the TAA provides that SARS may issue a notice to a third party who holds money on behalf of a tax payer (in this case CRRC's bankers) requiring such person to pay over the money required to settle a taxpayer's outstanding tax debt (in this case CRRC's outstanding tax debt of some R 4 billion).

[9] In terms of section 179(5) SARS is obliged to deliver a final demand to the tax debtor 10 days prior to the issuing of third party notices contemplated in section 179(1).

[10] In terms of section 179(6) however, "*SARS need not issue a final demand if a senior SARS official is satisfied that to do so <u>would</u> prejudice the collection of the tax debt*" (my underlining).

[11] CRRC complains that in the introductory paragraph of the judgment under attack, this court used the word "might" instead of the word "would" used in section 179(6).

[12] Upon a reading of the judgment as a whole and the cases quoted, it however becomes abundantly clear that the court was not only alive to the wording of the relevant section (which was quoted in full in paragraph 3.1 of the judgment under the heading: "The decision sought to be reviewed") but interpreted and treated it correctly. Reference was also made in the judgment to a memorandum by SARS' Criminal and Illicit Economics Activities Division, Illicit Economy Unit, which memorandum was placed before the senior SARS official who took the impugned decision.

[13] That memorandum, despite the contents thereof being criticised by CRRC, expressed the opinion that unless third party notices were issued the recovery of tax

debt would be prejudiced. This was dealt with in paragraph 5.4. of the judgment and further.

[14] After various case law had been examined and been referred to, the conclusion reached in par 5.9 of the judgment was as follows:

> "*5.9 The highwater-mark of CRRC's complaint, is that the third party notices had not been preceeded by a final demand. On the facts of this case, I conclude that the senior SARS official in question had sufficient grounds to justify his decision to issue the notices without such demand as contemplated in section 179(6) of this TAA*".

[15] The alleged misinterpretation of the relevant statutory provision is therefore without substance and I find that it has no reasonable prospect of success on appeal.

The alleged absence of prejudice to the tax debt recovery

[16] CRRC's argument was that since the funds in question were the subject of preservation orders this court erred in finding that despite this SARS had still been entitled to issue third party notices.

[17] This argument sidesteps SARS' complaint made out in its papers: despite the funds being kept out the hands of CRRC, that did not safeguard it from attachment by other creditors. Were that to take place, recovery of the tax debt would certainly be prejudiced.

[18] SARS' further argument, made out extensively in its answering affidavit by the same senior SARS official who had deposed to the founding affidavit in respect of the preservation order, was that it was dealing with a delinquent tax payer who had sought to defraud organs of state as part of the so-called State Capture, relating to Transnet. As a subsidiary company of a Chinese holding group of companies, incorporated shortly before the award of the Transnet tenders and with litigation ongoing regarding fronting allegations of its BEE component, SARS concluded that

the giving of prior notice by way of a final demand, would put the funds which were up to that stage only protected by the preservation orders, at other attachment risks, let alone the repatriation risks to China should the preservation order at any stage lapse or be lifted.

[19] As pointed out in the judgment, none of these weighty accusations were refuted (and neither had they been addressed in the application for the preservation order) by the taxpayer. At best, the court was presented by an affidavit by CRRC's attorney, containing bald denials but no evidence of fact or substance.

[20] As to the prospects of success on appeal, senior counsel for SARS laconically remarked that CRRC's evidence (or rather the lack thereof) was not going to get "better" on appeal.

The *Hindry* principle

[21] SARS relied on the decision in *Hindry v Nedcor Bank Ltd and Another*[2] (*Hindry*) in support of its argument that sufficient opportunity had been furnished to the taxpayer to be heard in the extensive prior correspondence exchanged between the parties. CRRC argued that this court had erroneously accepted this argument (dealt with in paragraph 4.6, 5.7 – 5.9 of the Judgment).

[22] In oral argument, this point was not as strenuously advanced as in the written heads of argument and understandably so. Despite *Hindry* having dealt with the predecessor of section 179[3], the question of a requirement of prior notice and the obligation to provide a taxpayer with *audi alterem partem* rights was squarely dealt with therein and SARS was in similar fashion as in the case of CRRC, relieved of that obligation as a result of the obligation having been sufficiently satisfied by way of prior correspondence.

The just and equitable argument

[23] In the main argument, SARS had argued that, should the original third party notices be set aside, all that would happen is that new notices, albeit then preceded

[2] 1999 (2) SA 757 (W).
[3] Being section 99 of the Income Tax Act 58 of 1962.

by a final demand, would be issued. It was clear from the fact that CRRC was not trading and that it had no other funds from which it could satisfy the tax debt, that the same result of payment of the funds by CRRC's bankers in compliance with such notices would result. Therefore, now that the funds had in any event been paid over to no prejudice of a non-trading company, just and equitable relief would be that SARS retain the funds.

[24] SARS' argument found favour with this court (dealt with in par 5.10 of the judgment) and when it was debated with Adv Mastenbroek who appeared for CRRC at the hearing of the application for leave to appeal, he maintained that despite SARS' argument and despite the fact that the just and equitable relief would have the same result as that achieved by a refusal of the main application, a finding of a review of the section 197(6) notices should still have been made.

[25] In my view, where no practical result would be achieved even if CRRC were to be successful on appeal, the spectre of mootness envisaged by section 16(2)(a)(i) of the Superior Courts Act looms large. If this is the case, as I find it is, it must be emphasized that no alterate exceptional circumstances or grounds have been advanced by CRRC to justify the hearing of a moot issue and neither did it rely on any "compelling reasons" as contemplated in Section 17(1)(a)(ii) of the Superior Court's Act, as to why an appeal should be heard.

Conclusion

[26] I therefore conclude that an appeal would have no reasonable prospect of success.

Order

[27] The application for leave to appeal is refused with costs, including the costs of two counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 12 December 2023

Judgment delivered: 13 December 2023

APPEARANCES:

For Applicant:	Adv R Mastenbroek
Attorney for Applicant:	B Makukunzva Attorneys, Sandton c/o Phosa Loots Inc Attorneys, Pretoria
For Respondents:	Adv H G A Snyman SC together with Adv F Storm
Attorneys for Respondents:	Savage Jooste & Adams Attorneys, Pretoria