REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

Case Number: A291/2022

High Court Case Nos: 40420/2020 & 17064/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

21/08/2024

In the matter between:

SOUTH AFRICA CUSTODIAL SERVICES

(LOUIS TRICHARDT) (PTY) LTD **APPELLANT**

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE **RESPONDENT**

CORAM : MABESELE J, VAN DER SCHYFF J AND MOLELEKI AJ

JUDGMENT

MABESELE J:

[1] This is an appeal against the judgement of the Court a quo which was delivered in the High Court, Gauteng Division, Pretoria, on 14 July 2022. Two related applications were dealt with in the same judgement. One is case no. 40420/2020 ("the first application") and the second is case no. 17064/2021 ("the second application").

[2] In the first application, SACS sought an order in the following terms:

1.1. Declaring that SARS was precluded from auditing and/or assessing and/or performing tax computation for SACS' 2013 to 2016 years of assessment on the basis that differed from the basis on which these activities had been performed in respect of SACS' 2005 to 2012 years of assessment, in particular by-

(a) Treating the capital portion of the fixed fee of the SACS' contract fee to be of a revenue nature for purposes of the definition of "gross income" in section 1 of the Income Tax Act[1];

(b) Disallowing the exemption contained in section 10(1)(Z1) of the Act;

(c) Recouping, in terms of section 8(4)(a) of the Act, the buildings allowances claimed by SACS under section 11(g) of the Act.

1.2. Precluding SARS from disallowing the exemption contained in section 10(1)(Z1) of the Act up to and including SACS' 2019 year of assessment.

[1] 58 of 1962.

1.3. Precluding SARS from disallowing the building allowances claimed by SACS under section 11(g) of the Act and/or applying section 23B of the Act in respect of the said building allowances and the exemption claimed by SACS.

[3] The second relief which was sought in the second application was an order declaring that SACS had acquired "immunity" for additional assessment in accordance with section 99(1)(a) of the Tax Administration Act[2], on 17 October 2020.

[4] SACS contends that the order sought in this appeal in relation to the first application would have the effect of requiring its 2013 to 2016 years of assessment to be assessed on the same basis as its 2005 to 2012 years of assessment because the Anti-Prescription Agreement which was concluded between the parties was binding on SARS. In relation to the second application the order would have the effect that SACS' 2013 to 2016 years of assessment would have prescribed owing to the expiry of the period of limitation in section 99(1)((a)[3] of the Tax Administration Act without the parties having concluded an agreement to extend the period of limitation as contemplated in section 99(2)(c)[4] of the Act. In addition, SACS' 2017 to 2019 years of assessment would also have prescribed as a result of the prescription period stipulated in section 99(1)(a) of the Act.

[5] This appeal raises two issues. The first issue is whether SARS is contractually bound by the Anti-Prescription Agreement, in particular clauses 2.3 and 3.1 thereof, to issue reduced assessment in respect of the 2013 to 2016 years of assessment on the basis as had been ordered by Cloete J, in

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[2] 28 of 2011.
[3]Section 99(1)(a) provides that an assessment may not be made three years after the date of assessment of an original assessment by SARS.
[4] Section 99(2)(c) provides that SARS and the taxpayer so agree prior to the expiry of the limitation period.

respect of the 2005 to 2012 years of assessment. The second issue is whether the period of limitation for the issuance of assessments contained in section 99(1)(a) of the Act expired in relation to the SACS' 2013 to 2016 years of assessment. With regard to the issue raised by SARS in its heads of argument as to whether the High Court, as opposed to the Tax Court, ought properly to determine the dispute concerning prescription of tax assessment, the Court a quo accepted that SACS was entitled to seek relief in the High Court. Since SARS did not cross-appeal the decision of the Court a quo, the decision stands.

[6] On 13 October 2016, SACS and SARS concluded the Anti-Prescription Agreement to extend the prescription period from the 2013 to 2014 tax year and any subsequent tax years. The purpose of the agreement was to ensure that there was no barrier to SARS to effect the changes in the assessment pursuant to the Final Decision by the Tax Court on the merits of the issues in dispute regarding the 2005 to 2012 tax years. This is apparent in clause 2.1 of the agreement. Clause 2.1 reads:

> *"The purpose of this agreement is to extend various time periods of the Further Years of Assessment to ensure that there is no barrier to effect the changes as a result of the Final Decision to the Further Years of Assessment and that neither SACS nor SARS would be prejudiced solely as a result of the time periods in terms of the Further Years of Assessment"*

[7] On 23 November 2016, SARS partially allowed the objection for the 2005 to 2012 assessment. Pursuant to an appeal lodged against the aforementioned partial allowance of the objection, SARS failed to timeously deliver the Rule 31 Statement in the Tax Court. This resulted in SACS applying and obtaining a default judgment in terms of Rule 56. The judgement was granted by

Cloete J, on 17 October 2017. It is this judgment that SACS argues that it became the "Final Decision" as contemplated in clause 3.1 of the Anti-Prescription Agreement.

[8] Clause 3.1 of the agreement reads:

> *"The parties agree in terms of section 95(2)(c) of the TAA that the Further Years of Assessment should not prescribe after the normal three years, but be extended and that the relevant three years' period for the Further Years of Assessment should only start from the date of the Final Decision. This will allow SARS to either raise additional assessment or reduced assessment in respect of the Further Years of Assessment, to give effect to the Final Decision."*

[9] Clause 2.3 reads:

> *"Finality of the 2005 to 2012 years of assessment will follow the cause as set out in section 100 of the (TAA) and in this regard the objection was electronically filled on 19 July 2016 and hand-delivered at SARS' Business and Individual Tax Centre at Megawatt Park, Sunninghill on 20 July 2016. The letter of objection to the Disputed Assessment explain how the deadline of 20 June 2016 is determined. The Final Decision will have an impact on the Further Years of Assessment insofar as it will indicate how the tax computations of the Further Years of Assessment should have been prepared"* [5]

[5] Emphasis added

[10] The order of Cloete J, reads:

> *"1. The respondent's application for condonation for the late filing of its answering affidavit is dismissed.*
>
> 2. *The final order is granted under section 129(2)(b) of the Tax Administration Act 28 of 2011 altering the assessments issued by SARS on 2 November 2015 in respect of the tax periods 2005 to 2010, and on 3 November 2015 in respect of the tax period 2011 and 2012, in the manner contemplated in the applicant's notice of appeal dated 31 January 2017.*
>
> 3. *The respondent shall pay the applicant's costs in respect of both applications, including the costs of two (2) counsel where employed."*

[11] In paragraph 67 of the judgement, Cloete J, concludes as follows:

> *"[67] The taxpayer has complied with the procedural provisions of rule 56. SARS has failed to show good cause for condonation for its default. In terms of Rule 56(2) this court is empowered to make an order under section 129(2) of the TAA which provides as follows:*

(2) In the case of an assessment or "decision" under appeal or an application in a procedural matter referred to in section 117(3), the tax court may:

(a) Confirm the assessment or "decision"; or

(b) Order the assessment or "decision" to be altered; or

(c) Refer the assessment back to SARS for further examination and assessment."

[12] Paragraph 68 of the judgement reads:

> "The tax payer seeks a final order under section 129(2)(b) of the TAA to alter SARS' assessment in the manner contemplated in its notice of motion.

[13] The dispute between the parties revolves around the word "Final Decision". SACS' argument is that the order of Cloete J, constitutes a "Final Decision" as contemplated in the Anti-Prescription Agreement. This argument is disputed by SARS. It advances two reasons. The first reason is that the decision did not address the merits of the appeal. The second reason is that the decision relates to its failure to timeously deliver Rule 31 Statement and failure to seek condonation for late delivery of Rule 31 Statement.

[14] Clause 1.1.7 of the agreement define “Final Decision” as a final decision in relation to the Dispute[6] as contemplated in section 100 of the Tax Administration Act. Section 100(1)(f) provides that an assessment or a decision referred to in section 104(2) is final if, in relation to the assessment or decision, an appeal has been determined by the tax court and there is no right of further appeal.

[15] In clause 2.3 of the Anti-Prescription Agreement, the parties agreed that the “Final Decision” will have an impact on the Further Years of Assessment insofar as it will indicate how tax computations of the Further Years of Assessment should have been prepared.

[16] Cloete J, ordered SARS to alter the assessments issued on 2 November 2015 in respect of the tax periods 2005 to 2010 and on 3 November 2015 in respect of the tax period 2011 and 2012. The order was granted after Cloete J, was satisfied that SACS has complied with the procedural provisions of Rule 56 and SARS having failed to show good cause for condonation for its default.

[17] It was argued on behalf of SARS that, since Cloete J, did not address the merits of the appeal, her order does not constitute a “Final Decision” as contemplated in the Anti-Prescription Agreement.

[18] In paragraph 54 of the judgment, Cloete J says the following:

> “*I accept that this court is not determining the merits of the disputed assessment. However, the onus rests upon SARS*

[6] Emphasis added.

to persuade me that it has good prospects of success in the context of whether it has shown good cause for condonation. ... To my mind, the approach adopted does not enable me to determine that it enjoys good prospects of success."

[19] It is evident from paragraph 18 above that, although the merits of the disputed assessments were not determined, Cloete J, considered the application for condonation and was not persuaded that SARS had good prospects of success on appeal. For that reason, she resolved the dispute by granting the final order which, in my view, constitute a "Final Decision" as contemplated in the Anti-Prescription Agreement. SARS admitted in paragraph 16.2 of its answering affidavit that the order of Cloete J, became final on 17 October 2017. SARS did not appeal the order of Cloete J. In fact, it complied with it.

[20] It is common cause that SARS and SACS signed the agreement to extend the prescription period for 2013 and 2014 tax year and subsequent tax years after 17 October 2020. It is also common cause that the notice of intention to oppose was filed on 20 October 2020 instead of 17 October 2020. For these reasons SACS argues that it is entitled to "immunity" from additional assessment in accordance with section 99(1)(a) of the Tax Administration Act. SACS argues that SARS did not comply with clause 2.7 of the agreement which, according to SACS, requires parties to sign a written agreement prior the expiry of the limitation period.

[21] Section 99(2)(c) of the Tax Administration Act requires SARS and taxpayer to agree prior to the expiry of the prescribed period. The section does not prescribe how parties should agree. Clause 2.7 of the Anti-Prescription Agreement reads:

"Any further extensions shall require prior written consent of the parties".

[22] On 12 October 2020 an official of SACS sent a pre-signed agreement to the official of SARS for consideration. The said agreement, in my view, is a form of a written consent on the part of SACS. On 14 October 2020 the same official of SACS informed SARS' official that the amendment to the pre-signed agreement which was requested by SARS cannot be effected. Since SARS did not reject the pre-signed agreement, both parties complied with the provision of section 99(2)(c) of the Tax Administration Act and clause 2.7 the Anti-Prescription Agreement. Of utmost importance is that the parties should comply with section 99(2)(c) regardless of the agreement they have entered into, in clause 2.7 of the Anti-Prescription Agreement. Section 99(2)(c) and clause 2.7 of the Anti-Prescription Agreement do not require parties to sign the agreement. The parties are required to agree. Prior "agreement" (section 99(2)(c)) or prior "written consent" (clause 2.7) are not synonyms of "signed agreement." Therefore, argument by SACS that the agreement was signed after the limitation period and, therefore, entitles it to immunity, does not hold water. So, too, is the argument that SARS filed its notice of intention to oppose on 20 October 2020 instead of 17 October 2020. The late filing of Notice has nothing to do with the provision of section 99(2)(c) which requires parties to comply with, for purposes of extension of the period of limitation. There is also no provision in clause 2.7 of the Anti-Prescription Agreement which compelled SARS to file Notice on or before 17 October 2020. For these reasons the argument that the period of prescription has expired has no merit.

[23] In the result, the following order is made:

23.1. The appeal is upheld.

23.2. The order of the *court a quo* which dismissed the appellant's first application (case no:40420/2020) is set aside.

23.3 The order of Cloete J, dated 17 October 2017, (in respect of the first application) constitutes a "Final Decision" as contemplated in the Anti-Prescription Agreement which was concluded by the parties on 13 October 2016.

23.4 The respondent is ordered to pay the appellant's costs on Scale C, including the costs of two counsel.

M.M MABESELE

JUDGE OF THE HIGH COURT, PRETORIA

E VAN DER SCHYFF

JUDGE OF THE HIGH COURT, PRETORIA

M MOLELEKI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 22 July 2024

Date of judgment: 21 August 2024

APPEARANCES:

COUNSEL FOR APPELLANT:	Adv N Maritz SC with Adv T Emslie SC & Adv N Komar
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