IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

OF INTEREST
Case no: 3090/2023

In the matter between:

SIZAKELE CROSBY PIET	**Applicant**
and	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**Respondent**

JUDGMENT

Govindjee J

[1] The applicant seeks repayment of an amount of R145 934,99 paid by Allan Gray Retirement Annuity Fund (Allan Gray) to the respondent on 28 August 2023. He claims that the notice for payment of the funds, in terms of s 179(1) of the Tax Administration Act, 2011[1] (the TAA), violates other provisions of the TAA and contravened s 37A(1) of the Pension Funds Act, 1956,[2] (the PFA) so that it was invalid and a violation of the constitutional right to have access to social security.

Background

[2] The founding papers were served and filed during September 2023. Notice of opposition was filed timeously. The matter was set down on the uncontested

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[1] Act 28 of 2011.
[2] Act 24 of 1956.

opposed roll on 31 October 2023 and postponed until 7 November 2023. On that date, the matter was transferred to the opposed motion court roll. The respondent gave notice of its intention to raise various questions of law on 7 November 2023.[3] It also gave notice requiring copies of various documentation pertaining to the applicant's tax affairs.[4] The applicant opposed that application. On 23 May 2024, Noncembu J ordered discovery of the documentation requested in terms of the rule, holding that the applicant would be barred from relying on these documents in the event of his failure to comply.

Condonation

[3] Following various case management directives, the respondent brought an application for condonation for late filing of an answering affidavit in the main application. The main explanation for the delay is that the respondent was hampered due to the applicant's failure to discover the documentation it had requested, and the need to bring a formal application for discovery. A further explanation is the difficulty experienced in briefing counsel. The respondent explains that it was necessary to offer a response on affidavit, in addition to the points of law raised on 7 November 2023, once all the documentation had been placed in its possession. The delay in doing so was a direct result of the applicant's opposition to the Uniform Rule 35(12) proceedings and failure to comply with the request for documentation. After that matter was decided in the respondent's favour on 23 May 2024, the time for the applicant to comply with the order only expired on 22 June 2024. It was only at this stage that the respondent was in a position to prepare and file its answering affidavit. On 19 July 2024, a case management directive was issued permitting the respondent to file their answering affidavit by 22 July 2024. As the applicant opposed the filing of the answering affidavit, the respondent was directed to apply for condonation, and timeframes were set for the exchange of papers.

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[3] Uniform Rule 6(5)(*d*)(iii).
[4] Uniform Rule 35(12).

[4] The respondent argues that there are strong prospects of success and that an order granting condonation cannot occasion prejudice to the applicant given his own role in delaying proceedings by virtue of his lack of discovery.

[5] The applicant opposes the application on the basis that the filing of the answering affidavit is ten months late. On his own version of events, the respondent was afforded until 22 July 2024 to file their answering affidavit. This was by way of an agreement entered into during the course of case management. Instead, the respondent did so a day late. The applicant argues, in effect, that the matter should be determined as if unopposed, also because the 'answering affidavit' is properly construed as a 'further affidavit', as contemplated in Uniform Rule 6(5)(*e*).

Analysis

[6] It is well settled that, in considering applications for condonation, the court has a discretion, to be exercised judicially upon a consideration of all the facts. Uniform Rule 27(3) provides that a court may, on good cause shown, condone any non-compliance with the rules. In essence it is a question of fairness to both sides.[5] The enquiry includes the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of a judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. The factors are not individually decisive but are interrelated and must be weighed one against the other, following an objective conspectus of all the facts, so that a slight delay and a good explanation may help to compensate for prospects of success which are not strong.[6] Condonation applications are not a matter of formality. There is an onus on the party seeking condonation to provide a full and satisfactory explanation for its failure to comply with the rules of court.[7]

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[5] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2007 ZACC; 2008 (2) SA 472 para 20.
[6] *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E–H. Also see *Melane v Santam Insurance Co Ltd* 1962 (4) SA 532 (A): a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay.
[7] *National Department of Public Works v Fani and 77 Others* [2024] ZASCA 43 para 7.

[7] The applicant's opposition is based on a selective understanding of the history of the matter. In particular, it ignores the Uniform Rule 35 proceedings, which ran between November 2023 and May 2024 and culminated in an order for discovery in favour of the respondent. That the respondent was of the view that it required discovery before finalising its answering affidavit cannot be gainsaid. Moreover, the procedure adopted is sanctioned by the Uniform Rules and ran its course, albeit that that applicant is of the view that this was a delaying tactic. As such, the period of delay for which condonation is sought is significantly shorter than that alleged by the applicant.

[8] The other delays are of the kind that may be expected in civil litigation that is subjected to case management. Any unexplained periods of delay are, in my view, compensated by the respondent's strong prospects of success in the main application, for reasons that will become apparent. It is true that the respondent's condonation application and answering affidavit were filed a day late, on 23 July 2024. That was ill-advised and disrespectful of the case management directive. But that, together with similar gripes, cannot on its own trump the proper application of the established test for condonation. As has often been repeated, compliance with the Uniform Rules is for the benefit of the court and slavish adherence to its provisions will not always be in the interests of justice. More particularly, to find for the applicant in the main application on the basis of a delay of a single day would be unconscionable.

[9] This court is obliged to exercise a discretion in the interests of justice considering the various factors holistically. In my view, the interests of justice are served by permitting consideration of the respondent's answering affidavit, to enable the matter to be ventilated properly and fully, with all relevant information placed before the court. In particular, I am satisfied that the respondent has explained the reasons for its delay properly, also demonstrating strong prospects of success. The importance of the issues raised, including the proper interpretation of legislation and invocation of the Constitution, supports the granting of condonation. Refusing the application would be manifestly unjust in all the circumstances.

The main application

[10] The applicant's case originates in an additional tax assessment imposed for 2015. He became aware of this when submitting his income tax return for the following year. The explanation received was that business expenses were disallowed and that there was no explanation for his decline in turnover. The applicant took issue with the additional assessment, as follows:

> 'It is irreconcilable and extremely absurd that respondent would be willing to accept and acknowledge business income from applicant but refuse to acknowledge expenses incurred in securing the income. In the business world there can be no income without expenses incurred. Even in ordinary government offices there are basic expenses incurred even if there is no income … there was no basis for respondent to disallow all business expenses. Such conduct amounted to arbitrary conduct on the part of the respondent … the basis for the disallowance of the business expenses were unfounded, unsupported by any rules; guidelines nor provisions in the Tax Administration Act 28 of 2011.' (sic).

[11] The applicant filed an objection in March 2017. He was advised that this was refused as it was outside the time period prescribed by TAA. Various other objections were rejected by the respondent during 2017. On the applicant's version, he furnished exceptional circumstances, in terms of s 104(4) of TAA, on 22 June 2017, to which no response has been received. The applicant avers that the process has not been finalised and that he intends to '…refer the outcome for condonation to a Tax Tribunal should application for condonation be declined by SARS'. A request for suspension of payment pending objection or appeal was rejected on 9 November 2018 on the basis that no objection or appeal was lodged within the prescribed timeframe. The applicant was informed that he remained obliged to pay the amount due.

[12] On 16 August 2023, the applicant applied to Allan Gray for the withdrawal of his retirement benefit as he had reached the age of 55. He was informed a week later that the full amount due had been paid over to the South African Revenue Service (SARS) following receipt of a notice in terms of s 179(1) of the TAA. The

applicant contests the s 179(1) notice on the basis that it was not written by a senior SARS official, as required by the legislation, is 'a product of artificial intelligence' and is null and void. Moreover, there was non-compliance with ss 179(4) and 179(5) of the TAA, a violation of s 37A of the PFA and s 27 of the Constitution.

Jurisdiction

[13] I approach the matter on the basis that the applicant does not, in the present application, object against an assessment or decision as contemplated by s 104 of the TAA. The essence of the application lies elsewhere so that it appears unnecessary to consider whether or not to exercise a discretion, in terms of s 105 of the TAA, to hear the matter.[8]

Section 179 of the TAA

[14] The applicant seeks, in paragraph 2 of the notice of motion, declaratory relief premised on non-compliance with s 179 of the TAA. That section is part of chapter 11 of the TAA, pertaining to 'recovery of tax', and concerns 'liability of third party appointed to satisfy tax debts'.

[15] Section 179 of the TAA provides as follows:

> '179. Liability of third party appointed to satisfy tax debts
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> (1) A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.

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[8] Cf *Leuven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* [2023] ZASCA 144 paras 14, 30. *WPD Fleetmas CC v Commissioner: South African Revenue Services and Another* [2020] JOL 49693 (GP); *SIP Project Managers (Pty) Ltd v Commissioner for the South African Revenue Service* [2020] ZAGPPHC 206.

(2) A person that is unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice and the official may withdraw or amend the notice as is appropriate under the circumstances.

(3) A person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, the person is personally liable for the money.

(4) SARS may, on request by a person affected by a notice, amend the notice to extend the period over which the amount must be paid to SARS, to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependants.

(5) SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice, which demand must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act, including, in respect of recovery steps that may be taken under this section –

(a) If the tax debtor is a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on the basic living expenses of the tax debtor and his or her dependants; and

(b) If the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship.

(6) SARS need not issue a final demand under subsection (5) if a senior SARS official is satisfied that to do so would prejudice the collection of the tax debt.'

[16] SARS is an organ of state within the public administration.[9] The respondent is responsible for the performance by SARS of its functions, including the collection of revenue.[10] The TAA provides for the effective and efficient collection of tax, including measures for the recovery of tax.[11] As Keulder explains, it is clear that the TAA was enacted to assist the respondent in its duty to collect tax.[12] As is the case in respect of other taxation legislation, SARS is afforded further powers to enforce the collection of taxes due, including the appointment of a third party as an agent of the taxpayer in terms of s 179 of the TAA.[13] As Moosa puts it, SARS' 'arsenal of powers' is strengthened by the authority conferred on it to collect a tax debt from a third party who pays it on a taxpayer's behalf.[14] It must be emphasised that s 179(1) explicitly includes 'a pension' in its ambit. If a taxpayer's obligation to pay tax pending an objection or an appeal is not suspended, SARS can actively take steps to enforce the collection of tax.[15]

[17] Did the respondent comply with its obligations in terms of s 179 of the TAA in doing so? It is apparent from the papers that various demands were issued to the applicant for an unpaid tax debt in accordance with s 179(5). The correspondence included the prescribed details and in each instance the applicant was put on clear

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[9] S 2 of the South African Revenue Service Act, 1997 (Act 34 of 1997) (the SARS Act).
[10] Ss 3 and 9 of the SARS Act.
[11] Long title to the TAA, s 2 of the TAA.
[12] C Keulder "Pay now, argue later" rule – before and after the Tax Administration Act" *PER* (2013) vol 16(4) 125 at 145. In respect of the obligation of a taxpayer to pay tax, s 164 of the TAA states that the obligation will not be suspended even pending an objection or an appeal unless a senior SARS official indicates otherwise. A taxpayer can request a senior SARS official to suspend the payment if the taxpayer intends to lodge an objection or an appeal against the assessment, but the request may be denied if the objection is frivolous or used by the taxpayer simply to delay the payment of tax: s 164(2) of the TAA.
[13] As Keulder notes, this section is similar to the s 47 procedure in terms of the VAT Act: Keulder above n 12 at 147.
[14] F Moosa 'Tax Administration Act: Fulfilling human rights through efficient and effective tax administration' *De Jure* (2018) vol 51(1) at 5
[15] Keulder above n 12 at 147.

and unequivocal terms to settle his debt.[16] The first such demand appears to have been made on 2 July 2019. There is no doubt that the applicant received a letter of demand dated 14 July 2020. In response, he corresponded with the respondent to indicate his view that the debt had prescribed. He responded similarly to a letter of demand dated 1 March 2022.[17] There is therefore no merit in the argument that the respondent failed to comply with s 179(5) of the TAA.[18]

[18] As far as the s 179(1) notice is concerned, it is important to note that the respondent is permitted to appoint a third party to act as an agent for the taxpayer. On the papers, and leaving aside the argument centred on the PFA, SARS was entitled to issue the third-party notice and thereby recover the funds in question to satisfy an existing tax debt.[19] Allan Gray, upon receipt of what it considered to be due notice, effected the payment to SARS. An investment service consultant subsequently advised the applicant as follows:

> 'I have attached the IT88 which stipulates the tax liability that is owed to SARS for your … lumpsum withdrawal … Please note the IT88 would have been issued due to outstanding tax owed to SARS. Allan Gray is liable to pay this amount on your behalf as we have received this IT88 which is a penalty instruction for the liable tax amount owed to SARS. If you would like to dispute this IT88 you would have to take it up with SARS directly …'

[19] In attaching proof of its payment to SARS, Allan Gray also informed the applicant of the link between the IT88 directive and s 179(1) of the TAA:

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[16] On the facts, the matter is therefore different to the situation confronted by the court in *Nondabula v Commissioner, South African Revenue Services* [2017] ZAECMHC 21; 2018 (3) SA 541 (ECM) para 5 and following.

[17] In fact, s 171 of the TAA provides that proceedings for recovery of a tax debt may not be initiated after the expiration of 15 years from the date of the assessment of tax, or a decision referred to in s 104(2) giving rise to a tax liability, becomes final. In terms of s 11 of the Prescription Act, 1969 (Act 68 of 1969), the period of prescription of any debt in respect of any taxation imposed or levied by or under any law is thirty years.

[18] Cf *WPD Fleetmas CC v Commissioner: South African Revenue Services and Another* [2020] JOL 49693 (GP).

[19] *CRRC E-Loco Supply (Pty) Ltd v Commissioner for the South African Revenue Service* [2022] ZAGPPHC 527; 85 SATC 463 at 5.8 and following.

> ‘The IT88 directive comes directly from SARS via Eb Tax and is issued to the retirement fund company (Allan Gray) in our capacity as withholding agents. Allan Gray then effectively becomes a ‘third party appointment’ in terms of section 179(1) of the Tax Administration Act and is required to comply with the tax directive…’

[20] Furthermore, the applicant received a copy of the IT 88 notice that Allan Gray received from SARS. That document makes reference to the applicant and provides ‘assessed tax outstanding’ as the reason for the ‘stop order’. The notice contains various details pertaining to the possible modalities for payment, and quotes ss 160(1), 155 and 179(1) of the TAA, adding the following remarks:

> ‘The Tax Administration Act empowers the Commission for the South African Revenue Service (SARS) to appoint a third party to withhold and pay over to SARS any amounts due by a taxpayer in terms of the relevant tax Act. Such a third party may be an employer of the taxpayer or any other person who has the management, custody or control of any income, monies or property of the taxpayer. The abovementioned taxpayer is indebted to SARS for the specified amounts and it is understood that the taxpayer is either entitled to income from you or have money deposited with you.’

[21] It was open to Allan Gray to raise any concerns about the notice received, or its contents. Section 179(2) specifically provides that a recipient who is unable to comply with the terms of a notice ‘…must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice’. The official may, in response, withdraw or amend the notice as may be appropriate in the circumstances.[20] That aside, the recipient is obliged, in terms of s 179(3), to pay the money in accordance with the notice. This is what occurred, seemingly without difficulty on the part of Allan Gray following receipt of the IT 88 notice.

[22] On the proper interpretative approach to s 179, any complaint in respect of the manner of the notice, including concern whether it had been issued by a senior

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[20] S 179(2) of the TAA.

SARS official, was to be raised by the third party appointed to satisfy the tax debt.[21] Any enquiries, including as to whether a senior SARA official had authorised the notice received, could have been addressed to the respondent, whose details are placed prominently on the notice. While the applicant, as the tax debtor, was affected by the notice, his recourse appears limited to what appears in s 179(4), namely to request SARS to '… amend the notice to extend the period over which the amount must be paid to SARS, to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependants'.

[23] This necessarily presupposes that Allan Gray notified the applicant of the notice prior to making payment to the respondent. This would have been expected given the relationship between Allan Gray and its member, and considering that Allan Gray had received a notice from SARS that would result in retirement benefits being directed away from its member. Information about the notice would have enabled the applicant to request SARS to amend the notice to the third party to extend the payment period based on his personal circumstances and that of his dependants. While it may, at first blush, appear anomalous that it is third party that should notify the taxpayer of the notice, as opposed to SARS, this interpretation is supported by the inclusion of s 179(5) of the TAA. SARS may only issue the s 179(1) notice after having itself delivered a letter of final demand to the tax debtor. That letter, in the case of a natural person, already includes an opportunity for an application for reduction of the amount to be paid based on the basic living expenses of the tax debtor and their dependants.

[24] The applicant's papers seem to suggest that he only became aware of the notice and payment to SARS after the event. By not citing Allan Gray as a party to the proceedings, however, any failure on their part to inform him of the notice timeously is of no moment. As far as the respondent is concerned, there is nothing on the papers to suggest that any request for extension of the payment period was made either subsequent to the final demands it had delivered, or after the notice was dispatched to Allan Gray and prior to receipt of payment.

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[21] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18–20.

[25] Put differently, the complaint that the respondent did not afford the applicant another opportunity to raise his personal circumstances overlooks the purpose of the notice and its intended recipient. The notice is correspondence between the respondent and a third party, such as Allan Gray, holding money including a pension for a taxpayer such as the applicant, requiring payment in satisfaction of an outstanding tax debt subsequent to the delivery, by SARS, of a final demand for payment. The applicant had received notification of a final demand for payment prior to the issue of the notice, as required by the legislation. Any complaint that the applicant was not informed about the notice, or given a further opportunity to request an extension of the period over which the amount could be paid, based on personal circumstances, would appear to be one properly directed to the third party.

[26] As Allan Gray was not joined in the present proceedings, this aspect was not canvassed fully. As pointed out by the respondent, a further difficulty for the applicant is the failure to establish a cause of action for any money to be paid directly to the applicant, as opposed to being returned to Allan Gray.[22] The prudent approach would have been to join Allan Gray as a third party appointed to satisfy the applicant's tax debt, bearing in mind the company's potential personal liability in the event of failure to do so. The claim based on the invalidity of the s 179 notice must fail for these reasons.

Section 37A of the PFA

[27] The applicant also relies on s 37A of the PFA, interpreting this section in a manner preventing any tax deduction in terms of s 179 of the TAA. Section 37A(1) provides as follows:

> 'Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No.58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund … or right to such benefit … shall, notwithstanding

[22] Cf *SIP Project Managers (Pty) Ltd v Commissioner for the South African Revenue Service* [2020] ZAGPPHC 206 para 26.

anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law…'

[28] It is so that s 37A of the PFA protects pension funds from reduction, transferability or executability. One of the exceptions listed in the section is a deduction permitted by the Income Tax Act, 1962[23] (the Income Tax Act). Section 37A was inserted in 1976. At that time, and until 2011, the Income Tax Act included a section providing as follows:

'99. Power to appoint agent.– The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, *including pensions*, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be.' (Own emphasis).

[29] The PFA, in other words, must be interpreted as having permitted the respondent to declare a person as the agent of a taxpayer, required to make payment of any tax due by 'the person whose agent he has been declared to be'. Significantly, the declared agent could 'make payment of any tax', inter alia, from pension funds due to the person. In effect, this appears to have been the position from the inception of the PFA. Section 99 of the Income Tax Act was repealed in 2011, but only because a more elaborate section was introduced courtesy of s 179 of the TAA. The effect, however, is clearly the same: a third party may be appointed by a senior official of the respondent for purposes of satisfying a tax debt. The third party may do so by paying the money due from money held or owed to the taxpayer in a pension. As the abbreviation suggest, the 'IT88' has its origins in the Income Tax Act. It is seemingly now used, whether or not in modified form, to give effect to the

[23] Act 58 of 1962.

purpose of s 179 of the TAA. Section 37A of the PFA must be interpreted accordingly.

[30] The effect of this approach is supported by various judgments pertaining to conflict of laws. The general rule was explained in *Khumalo v Director-General of Co-operation and Development and Others*:[24]

> 'It is, of course, true that in general an earlier enactment is to be regarded as impliedly repealed by a later one if there is an irreconcilable conflict between the provisions of the two enactments.'

[31] The Constitutional Court has also endorsed the principle:[25]

> 'The common law rule of implied revocation provides that where there is an irreconcilable conflict between two enactments, the later enactment will take precedence over the earlier one.'

[32] Interpreting s 37A of the PFA strictly results in a conflict with s 179 of the TAA. This is because s 37A provides that pension benefits are, in general terms, not 'reducible, transferable or executable' save to the extent permitted in the PFA itself, the Income Tax Act or the Maintenance Act, 1998. The Income Tax Act no longer permits for the payment of pension money to SARS by an agent, because of the repeal of s 99 of the Income Tax Act.[26] By contrast, s 179(3) of the TAA, read with s 179(1), obliges a third party to 'pay the money … including a pension' to SARS in satisfaction of the taxpayer's outstanding tax debt. To the extent that it is necessary to do so, and noting the absence of submissions on the point, it must be implied that

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[24] *Khumalo v Director-General of Co-operation and Development and Others* [1991] 1 All SA 297 (A) at 301.
[25] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) para 66.
[26] The Income Tax Act, 1962 (Act 58 of 1962) (the Income Tax Act) is a 'tax Act' according to the definition of that notion in the TAA, being listed in the schedule referred to in s 4 of the SARS Act. It may be added that this is not an instance where the TAA is silent on a matter provided for in the Income Tax Act or a case of inconsistency between the two, which would result in the latter prevailing: s 4(2) and 4(3) of the TAA. The position is that the Income Tax Act no longer deals with a matter it previously regulated, the TAA now doing so.

s 179 of the TAA, as the later enactment, takes precedence over s 37A of the PFA in respect of payment of pension benefits to SARS.

The constitutional right to have access to social security

[33] The applicant's final submission relies on selected paragraphs contained in *Mudau v Municipal Employees' Pension Fund and Others*:[27]

> '…a pension is a crucial instrument through which individuals plan and anticipate a period in which they will no longer be working to generate income. Pensions also contribute towards fulfilling the right to social security as they are a means by which individuals can secure financial stability through monetary contributions…the determination of the pension withdrawal benefit affects Mr Mudau's section 27 right to social security…'

[34] The argument that the respondent acted unconstitutionally fails to consider the limitation of rights envisaged by s 36 of the Constitution. The PFA is a law of general application. Section 37A curtails the protection afforded to pension benefits deliberately and carefully. As indicated, this section must be interpreted in a manner that includes limitation by way of s 179 of the TAA. Alternatively, the somewhat technical conflict that is apparent when considering the two pieces of legislation must be resolved in favour of the later law. On either basis, the respondent's conduct in issuing final demands to the applicant prior to notifying Allan Gray of the tax debt, and obtaining payment, constitutes a reasonable and justifiable limitation of the right to have access to social security. There is in any event no argument advanced that either section is unconstitutional and the application cannot succeed on this basis.

Costs

[35] An unsuccessful litigant engaged in constitutional litigation against the state ought not to be ordered to pay costs as a general rule. I see no reason to depart from this rule. The proceedings, while ultimately unsuccessful, were neither frivolous

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[27] *Mudau v Municipal Employees' Pension Fund and Others* [2023] ZACC 26 paras 3, 47.

nor vexatious. The applicant represented himself commendably while the respondent was put on terms during case management and nonetheless failed to comply. Moreover, the apparent conflict between the PFA and TAA following the repeal of s 99 of the Income Tax Act is an issue that required clarification. The claim also included a genuine constitutional component. It would be wholly unjust to order the applicant to pay costs in all the circumstances. The appropriate order is for each party to pay their own costs, also in respect of the opposed condonation application.

Order

[36] The following order is issued:

1. The application is dismissed.

2. Each party shall pay their own costs.

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A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard: 08 August 2024

Delivered: 27 August 2024

Appearances:

For the Applicant:	Mr S C Piet In Person 9 Mqaqoba Street KwaDwesi Gqeberha Email: crosby.piet99@gmail.com
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