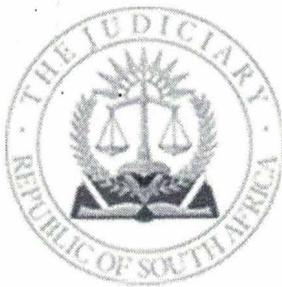


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 48495/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO

29/10/2025

DATE

Malindi

SIGNATURE

In the matter between:

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

Applicant

and

ROY MULEYA

Respondent

JUDGMENT

MALINDI J

INTRODUCTION

[1] The Applicant, the Commissioner for the South African Revenue Service ("SARS"), has brought an application for the Respondent's provisional sequestration alleging

that:

"The Commissioner for the South African Revenue Service ("SARS") has

(1) raised income tax in terms of assessments SARS raised and a subsequent tax judgment SARS obtained in this Court, against Mr Muleya in the amount of R32 million ("the income tax debt"); and

(2) the liability SARS raised against Mr Muleya in terms of section 103 of the Customs and Excise Act 91 of 1964 ("the Customs Act") in the amount of R155 million ("the customs debt"). The total debt due to SARS amounts to, in excess, of R188 million."

[2] It is averred that Mr Muleya's total debt due to the Applicant (the Commissioner or SARS) is in excess of R188,000,000.00. This amount comprises of:

- 2.1. Income tax, in terms of assessments SARS raised and a subsequent tax judgment obtained in this court, against Mr Muleya in the amount of R32,000,000.00 (the income tax debt).
- 2.2. The liability SARS raised against Mr Muleya in terms of section 103 of the Customs and Excise Act 91 of 1964 (the Customs Act) in the amount of R155,000,000.00 (the customs debt).

[3] It is further averred that Mr Muleya is not only factually insolvent but has also committed acts of insolvency in terms of the Insolvency Act 24 of 1936 (the Insolvency Act), in that he, for instance, subsequent to the income tax debt being raised, dissipated his immovable properties to his family trust.

[4] The application is opposed by the Respondent, Mr Muleya, on the following grounds:

- 4.1. The Applicant is not a creditor of the Respondent and has no *locus standi in iudicio* to apply for his sequestration. He therefore does not qualify for the relief intended to be sought in terms of section 177(3) of the Tax Administration Act ("TAA").¹
- 4.2. The Applicant's belated amendment for leave to institute the sequestration application in terms of section 177(3) of the TAA cannot be granted.
- 4.3. The application is an abuse of this Court's process, as the Applicant applied for sequestration within the time that the Respondent could still appeal the assessments, and seeks to circumvent the adjudication of the appeal proceedings in the Tax Court.
- 4.4. The Respondent's constitutional right of access to court will be severely and unjustifiably prejudiced should leave be granted, (as this could close the doors

¹ 58 of 1962.

to the Tax Court).

- 4.5. The interlocutory application should be dismissed due to the Applicant's failure to make out a proper case for leave to file a supplementary affidavit and amend the notice of motion.
- 4.6. No acts of insolvency were committed by the Respondent.

BACKGROUND

[5] The parties agree on the following chronology:

1. 23/07/2020: SARS issues a letter of audit findings to Mr Muleya for the income tax period 2015 to 2019.
2. 23/09/2020: SARS Issues a letter of demand to Afri-Teecee Investments (Pty) Ltd ("Afri-Teecee") in the amount of R155,199,942.
3. 16/10/2020: SARS issues its finalization of audit letter and assessments to Mr Muleya in respect of the income tax period for 2015 to 2019.
4. 15/01/2021: Mr Muleya donates Erf 747, Barlett Ext 78 and Erf 771, Barlett Ext, 78 to the Roy Muleya Trust.
5. 15/01/2021: SARS obtains knowledge that Bredell donated the immovable property situated at 59, 7th Avenue, Brendel, Kempton Park to the respondent's family trust.
6. 28/01/2021: SARS issues Third Party Appointments in terms of section 179 of the Tax Administration Act to Nedbank as well as First National Bank Limited.
7. 01/02/2021: Mr Muleya lodges objection for revised 2017 period along with his objections to the 2015 to 2019 tax periods (Income Tax).
8. 23/02/2021: SARS withdraws its demand issued to Mr Muleya in terms of section 103 of the Customs and Excise Act dated 19/11/2020 and simultaneously issues a notice of intent to raise new demand against Mr Muleya for the debt of Afri-Teccee and calling upon him to make representations as to why he should not be held personally liable.
9. 12/03/2021: Mr Muleya's requests for suspension of payment of the Income Tax debt in terms of section 164 of the Tax Administration Act and discloses thereinto because that he is the shareholder of Bredel Enterprises and that he conducts farming operations in Zimbabwe.
10. 16/03/2021: Mr Muleya replies to the notice of intent. He does not make

representations. He indicates that he intends to dispute and appeal the decision to hold him personally liable and that he intends to apply for suspension of payment.

11. 17/03/2021: SARS explains to Mr Muleya that no determination has been made in terms of section 103 and that he should provide SARS with representations as to why he should not be held liable.

12. 30/04/2021: SARS issues a letter of demand in terms of section 103 of the Customs and Excise Act to Mr Muleya informing him that he is being held liable for AfriTeecee's liability in the amount of R155,199,942.00.

13. 07/06/2021: SARS obtains tax judgment against Mr Muleya (Income Tax).

14. 06/07/2021 CDH comes on record as attorney for Mr Muleya. Requests SARS to confirm that a notice issued in terms of section 4(4(ac)(iii) of the Customs and Excise Act was not a notice to hold Mr Muleya and his wife personally liable for the debt of Verbena Freight and Logistics Management CC.

15. 09/07/2021: Sheriff executes warrants of execution at three properties.

16. 13/07/2021: Mr Muleya lodges request for suspension of payment in terms of section 164 of the Tax Administration Act (Income Tax).

17. 02/08/2021: SARS denies Mr Muleya's request for suspension of payment dated 13/07.2021 (Income Tax).

18. 10/08/2021: Mr Muleya, through CDH, delivers a notice of intended litigation in terms of section 11(4) of the Tax Administration Act.

19. 17/08/2021: SARS withdraws the decision to allow the respondent's objection (delivered on 01 February 2021) to the revised income tax assessment for the 2017 income tax period.

20. 25/08/2021: SARS disallows Mr Muleya's objections.

21. 31/08/2021: Final liquidation order granted against Verbena Freight & Logistics Management CC.

22. 28/09/2021: SARS launches sequestration application against Mr Muleya.

23. 07/10/2021: Mr Muleya lodges appeal to the Tax Court in terms of s 107 of the TAA against the assessments issued for the 2015 to 2019 income tax years of assessment.

24. 22/10/2021: Respondent institutes application to review applicant's decision

to decline his request for suspension of payment.

25. 27/10/2021: Applicant is heard in the urgent court.

26. 10/11/2021: Mokose J hands down judgment in the urgent application – application struck from the roll due to lack of urgency.

27. 10/06/2022: SARS delivers its ground of assessment in terms of rule 31 of the Tax Court Rules issued in terms of section 103 of the Tax Administration Act (“the Tax Court Rules”).

28. 30/09/2022: Mr Muleya delivers his grounds of appeal in terms of rule 32 of the Tax Court rules.

29. 13/10/2022: SARS delivers a rule 36(2) notice in terms of the Tax Court rules calling Mr Muleya to discover certain documents.

30. 01/12/2023: SARS institutes interlocutory application.

31. 05/04/2023: SARS delivers a notice of set down setting the matter down for hearing on the opposed motion roll of 22 May 2023.

32. 24/04/2023: The respondent’s attorney delivers notice of intention to oppose SARS’s interlocutory application.

33. 11/05/2023: Respondent delivers his answering affidavit to the interlocutory application.

ISSUES FOR DETERMINATION

[6] The issues for determination are, as set out in the joint practice note as follows:

“10.1. *Whether the applicant has the requisite locus standi in the application as creditor to apply for the respondent’s sequestration.*

10.2. *Whether the applicant’s interlocutory application stands to be adjudicated by this Court together with the main application on the opposed motion roll.*

10.2.1. *If so, whether the applicant’s interlocutory application for leave to file a supplementary affidavit, and for leave to amend its notice of motion, should be granted.*

10.3. *Whether the applicant was required to seek this Court’s leave in terms of section 177(3) of the Tax Administration Act 28 of 2011 (“the Tax Administration Act”), and should this Court grant the interlocutory relief to amend the notice of motion to include*

such relief, whether such relief should be granted.

10.4. *Whether the impugned portions of the applicant's replying affidavit stand to be struck out.*

10.5. *Whether a sequestration order should be granted."*

THE PRELIMINARY POINTS

[7] The preliminary issue is therefore whether the Commissioner has the legal standing to bring these proceedings. Mr Swanepoel SC, for the Respondent, contends that the Commissioner commenced these proceedings on the erroneous assumption that he has the legal standing to do so. He submits that:

"13. *The applicant is not entitled to any of the relief sought in the main sequestration application, or to the proposed relief in terms of s 177(3) of the TAA. The Commissioner is not a creditor of the respondent.*

14. *Both the South African Revenue Service Act and the TAA expressly distinguish between "SARS" (i.e., the South African Revenue Service) on the one hand, and "the Commissioner" on the other*

18. *SARS is responsible for the administration of the TAA under the control or direction of the Commissioner, including to determine the liability of a person for tax, and to collect tax debts.*

19. *Chapter 11 of the TAA, provides for the recovery of tax:*

19.1 *An amount of tax due or payable in terms of a tax Act is a debt due to SARS for the benefit of the National Revenue Fund.*

19.2 *A tax debt is recoverable by SARS under Chapter 11 of the TAA. This includes the institution of sequestration proceedings under Part C of Chapter 11.*

19.3 *SARS is regarded as the creditor for the purposes of any recovery proceedings related to a tax debt (this includes sequestration proceedings).*

22. *In the premises, SARS (an organ of state with separate legal personality) is mandated and authorised in terms of the various tax Acts to collect, enforce, and recover revenue and tax debts.*

24. *The Commissioner:*

24.1 *is responsible for the performance by SARS of its functions;*

24.2 *takes all decisions in the exercise by SARS of its powers;*

24.3 *performs any function and exercises any power assigned to the Commissioner*

in terms of any legislation;
24.4 is the Chief Executive Officer and accounting authority for SARS; and
24.5 performs the functions of office as required by the SARS Act.

27. *The Commissioner's functions, powers and duties pertain to his responsibility for the performance and exercise by SARS of its functions, powers and duties, unless specific powers and duties are expressly assigned to the Commissioner and required by a tax Act to be exercised by the Commissioner personally.*

29. *The applicant has no function or power to enforce or collect revenue or tax debts in his capacity as Commissioner and lacks the requisite locus standi in judicio to apply in his official capacity as Commissioner for the particular relief sought in the notice of motion."*

[8] The Commissioner had commenced these proceedings on the simple assumption that he has legal standing to do so. After noting Mr Muleya's objection to his legal standing he filed an interlocutory application seeking relief as follows:

"1. *That leave be granted to the applicant that it may file the supplementary affidavit annexed to this notice of motion and that it be accepted into evidence; and*

2. *That paragraph 1 of the applicant's notice of motion dated 28 September 2021 be amended in its entirety by replacing it with the following prayer:*

'That leave be granted to the applicant as envisaged in terms of section 177(3) of the Tax Administration Act 28 of 2011 ('the Tax Administration Act') that this application for the sequestration of the respondent's estate may be instituted although the respondent's outstanding tax debt is subject to an appeal under chapter 9 of Tax Administration Act.'

[9] The Commissioner submitted that section 177(3) of the TAA applies only when there is a pending objection or appeal and contended that:

"28. *SARS Disputed this and in its replying affidavit contended that it is only required to obtain the leave of the court if in the event that the "tax debt is subject to objection or appeal under Chapter 9 or a further appeal against a decision by the Tax Court under section 129". That is at the time of instituting the application.*

29. *By the time the main application was instituted the tax debt was not subject to objection or appeal under Chapter 9 or a further appeal against a decision by the Tax Court under section 129. In this regard, the following dates are relevant:*

29.1. *The objections lodged by the respondents were considered by SARS and a notice of*

disallowance of the objections were issued on 25 August 2021 ("MC"9");

29.2. The main application was instituted on 28 September 2021;

29.3. The respondents lodged an appeal against the dismissal of his objection in terms of section 107 of the Tax Administration Act on 7 October 2021."

[10] In argument, Mr Snyman SC, for the Commissioner, submitted that the section 177(3) prayer was sought out of an abundance of caution but stands by the submission that the Commissioner does have standing. In respect of the latter contention the Commissioner makes submissions about the challenge of his authority to depose to the affidavit whereas the challenge is of a different nature. It is about his legal standing to bring proceedings in court. The challenge is not a Rule 7(1) one. Instead of tackling the Commissioner's legal standing in these proceedings, Mr Snyman the undisputed fact that SARS has the necessary legal standing.

[11] However, the Commissioner, having gone on a tangent on this issue does not mean that the respondent is correct on this issue. The Respondent submits that, first, the Commissioner has no standing at all, as he has brought these proceedings in his own capacity, whereas he is not a creditor of the Respondent—SARS is. Secondly, that even if he has legal standing, he is required by section 177(3) to have sought the leave of the court to bring these proceedings, despite the income tax debt being a subject matter of a Tax Court Appeal proceedings in terms of section 107 of the TAA and Rule 10 thereof. Section 177(1) provides that a senior SARS official may authorise the institution of sequestration, liquidation or winding-up of a person for an outstanding tax debt and also in terms of section 177(3) that if the tax debt is subject to an objection or appeal the proceedings may only be instituted with the leave of the court before which the proceedings are brought. The respondent submits further that when the applicant sought leave under section 177(3) it was a cynical move taken only after the respondent had raised an objection to the non-compliance with the requirement. He alleges that from the onset SARS sought to circumvent the objection and appeal process through a sequestration that should be held in abeyance until all appeals have been exhausted, save with the leave of the court.

[12] The respondent was responding to paragraph 46² of the founding affidavit that: "*No appeal has to date been lodged against the disallowance of the objection. However, even if an appeal is to be lodged, the pay now argue later principle is applicable. As will be illustrated below, the respondent is insolvent and do not have the resources available to settle the*

² Founding affidavit: CaseLines section 001-20.

substantial debt due to SARS."

- [13] The court in *Miles Plant Hire*³ granted leave. This matter found its way to the SCA⁴ on an issue not relevant for the current proceedings. The SCA recapitulated the section 177(3) contentions in the court below and appeared not to disagree with the order granted by Van Niekerk AJ and his preference for the interpretation advanced by the Commissioner in the court below that the need for leave in the winding-up of a company could legally be sought in the same application proceedings.⁵
- [14] In *Miles*, the tax debt was subject to a pending appeal to the Tax Court at the time when the winding-up proceedings were instituted.
- [15] As in *Miles Plant Hire* where the Commissioner amended the notice of motion to add a prayer seeking leave under section 177(3), doing so only after *Miles Plant Hire* had filed an objection in a form of a point of law under Rule 6(5)(d)(iii) that SARS was prohibited in law to instituting winding-up proceedings before being granted leave in a preceding application, SARS has herein sought to amend its notice of motion.
- [16] On the authority of *Miles Plant Hire*, in both the High Court and SCA, I find that it is not a cynical move or an abuse of process on the part of SARS to have instituted sequestration proceedings even when the objection and appeal process had not been fully ventilated. As in *Miles Plant Hire*, where an appeal was pending, I adopt the wide interpretation of Chapter 11 of the TAA that:

...the context in which the section occurs, its purpose, and the potential consequences that might flow from each of the interpretations proffered, it should be recalled that s 177(3) is located in chapter 11 of the Act, headed "Recovery of Tax". More specifically, part C of the chapter empowers SARS, as one of the means available to it to recover a tax debt, to institute sequestration, liquidation or winding-up proceedings."
- [17] In short, the court found that the words "*the proceedings may only be instituted with the leave of the Court before which the proceedings are brought*" mean that the disputed tax debt is not recoverable under the pay now, argue later rule during winding up proceedings, unless the court before which those proceedings serve, permits it. Such an interpretation affirms the courts inherent discretion in winding-up proceedings and empowers the court to evaluate all of the appropriate facts and circumstances

³ Miles Plant Hire Gauteng Division: (23533/2013) (3 October 2025).

⁴ Miles Plant Hire SCA: (20430/2014) [2015] ZASCA 98 (1 June 2015) at [11].

⁵ At [11].

(including the merits of any objection and pending appeal), and to make an appropriate order.

[18] "Commissioner" is defined in section 1 of the SARS Act⁶ as meaning the Commissioner appointed in terms of section 6 which states "*the Minister must consult both the Cabinet and the Board before appointing a person as a Commissioner.*" The responsibilities of the Commissioner are set out in section 9(1) which states:

"(1) *The Commissioner—*

(a) *is responsible for the performance by SARS of its functions;*

(b) *takes all decisions in the exercise by SARS of its powers;*

(c) *performs any function and exercises any power assigned to the Commissioner in terms of any legislation or agreement referred to in section 4(1)(a); and*

(d) *is the chief executive officer and also the accounting officer of SARS.*"

[19] The question raised by the respondent regarding whether the Commissioner has the legal standing to perform and carry out SARS's objectives, including the enforcement of the TAA⁷ finds answer in the body of SARS Act and TAA. The respondent contends that it is SARS (an organ of state with separate legal personality) which is mandated in both these statutes to collect, enforce, and recover revenue and tax debts, and not by the Commissioner in his official capacity as Commissioner. Further he contends that it is SARS which is the creditor of the respondent⁸ and that it institutes or defends any legal action in its own name⁹ and that powers and duties of the Commissioner under the TAA are to be exercised personally as stipulated in section 6(2) of the TAA which state is that:

"(2) *Powers and duties which are assigned to the Commissioner by this Act must be exercised by the Commissioner personally, but he or she may delegate such powers and duties in accordance with section 10.*"

[20] It must be said that the respondent's contention in this respect is because of the misreading of section 6(2) which requires that the Commissioner performs these powers and duties in person except where he/she specifically delegates the task in terms of section 10. In the events that I find that SARS's duties and functions under

⁶ Act 34 of 1997.

⁷ Act 58 of 1962.

⁸ As contemplated in section 169(3) of the TAA.

⁹ As contemplated in section 8(1), 8(1)(i) and (k) of the SARS Act.

the SARS Act can be performed by the Commissioner, it should follow that SARS's performance of its duties and functions under the TAA can equally be performed by the Commissioner. If SARS is the creditor of the respondent and is authorised to act in terms of Chapter 11 of the TAA, then the Commissioner would be entitled to do so on behalf of SARS and carry out this function in person or by delegating another official under section 10 of the TAA.

[21] Section 3(1) of the TAA assigns SARS the responsibility of the administration function of the Tax Administration Act "under the control or direction of the Commissioner" and too "*collect tax debts...*"¹⁰. Section 9 of SARS states at the outset that the Commissioner "is responsible for the performance by SARS of its functions". The Commissioner is legally responsible for the performance of SARS duties and functions under the TAA. The TAA stipulates that such functions of SARS, if carried out by the Commissioner, they must do so in person or personally, unless delegated in terms of section 10. When SARS institutes or defends any legal action in its own name, especially in motion proceedings, it does so by affidavit. It stands to reason that the affidavit has to be deposed to by an appropriate official, being the Commissioner or delegate or any official as defined in the SARS Act. SARS cannot do so on its own as it is a juristic person. In these proceedings, although SARS is not cited as a co-applicant, the Commissioner cites himself as the Commissioner of SARS. He is acting in his official capacity on behalf of SARS and as dictated by the TAA that whenever SARS performs its functions under the TAA it must be the Commissioner, personally, who acts unless he/she delegates the task under section 10.

[22] In *Capstone 556 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another*¹¹ the Commissioner instituted proceedings on behalf of SARS, as Commissioner, South African Revenue Services and Another. It was stated that:

*"[37] The point of departure must be an acceptance that the tax in issue is payable on the date fixed in terms of s 89 of the IT Act. The effect of s 88 is that the noting of an appeal does not suspend the taxpayer's obligation to make payment: see Commissioner for Inland Revenue v NCR Corporation of South Africa (Pty) Ltd *supra* at 775E – F. The Act contains a number of provisions of which the Commissioner may make use to exact the payment which the taxpayer is obliged to make. One such provision is s 91(1)(b). Although a statement filed by the Commissioner in terms of s 91(1)(b) has all the effects (i.e., consequences) of a*

¹⁰ Section 3(2)(e).

¹¹ 2011 (6) SA 65 (WCC) at 37.

judgment, it is nevertheless not in itself a judgment in the ordinary sense. It does not determine any dispute or contest between the taxpayer and the Commissioner. It has the effect of a judgment, however, in enabling the Commissioner to obtain a writ to attach and sell in execution the taxpayer's assets to exact payment of an amount that is payable. As already emphasised, the existence of any pending appeal by the taxpayer against its assessed liability has no effect on its obligation to pay the tax. It thus cannot constitute any bar to the Commissioner's resort to s 91(1)(b) to exact from a taxpayer the payment that the taxpayer is obliged by the Act — notwithstanding any appeal — to make.” (Emphasis added).

[23] I am fortified therefore by this passage that no issue can be taken with the Commissioner, SARS being cited alone on behalf of SARS.

EVALUATION ON THE PRELIMINARY POINTS

[24] From the above discussion the following has been decided in favour of the Commissioner:

- 22.1. The Commissioner has legal standing to institute proceedings as Commissioner of SARS when executing SARS's duties and functions in terms of Chapter 11 of the TAA.
- 22.2. When acting as above, the Commissioner is not litigating in his personal capacity but on behalf of SARS.

[25] The applicant challenged the decision to institute sequestration proceedings against him on the basis that the Commissioner needed the court's leave to do so as required by section 177(3) of the TAA. *The Miles Plant Hire* case has resolved this question by holding that indeed such application is necessary and that it can be brought in the same proceedings as the sequestration, liquidation or winding up proceedings. Where the debt is subject to an objection or appeal the court has a discretion whether to allow the sequestration, liquidation, or winding-up?

[26] On 1 December 2022, the Commissioner brought an interlocutory application seeking the following relief:

- “1. That leave be granted to the applicant that it may file the supplementary affidavit annexed to this notice of motion and that it be accepted into evidence; and
2. That paragraph 1 of the applicant's notice of motion dated 28 September 2021 be amended in its entirety by replacing it with the following prayer:

'That leave be granted to the applicant as envisaged in terms of section 177(3) of the Tax Administration Act 28 of 2011 ('the Tax Administration Act') that this application

for the sequestration of the respondent's estate may be instituted although the respondent's outstanding tax debt is subject to an appeal under chapter 9 of Tax Administration Act."

[27] The purpose of the interlocutory application is set out as follows:

- “6. *This affidavit serves as founding affidavit for purposes of SARS's interlocutory application for leave that this supplementary affidavit be filed; and for leave that its notice of motion be amended in terms of rule 28(10) of the Uniform Rules of Court ("the Rules").*
7. *If the requisite leave is granted, this affidavit will serve as a supplementary affidavit to inform this court regarding the events that transpired since the matter was struck from the roll. The applicant contains that it is in the interest of justice for this affidavit to be allowed into evidence as it will ensure that this court is in a position to adjudicate this matter on the correct and updated facts.*
- 8.2. *The replacement of prayer 1 (relating to urgency) with a pre requesting that the leave of this court, to the extent that it may be required, in terms of section 177(3) of the Tax Administration Act, 28 of 2011 ("the Tax Administration Act"), to have instituted the present proceedings."*

[28] As stated above, it was procedural for the Commissioner to seek leave to proceed with the sequestration in one proceeding. This was done in the event that it was held that section 177(3) applies. As a matter of fact, and has become common cause, there was no pending objection when this application was instituted now was there a pending appeal? The respondent contends that it was launched while he still had a window period to appeal.

THE INTERLOCUTORY APPLICATION: SUPPLEMENTARY AFFIDAVIT AND AMENDMENT

[29] On 1 December 2022, the Commissioner brought an interlocutory application seeking leave to file a supplementary affidavit and to amend the notice of motion to include a prayer for leave in terms of section 177(3).

[30] The Commissioner seeks the admission of the supplementary affidavit in order to “deal with events that transpired since the application was struck from the roll.” He seeks to deflect the respondent's contention that the sequestration application is incomplete because it could not be brought until the respondent's objection or appeal under Chapter 9 or the further appeal against the decision by the Tax Court under section

129. Section 177(3) of the TAA provides:

"if the tax debt is subject to an objection or appeal under chapter 9 or a further appeal against a decision by the tax Court under section 129, the proceedings may only be instituted with the leave of the court before which the proceedings are brought".

- [31] The respondent submits that because the Commissioner instituted the proceedings on 28 September 2021 which was within the time period in which he was still entitled to lodge an appeal to the Tax Court against both the assessments and with the disallowance of his objections thereto he did so on 7 October 2021.¹²
- [32] The Respondent submits that were leave granted in terms of section 177(3), the court would be sanctioning an abuse of its process. In this regard reliance is placed on *Meskin's Insolvency Law*¹³ where it stated:

"... (A)lthough a case for sequestration may be capable of being established, the Court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the bona fide achievement of the sequestration of the estate for its own sake, eg, the enforcement of a debt bona fide disputed, the procuring of a suspension of legal proceedings by or against the debtor ...

The Court may refuse to grant an order where to do so would bring the administration of justice into disrepute."

- [33] To this the Commissioner submits that:

"61. However, at the time when the main application was instituted, no tax appeal was pending. In this regard, the following dates are relevant:

- 61.1. SARS considered the objections Mr Muleya lodged and a notice of disallowance of the objection was issued on 25 August 2021;
- 61.2. The main application was instituted on 28 September 2021;
- 61.3. Mr Muleya lodged an appeal in terms of section 107 of the Tax Administration Act on 7 October 2021.

66. Having regard to the definitions and authorities listed above, it is evident that the appeal had to be "actually proceeding" at the time when the sequestration application was instituted, which was not the case. The appeal was only launched more than a week

¹² Annexure "RM5", CaseLines section 001-319.

¹³ August 2021, SI 56, LexisNexis, at Chapter 2.1.5.

thereafter.

68. *In any event, SARS has, out of an abundance of caution, launched the interlocutory application in terms of which it will seek at the hearing of the matter that the notice of motion be amended in terms of rule 28(10) of the Uniform Rules of Court (“the rules”) to seek the aforesaid authorisation. It is submitted that a proper case for such relief has been made out on the papers and is further dealt with in the interlocutory application.”*

- [34] I find that the Commissioner was within the timeframes of section 177(3) when he lodged these proceedings. Even if I am wrong, I align myself with van Niekerk AJ’s statement in *Miles Plant Hire* in that leave be granted in the circumstances where SARS had made out its case and further delays may result in the sequestration not being in the interest of creditors with the likelihood of dissipation of assets.
- [35] The two legs of the application are therefore properly before the court and the amendment of the notice of motion is granted to reflect the relief under section 177(3).

APPLICATION TO STRIKE OUT

- [36] The Respondent submits that the Commissioner’s replying affidavit should be struck out because it seeks to supplement a defective founding affidavit, thereby seeking to make a case in reply where “*no case at all was made out in the original founding affidavit.*”¹⁴
- [37] The respondent equally seeks the exclusion of the supplementary affidavit at the Commissioner held back the enrollment of the application after it was struck off the urgent court roll to await new facts favorable to the Commissioner. It is submitted that the respondent is prejudiced thereby as the Commissioner should stand or fall on the evidence available to him at the time of his founding affidavit.
- [38] I have already held that the supplementary affidavit is admissible as it deals with matters that arose after the application was struck from the urgent court roll. The principle that applies to the exclusion or admission of the replying affidavit applies to a supplementary affidavit. The court will not, save in exceptional circumstances, allow an applicant to make or supplement a case in a replying affidavit and will order any matter appearing in it that should have been in the founding affidavit to be struck out.

¹⁴ *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D) at 316A; and see *Titty’s Bar & Bottle Store v ABC Garage & Others* 1974 (4) SA 362 at 369A-B.

As stated in *Hebstein and Van Winsen*¹⁵:

"The necessary allegations must appear in the supporting affidavits, for the court will not, save in exceptional circumstances, allow the applicant to make or supplement a case in a replying affidavit, and will order any matter appearing in it that should have been in the supporting affidavits be struck out. If, however, the new matter in the replying affidavits is in answer to a defence raised by the respondent and is not such that it should have been included in the supporting affidavits in order to set out the cause of action, the court will refuse the application to strike out. It is well established that there exists a general rule that the new matter may not be introduced by an applicant in the replying affidavit, but this is not an absolute rule and the court may in an appropriate case allow the applicants to do so. In this context, new matter' is not synonymous with a new cause of action. The abandonment of an existing claim together with its cause of action and the substitution of a fresh and completely different claim based on a different cause of action does not amount merely to the introduction of 'new matter'".

- [39] The respondent is correct that the ordinary three sets of affidavits are allowed, i.e founding affidavit, answering affidavit and replying affidavit. Another rule, which is sparingly used, is that the court may, in its discretion, permit the filing of further affidavits.¹⁶
- [40] This is no ordinary case. The duties and functions of SARS as an organ of state, and when it carries out duties and functions imbued on it by the Tax Administration Act, call for the court to exercise its discretion in favour of SARS being able to put its case forward in its fullest, without prejudicing the persons it is pursuing. The other party must be afforded the fullest opportunity to answer to the charge.
- [41] The *Miles Plant Hire* case, in my view, approves of this approach. SARS plays an important function in the construction of statehood. Where it is acting within the confines of law it must not be hamstrung by technicalities that do not go to the nub of the issues.
- [42] The respondent criticises SARS's inaction from the date of the application being struck off the roll of the urgent court. The Commissioner's attorney's letter which refers to not holding this case back any further is not an admission of having held the prosecution of the case back but an expression of exasperation that SARS has been hampered from proceeding with the matter and the attorney is now insistent on no further delays.
- [43] Lastly on this issue, this is a case where things were constantly moving. They were

¹⁵ The Civil Practice of the High Court of South Africa (5th Ed), Vol 1, Juta 2009, at 439-440.

¹⁶ Rule 6(5)(e); *Afric Oil v Ramdaan Investments CC* 2004 (1) SA 35 (N).

fluid. Each of the issues arose as the parties engaged in other internal remedies available to the respondent. I hold therefore that both the replying affidavit and supplementary affidavit are necessary for the full ventilation of this matter. I therefore exercise my discretion to allow both affidavits for the reasons stated above.

THE MERITS

[44] The test for provisional sequestration is a *prima facie* case showing that the debtor is insolvent, and that the final sequestration will be to the benefit of creditors and that the applicant has a valid claim against the debtor. On the return date the Commissioner must satisfy the court on a balance of probabilities that he has established a claim for final sequestration.

[45] The test is articulated in *Payslip Investment Holdings CC v Y2K Tec Ltd*¹⁷ as follows: “*Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in Kalil v Decotex 1988(1) SA 943 (A). According to these guidelines a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, inter alia, the strength of the respondent's case and the prospects of viva voce evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general.*”

[46] The Commissioner's claim must be disputed on reasonable and *bona fide* grounds in order to defeat the claim.

[47] The Respondent alleges that the warrants of execution were not served on him personally and no demand for payment was made to him, as the properties were rented to third parties and their assets were attached. It is submitted that a demand on someone other than the judgment debtor is insufficient.

[48] It is submitted that even if the court were to find that some act of insolvency was

¹⁷ 2001 (4) SA 781 (C) AT 783 F-I; see also *Poole v Saffy N.O.* (Case no. 2566/2021) [2024] ZAGPPHC 94 (5 February 2024) at [15].

committed, the assessments are disputed on *bona fide* and reasonable grounds. The Respondent further invokes the so-called *Badenhorst Rule*. It was held in *Badenhorst v Northern Construction Enterprises (Pty) Ltd*¹⁸ that:

“... A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by a company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatized as a scandalous abuse of process of the Court. Some years ago, petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order.” (Emphasis added)

- [49] The Badenhorst Rule has been confirmed and applied to the effect that it applies equally in applications for the sequestration or liquidation of the debtor.¹⁹ The underlined sentence in this extract is crucial in this case.
- [50] On the other hand, the Commissioner contends the income tax assessments against the respondent for the 2015 to 2019 tax period are not disputed. The respondent has disputed the assessments which he had applied for suspension of payment thereof but which suspension was subsequently withdrawn. The matter is now on appeal to the Tax Court. The Commissioner contends that because these proceedings were instituted after the suspension of payment had been withdrawn the institution of these proceedings is competent. As previously stated, even if the suspension of payments exist or it is subject to further appeals leave of this court in terms of section 177(3) of the tax administration act is granted. The mere fact that the debt is disputed does not suspend the respondent's obligation to pay the assessed tax debt this is in accordance with the so-called “pay now argue later” rule referred to in *Miles Plant Hire*.
- [51] Regarding the customs debt the dispute is about whether the tobacco was imported for use as compost to sell to farmers or for the manufacturing of illicit cigarettes.
- [52] As to the defence that the warrants of execution were served on third parties and not

¹⁸ 1956 (2) SA 346 (T) at 348 A.

¹⁹ *Badenhorst v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T) at 347; affirmed by the Supreme Court of Appeal in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980B; and discussed in *Exploitatieen Beleggingsmaatschappij Argonauten 11BV v Honig* 2012 (1) SA 247 (SCA) at paras 1112, in which the Court held that sequestration proceedings are intended to bring about a ~~concursus~~ ^{concursus} ~~creditorum~~ ^{creditorum} and are not designed to resolve disputes relating to the existence or otherwise of a debt. See also *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C), at 116, in which the Court ruled that the Badenhorst rule applies equally in applications for the sequestration or liquidation of a debtor.

on him personally, on the authority of *Standard Bank of South Africa v Sewpersad and Another*²⁰ the Commissioner can bring proceedings in terms of section 8(b) of the Insolvency Act if the execution officer is unable to serve the writ upon the debtor. In this case the respondent was not in the country at the relevant times. His protestations that he was travelling frequently between South Africa and Zimbabwe does not disturb the Commissioners assertion that he was not reachable.

- [53] The respondent committed an act of insolvency in terms of Section 8(c) of the Insolvency Act when immovable properties were transferred into the name of his family trust a month after SARS had issued its final demand in respect of the income tax debt. That he had always intended to donate the properties to the family trust is no answer to why he only did so when faced with a demand to pay the income tax debt.
- [54] These debts are not disputed on *bona fide* grounds. The Bardenhorst Rule must be considered in the context of Chapter 11 of the Tax administration act and section 177(3) which sanctions sequestration processes where a debt is owed to SARS.
- [55] The respondent submits that it is sufficient for him to allege facts, if proved at a trial, would constitute a good defence to the claim of the applicants. Such grounds must be reasonable²¹ and *bona fide*.²²
- [56] The respondent reduces the reasons for the customs and excise debts to being the SARS's mere decision to do so as stated in paragraph 2 of the applicant's demand dated 30 April 2021.²³ The respondent's assertions in this regard are not taking the letter in its full context. The demand is based on a three-year investigation and refers to a notice of 23 February 2021 in which the respondent was informed of the Commissioner's intention to hold him personally liable in terms of section 103 of the Customs and Excise Act. The respondent conveniently excises the first words of this paragraph which say "*based on the evidence at SARS' disposal, which your client did not refute despite being afforded the opportunity to do so,...*" this conduct does not display *bona fides*.
- [57] The respondent was advised in previous correspondence in which the excise liability was explained in detail and "a complete breakdown of the calculations was reflected on both the said letters and the annexures thereto."²⁴

²⁰ 2005 (4) SA 148 (C).

²¹ *Hulse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 219E-220A.

²² *Kalil v Decotex (Pty)Ltd and Another* 1988 (1) SA 948 (A) at 980C-D.

²³ Annexure "FA5": CaseLines section 001-50.

²⁴ *Ibid*, paragraph 3.1.

[58] The respondents can advance the rest of his defences in this regard on the return date as his defence at this stage on a *bona fide* and reasonable defence is tainted by lack of *bona fides* and is not reasonable.

[59] In regards to the income tax debt the respondent submits that the alleged undeclared income tax debt is based on “vague and Bay allegations that the respondent is involved in “illicit activities”, and that the Commissioner “failed to address the bases and particulars of the reasonableness of its estimated assessments, the merits of the objection...”.

[60] In his notice and grounds of appeal dated 7 October 2021²⁵ the respondent provides comprehensive grounds of appeal with annexures of some seventy-seven pages. He “disputes the correctness of the applicant’s allegations pertaining to the respondent’s income, and the source of such income.

[61] The Commissioner submits that:

“The appeal Mr Muleya instituted is pending, and the procedure set out in the Tax Administration Act will now be followed for the resolution of the dispute. We point out that Mr Muleya is not deprived of his right to appeal to the Tax Court merely as a result of any sequestration. If his estate is sequestrated, his trustee can proceed with the appeal, if the trustees so elect.”²⁶

[62] In his request for suspension of payment dated 12 March 2021,²⁷ the Respondent states:

“4. To date I have made tax submissions to the South African Revenue Service (“SARS”) for the years 2017 and I am in the process of making a tax submission for the year 2018.

6. I seek to be tax compliant in South Africa and as such I am in the process of submitting all my arrear tax returns to SARS based on the actual income that I have derived in South Africa and on actual amounts that are/were in my bank accounts during the years 2015 to 2018.”

[63] The respondent is challenging the amounts assessed as not reasonable considering the actual income generated during the periods and tax returns made in 2017. He admits that he has arrear tax returns.

[64] Contrary to the allegation of vague and bare allegations in this regard, the letter of demand dated 23 September 2020²⁸ sets out the background to the investigation and its findings. The submission in respect of the income tax debt is not sustainable. The

²⁵ Annexure “RM5”: CaseLines section 001-319.

²⁶ CaseLines section 003-18 paragraph 27.

²⁷ Annexure “FA10”: CaseLines section 001-85, paragraph 4 & 6.

²⁸ Annexure “FA11”: CaseLines 001-92.

Commissioner has demonstrated that this defence is also not *bona fide*. The calculations of the respondent's liabilities will be determined on appeal to the Tax Court.

CONCLUSION

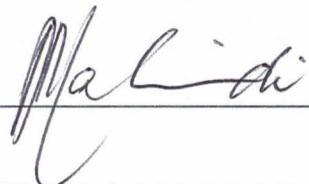
- [65] The Commissioner's supplementary affidavit provided relevant timelines showing there was no pending objection at the institution of proceedings, and the pending appeal was launched thereafter. The Commissioner had legal standing to bring these proceedings, as the matter was not subject to any internal objections, reviews, or appeals at that stage. Even if it were, leave is granted in terms of section 177(3) of the TAA.
- [66] The supplementary affidavit did not constitute a new cause of action but provided new facts relevant to an accurate narration of the claim.
- [67] In the circumstances, the order prayed for by the Commissioner stands to be granted.

ORDER

- [68] The following order is made:
 1. The supplementary affidavit annexed to the applicant's interlocutory application for the amendment of its notice of motion in terms of rule 28(10) of the Uniform Rules of Court dated 1 December 2022, is accepted into evidence.
 2. Leave is granted to the applicant, as envisaged in terms of section 177(3) of the Tax Administration Act 28 of 2011 ("the Tax Administration Act"), to institute this sequestration application against the respondent notwithstanding that the respondent's outstanding tax debt is subject of an appeal under chapter 9 of the Tax Administration Act.
 3. The respondent's estate is placed under provisional sequestration and is placed in the hands of the Master of the High Court.
 4. A *rule nisi* is issued, returnable on 23 February 2026, on which date the respondent and interested persons are called upon to appear and show cause why the respondent's estate should not be sequestered finally.
 5. The provisional order is to be:
 - 5.1. Served upon the respondent via its attorneys of record, Moss Marsh & Georgiev with offices situated at 99 Langermann Drive, Kensington, Johannesburg for the attention of Messrs. Silverthorne and Moss.

- 5.2. Emailed to the respondent at roymuleya72@gmail.com; and
- 5.3. Published in the Government Gazette, the Beeld and Pretoria News newspapers.

6. The costs of this application shall be costs in the sequestration.



G MALINDI

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION**

Appearances:

For the Applicant:	Adv HGA Snyman SC Adv N Komar
Instructed by:	VDT Attorneys
For the Respondent:	Adv PA Swanepoel SC Adv CA Boonzaaijer
Instructed by:	Moss Marsh & Georgiev Attorneys
Date of hearing:	22 May 2023
Date of judgment:	29 October 2025