**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

CASE NO. 2024-067035

In the matter between :

**MARIO JOSE ANDRADE FERRERIA** Applicant

and

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

| | |
|---|---|
| Reportable | NO |
| Not Reportable | YES |
| Of Interest | NO |

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**JUDGMENT**

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DYKE, AJ

*Introduction*

[1] This is an application to review, alternatively, declare unlawful and constitutionally invalid and set aside the respondent's decision to refuse the applicant's section 9 request, in terms of the Tax Administration Act, 28 of 2011, ("the TAA"), to reconsider the respondent's original decision to refuse the

applicant's request that the respondent suspend the applicant's payment of tax in an amount totaling R 531 082 580.51 ("the tax") .

[2] The matter has its genesis in additional income tax assessments, raised by the respondent against the applicant, for the period 2009 – 2021 and the terms of section 164(1) of the TAA, which contains the so called "*pay now, argue later*" principle.

[3] The merits of that dispute are not before this court and accordingly shall not be taken into account.

[4] The applicant has disputed his liability for the tax. The pleadings in the dispute have closed and the appeal hearing is before the Tax Court ("the tax dispute").

[5] Whilst there is a *bona fide* dispute relating to the applicant's liability for the payment of the tax, the factual matrix relevant to the present matter is not seriously disputed, rather it is the exercise of the respondent's powers in terms of section 163 that is in dispute.

*Facts*

[6] The respondent, having raised additional income tax assessments in respect of the applicant, sought payment of the tax.

[7] The applicant disputed his liability for the tax on various grounds. Pending the outcome of the tax dispute the applicant requested that the respondent

exercise his discretionary power to suspend the payment of the tax pending the determination of the tax dispute.

[8] The applicant, as part of his original request for the suspension of the payment of the tax, originally tendered as security for the tax certain race horses and when this was considered inadequate by the respondent, subsequently tendered Siyangena Technologies (Pty) Ltd's claim against PRASA .

[9] The respondent's view was that this security was inadequate (it is not necessary to canvass the reasons for this view) given the extent of the tax it claimed was due and the fact that the applicant had other assets such as a motor vehicle collection and equity in immovable property which, in the opinion of the respondent, would be a better form of security.

[10] The respondent, in the exercise of his discretion, elected to refuse the request (the "first decision"). The reasons given for the refusal were as follows:

*"[t]he collection of the debt may be in jeopardy and there is a risk of dissipation of assets if the suspension is granted",*

*"[t]he value of the assets if further not such that the recovery of the disputed tax will not be jeopardy",*

"*[c]onsidering the substantial tax debt and the value of the taxpayer's assets, the prejudice to SARS should the tax debt not be collected timeously, far outweighs the alleged hardship the taxpayer may suffer",*

*"[t]he taxpayer did not tender adequate security for the payment of the disputed tax and accepting the tendered security is not in the interest of SARS or the fiscus", and*

*"the security offered is not adequate while the taxpayer has the means to provide considerably better security".*

[11] The applicant, in order to address the reasons raised by the respondent in his decision not to grant the suspension of the payment of the tax pending the determination of the tax dispute, tendered additional security in the form of his shares in TMM Holdings (Pty) Ltd (the "TMM Shareholding"), valued at more than R1 billion, and, pursuant to section 9(1) of the TAA, requested the respondent to reconsider the first decision and to suspend payment of the tax.

[12] The respondent, in the exercise of his discretion, conferred in terms of section 9(1) of the TAA, elected to refuse the request (the "second decision"). In refusing the request, the respondent reasoned, *inter alia*, as follows:

"*[t]he outstanding debts is approximately R 525 million*" [sic],

"*[t]he security offered is only a fraction of this*",

"*therefore…. recovery of the disputed debt will be in jeopardy, or there will be a risk of dissipation of assets if SARS's decision not to suspend the payment is withdrawn or amended*",

"*[c]onsidering the substantial amount of tax debt and SARS's duties to collect taxes, the prejudice to SARS should this not be collected, outweighs the alleged hardship the taxpayer may suffer*",

"*the security offered is not adequate*",

"*the taxpayer has the means to provide considerably better security*".

[13] The applicant seeks the review of the second decision having abandoned the relief sought in paragraph 1 of the amended notice of motion, ie the review of the first decision.

[14] The applicant is otherwise tax compliant.

[15] The central issue in dispute is the adequacy of the tendered security.

*In Limine*

[16] It was suggested, *in limine*, in the respondent's heads of argument, and argued as part of the respondent's contentions, that the application is fatally defective as it does not bring the respondent's decision-making process within the grounds of review as envisaged in section 6(2)(f) of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA") but rather the applicant focusses his attack on the respondent's refusal to suspend his obligation to make payment of his tax debts. Accordingly, as I understood the

argument raised by the respondent, the applicant placed the focus of the application on the provisions of section 164(3) of the TAA and not on the provisions of PAJA.

[17] It was furthermore submitted that in an application for judicial review of an administrative decision, an applicant must:

[17.1] provide evidence to the court that the decision is reviewable; and

[17.2] allege and prove that the decision fell within one or more of the listed categories of decisions in section 6(2) of PAJA.

[18] In this matter, the respondent argues that the application is fatally defective as the applicant "*merely concludes that SARS's decisions stands to be reviewed and set aside*" without explaining how the respondent's decision making falls within any of the listed provisions of s 6(2) of PAJA.

[19] It is also suggested that the applicant does not, in the alternative, seek a legality review of respondent's decision, and, so the submission proceeds, the applicant cannot rely on a legality review if it is found that the application cannot succeed due to the applicant's failure to bring the review within the parameters of PAJA.

[20] I do not agree with either of these submissions.

[21] Firstly the suggestion that the papers do not explain how the respondent's decision making falls within the listed provisions of section 6(2) of PAJA is misplaced. A proper reading of the papers indicates that the applicant brings the application within the following provisions of PAJA: Sections 6(2)(c); 6(2)(e)(iii), 6(2)(f)(ii), 6(2)(h) and 6(2)(i).

[22] Secondly, the amended notice of motion, dated 30 September 2024, leaving aside the relief sought in the first paragraph, which has been abandoned, seeks relief in terms of PAJA and in the alternative, a so called "legality review".

[23] I am also in substantial agreement with Mr Miller that the authorities cited by the respondent in support of these submissions do not support the argument that the application is fatally defective.

[24] In the result the point *in limine* is dismissed.

*Applicant's Case*

[25] The applicant sets out numerous grounds on which it relies for the relief sought in this application. It is perhaps apposite to deal with them sequentially as argued by Mr Miller.

[26] As a starting point it is suggested that if the court accepts as a fact that the value of the TMM Shareholding exceeds R1 billion, then, as a matter of logic the following correct facts follow:

[26.1] the security offered by the applicant is "*adequate*";

[26.2] suspension of payment of the tax does not result in recovery of the tax being "*in jeopardy*" or in there being a *"risk of dissipation*" of assets from which the respondent can recover the tax as the TMM Shareholding pledged to the respondent will be in its possession and the applicant will not be able to dispose of it;

[26.3] suspension of payment of the tax does not result in any "*prejudice to SARS*" from the tax "*not be[ing] collected*"; and

[26.4] Consequently there is no prejudice to SARS that "*outweighs the … hardship the taxpayer may suffer*" from requiring upfront payment of the tax.

[27] Mr Miller argues further that given that the second decision was based on facts entirely inconsistent with the correct facts, the second decision falls to be reviewed and set aside in terms of PAJA and/or section 1(c) of the Constitution, 1996 on the following grounds:

*Taking irrelevant considerations into account (s 6(2)(e)(iii))*

[28] In making the second decision, the respondent took irrelevant considerations into account, being the alleged:

[28.1] Inadequacy of the security offered;

[28.2] Recovery of the tax being "*in jeopardy*";

[28.3] "*risk of dissipation*" of assets from which the respondent could recover the tax;

[28.4] "*prejudice to SARS*" from the tax "*not be[ing] collected*"; and

[28.5] "*prejudice to SARS*" allegedly "outweigh[ing] "*the … hardship the taxpayer may suffer*" from requiring upfront payment of the tax.

*Relevant considerations not considered (s 6(2)(e)(iii))*

[29] As the correct facts[1] were clearly material to the second decision, the failure by the respondent to take these into consideration meant that he did not consider relevant considerations when making the second decision.

*No rational connection (s 6(2)(f)(ii))*

[30] Due to the respondent's fundamental error of not taking the correct facts into account, the second decision was not rationally connected to:

[30.1] "*the purpose for which it was taken*" ie to refuse to suspend the "pay now, argue later rule" because the tendered security is inadequate and there is a risk to the respondent of "prejudice", jeopardy" and "dissipation of assets";

[1] See paragraph [21] *supra*.

[30.2] "*the purpose of empowering provision"* in section 9(1) read with section 164 ie to suspend the "*pay now, argue later*" rule where it is justified;

[30.3] *"the information before the [Commissioner]"* that the security offered by the applicant is adequate, that there is no risk of dissipation of the assets comprising that security from which the respondent can recover the tax, and that the alleged risk of prejudice and jeopardy to the respondent does not exist;

*Other grounds (s 6(2)(h) and s 6(2)(i))*

[31] As the respondent based the second decision on incorrect facts rather than on the correct facts, the second decision, it is argued, was so unreasonable that no reasonable person would have made it, was otherwise unconstitutional or unlawful and/or was contrary to the principle of the rule of law.

*Procedurally Unfair (s 6(2)(c)*

[32] The second decision was "*procedurally unfair*" on the following grounds:

[32.1] The Independent Debt Committee was not informed about the applicant's tender of the TMM shareholding as security for the payment of the tax when it declined his section 9 request.

[32.2] The applicant was not given the opportunity to explain the increase in the value of the TMM Shareholding in TMM Holdings' books from R400 in 2022 to R1.25 billion in 2023, or to provide the respondent with substantiating documentation pertaining to the valuation of the TMM shareholding to address any concerns that the respondent may have had in that regard.

[33] There is no basis for the respondent's contention that the main test to be applied in determining whether the respondent's decision to refuse the request for suspension stands to be set aside or not, is procedural fairness and the application of the *audit alteram partem* rule.

[34] For all or any of the above reasons, the second decision falls to be reviewed and set aside.

*Respondent's Case*

[35] The applicant's outstanding tax debt is in respect of additional income tax assessments the respondent raised for the 2009 to 2021 years of assessment.

[36] Applicant sought a suspension of payment until such time as his tax appeal against the assessments had been adjudicated by the Tax Court.

[37] Section 164(1) of the TAA provides that the obligation to pay tax and the right of the respondent to receive and recover tax, are not suspended by an objection

or appeal or pending the decision of a court of law pursuant to an appeal under section 133, unless a senior SARS official otherwise directs.

[38] Section 164(2) to (8) further provides for the mechanism as well as factors to be considered in an application for suspension of payment of tax debts.

[39] The respondent submits the applicant's application for suspension of payment could not be successful given his representations coupled with the application of section 164 of the TAA.

[40] The applicant has failed to demonstrate his financial prejudice and/or irreparable harm if he is expected to pay the full tax debt pending his appeal to the Tax Court.

[41] The applicant does not challenge the "*pay now, argue later*" rule.

[42] The applicant has constantly been non-tax compliant, this despite being advised to correctly reflect his horse-trading losses. Applicant intentionally did not do so by failing to ring fence these losses.

[43] There were *prima facie* indications of fraud on the part of the applicant which allowed the respondent to rely on section 9(2) of the TAA to raise the additional assessments which they would have otherwise have been precluded from doing so.

[44] The security sought to be tendered was wholly insufficient for the value of the tax debt. The further security tendered in the founding affidavit i.e. Siyangena's claim against PRASA, is already tendered security in respect of another taxpayer's disputed tax debt.

[45] The respondent risks non recovery of the disputed tax debt given the nature of the applicant's assets, their value and the ability to quickly and discretely dispose of them.

[46] This court is bound by the findings of the Constitutional Court which upheld the "*pay now, argue later*" rule whilst reiterating that a taxpayer's rights in terms of section 34 of the Constitution are not infringed by a taxpayer's obligation to make payment whilst still disputing liability through the litigation process.

[47] The court must balance the applicant's rights in having the issues in his tax appeal adjudicated, which rights have not been trampled upon, against the respondent's right to collect a tax debt which has been outstanding for a length of time with no adequate form of security having been tendered.

[48] In the absence of the applicant challenging the "*pay now, argue later*" principle coupled with the Constitutional Court's findings on section 34 of the Constitution, there is no reason why the applicant should not be required to make payment of the tax debts and argue the merits of the tax debts later.

[49] There is no reason why the respondent should be left in a position where it is unable to collect the tax debts from a taxpayer who, by his own admission, can

afford to pay the tax debts and is having his appeal against the assessments adjudicated.

*The Legal Position*

[50] Section 164 of the TAA provides as follows:

> "***164. Payment of tax pending objection or appeal.***
> *(1) Unless a senior SARS official otherwise directs in terms of subsection (3)—*
> *(a)the obligation to pay tax; and*
> *(b)the right of SARS to receive and recover tax,*
> *will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.*
> *(2) A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9.*
> *(3) A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including—*
> *(a)whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;*
> *(b)the compliance history of the taxpayer with SARS;*
> *(c)whether fraud is prima facie involved in the origin of the dispute;*
> *(d)whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or*
> *(e)whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus.*
> *(4) If payment of tax was suspended under subsection (3) and subsequently—*
> *(a)no objection is lodged;*
> *(b)an objection is disallowed and no appeal is lodged; or*
> *(c)an appeal to the tax board or court is unsuccessful and no further appeal is noted, the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or any extension of the relevant time period under this Act.*
> *(5) A senior SARS official may deny a request in terms of subsection (2) or revoke a decision to suspend payment in terms of subsection (3) with immediate effect if satisfied that—*
> *(a)after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;*
> *(b)the taxpayer is employing dilatory tactics in conducting the objection or appeal;*
> *(c)on further consideration of the factors referred to in subsection (3), the suspension should not have been given; or*
> *(d)there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend payment of the amount involved was based.*
> *(6) During the period commencing on the day that—*
> *(a)SARS receives a request for suspension under subsection (2); or*
> *(b)a suspension is revoked under subsection (5),*
> *and ending 10 business days after notice of SARS' decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.*

*(7) If an assessment or a decision referred to in section 104 (2) is altered in accordance with—*
*(a)an objection or appeal;*
*(b)a decision of a court of law pursuant to an appeal under section 133; or*
*(c)a decision by SARS to concede the appeal to the tax board or the tax court or other court of law,*
*a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid, and amounts short-paid are recoverable with interest calculated as provided in section 187 (1).*
*(8) The provisions of section 191 apply with the necessary changes in respect of an amount refundable and interest payable by SARS under this section.*"

[51] It is well established that the principle of "*pay now, argue later*" obliges a taxpayer to make payment of the tax even though the taxpayer may choose to object to, or appeal against, the assessment raised. In *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another* 2001 (1) SA 1109 (CC) the Constitutional Court found that the "*pay now, argue later*" principle was:

*"[g]iven its prevalence in many other jurisdictions, it suggests that the principle is one which is accepted as reasonable in open and democratic societies based on freedom, dignity and equality as required by s 36."*[2]

[52] The Constitutional Court also reiterated that the exercise of the Commissioner's discretionary powers was the implementation of legislation and hence administrative action which fell within the administrative justice clause in the Constitution, and accordingly the Commissioner had to justify his decision as being rational.[3]

[53] Section 6 of PAJA provides:

[2] At 1142A
[3] At 1134D-G

"***6. Judicial review of administrative action.—***

*(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*

*(2) A court or tribunal has the power to judicially review an administrative action if—*

*(a)the administrator who took it—*

*(i)was not authorised to do so by the empowering provision;*

*(ii)acted under a delegation of power which was not authorised by the empowering provision; or*

*(iii)was biased or reasonably suspected of bias;*

*(b)a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*

*(c)the action was procedurally unfair;*

*(d)the action was materially influenced by an error of law;*

*(e)the action was taken—*

*(i)for a reason not authorised by the empowering provision;*

*(ii)for an ulterior purpose or motive;*

*(iii)because irrelevant considerations were taken into account or relevant considerations were not considered;*

*(iv)because of the unauthorised or unwarranted dictates of another person or body;*

*(v)in bad faith; or*

*(vi)arbitrarily or capriciously;*

*( f )the action itself—*

*(i)contravenes a law or is not authorised by the empowering provision; or*

*(ii)is not rationally connected to—*

*(aa)the purpose for which it was taken;*

*(bb)the purpose of the empowering provision;*

*(cc)the information before the administrator; or*

*(dd)the reasons given for it by the administrator;*

*(g)the action concerned consists of a failure to take a decision;*

*(h)the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*

*(i)the action is otherwise unconstitutional or unlawful.*

*(3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where—*

*(a)*

*(i)an administrator has a duty to take a decision;*

*(ii)there is no law that prescribes a period within which the administrator is required to take that decision; and*

*(iii)the administrator has failed to take that decision,*

*institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or*

*(b)*

*(i)an administrator has a duty to take a decision;*

*(ii)a law prescribes a period within which the administrator is required to take that decision; and*

*(iii)the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.*"

[54] In *Sawmilling South Africa v Department of Environmental Affairs and another*, [2022] JOL 52131 (GP), the court held[4] that:

"*It is trite that the purpose of PAJA is to give effect to the constitutional right that every person has to administrative action that is lawful, reasonable and procedurally fair. The purpose of PAJA is to codify the standard for permissible administrative action contemplated in section 33 of the Constitution, as was stated by the Constitutional Court, the purpose of section 6 of PAJA is to codify the grounds of judicial review as contemplated in section 33 of the Constitution*." (Footnotes omitted)

*Discussion*

[55] As I understand the respondent's case, it is confined to whether or not the respondent's decision to refuse the applicant's request for a suspension of payment pending the outcome of the tax dispute is founded on procedural fairness and the application of the *audi alteram partem* rule.

[56] The respondent contends that the onus is on the applicant to prove that he was not afforded a fair opportunity to present evidence in support his request for suspension of payment of his tax debts and as such his rights were transgressed.

[57] As I understand the applicant's case it is founded on the right to just administrative action on the part of the respondent and the respondent's failure to heed this imperative, in particular, that the decision making process was procedurally unfair, irrelevant considerations were taken into account and

[4] at 23 paragraph 48.

relevant considerations were not taken into account, and the decision reached by the respondent was not rationally connected to the purpose for which it was taken; the purpose of the empowering provision; the information before the respondent; or the reasons given for the decision by the respondent.

[58] The respondent argues that it gave the applicant the opportunity to request a suspension of payment of the tax in terms of section 164(3) of the TAA and that the respondent engaged with the applicant on the content of the request and the grounds advanced for the request as well as the grounds on which he believed entitled him to the suspension. A decision on suspension was made after consideration of all the information the applicant supplied and an analysis of the factual findings in the assessments.

[59] As a result, it is apparent that the initial request for a suspension of the payment of tax in terms of section 164(2) of the TAA was declined on the recommendation of the respondent's Tier 3 Debt Management Committee ("DMC") who recommended that the suspension of payment be declined for the following main reasons:

[59.1] The recovery of the tax debt would be in jeopardy or there would be a risk of dissipation of assets if the suspension is granted;

[59.2] Payment would not result in irreparable hardship as contemplated by section 164(3)(d) of the TAA;

[59.3] Fraud was involved in the origin of the dispute; and

[59.4] The applicant did not tender adequate security for the payment of the disputed tax and accepting the tendered security was not in the interests of the respondent as contemplated by section 164(3)(e) of the TAA. The subsequent offer to cede to the respondent the right, title and interest in and to the claim against PRASA in the name of Siyangena Technologies (Pty) Ltd was similarly found to be not satisfactory in as much as Siyangena had already ceded its claim against PRASA to the respondent as security for its own substantial tax debts.

[60] It is apparent that in terms of section 164(2) and (3) of the TAA that should a taxpayer request a senior SARS official to suspend the payment of any outstanding amount of tax, a senior SARS official has a discretion to suspend payment of the disputed tax or a portion thereof having regard to *inter alia* the factors listed in the section.

[61] A perusal of the DMC recommendation and the provided record indicates that whilst the applicant may not have agreed with the outcome of the request and hence initially sought to review the first decision, there is little doubt that the respondent's DMC considered the request as it is charged to do and that pursuant to the DMC recommendation the request was declined.

[62] In *MEC for Environmental Affairs and Development Planning v Clairison's CC*[5] the court stated:

[5] 2013 (6) SA 235 (SCA) at 239 -240 paragraph [18] and 240 -241 paragraph [22].

"*We think it apparent from the extracts from her judgment we have recited, and the judgment read as a whole, that the learned judge blurred the distinction between an appeal and a review. It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted. Clearly the court below, echoing what was said by Clairisons, was of the view that the factors we have referred to ought to have counted in favour of the application, whereas the MEC weighed them against it, but that is to question the correctness of the MEC's decision, and not whether he performed the function with which he was entrusted.*"

and

"*What was said in Durban Rent Board is consistent with present constitutional principle and we find no need to reformulate what was said pertinently on the issue that arises in this case. The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere*."

[63] Given that the relief in paragraph 1 of the amended notice of motion has been abandoned, I am not called upon to decide whether or not the first decision is reviewable.

[64] I am however required to determine whether or not the second decision passes muster or whether it stands to be reviewed and set aside on the facts before me.

[65] As a starting point there is the issue of the value of the TMM shareholding. The applicant tendered to pledge his 80% shareholding in TMM Holdings in his section 9 of the TAA request and before the respondent made the second decision. In the section 9 request it was stated that the shares were valued at

R 1.250 billion, which valuation was based on the group's last audited financial statements, prepared on 03 June 2024 by the applicant's auditors and a copy of the relevant financial statements were attached in support of the valuation. The basis of the calculation was the discounted cash flow method, a method of valuation which has been accepted by the respondent as being an appropriate method of valuing shares. In the matter of *CSARS v Stepney Investments* matter the Supreme Court of Appeal noted:

> *"…. the Bridge valuation was done by utilising the discount cash flow (DCF) valuation method. This was contended to be the most appropriate method in respect of the valuation of an asset such as shares. It entails valuing the business of an entity on its future forecast free cash flows, discounted back to present value through the application of a discount factor. The Commissioner, on the other hand, in adjusting the base cost valuation to nil, utilised the net asset value (NAV) valuation method. It was implicitly conceded in the court below that this valuation method was inappropriate and that the DCF method should have been used. The concession was properly made."* [6]

[66] Although the respondent speculates about the vale of the TMM shares, given their prior year value, the respondent admits, in his answering affidavit, that the value of the TMM shareholding exceeds R 1 billion.

[67] Given the admission in the respondent's answering papers, I am of the view that the value of the TMM shareholding exceeds R 1 billion. This removes the question of the value of the TMM shareholding from dispute, and I can accept that the value of the TMM shareholding exceeds R 1 billion.

[68] This factual question of the value of the TMM shareholding having been answered in the affirmative, attention must now turn to the question of whether

[6] CSARS v Stepney Investments (Pty) Limited 2016 (2) SA608 (SCA) at [6]

or not the respondent's second decision was fair in the procedural sense. In determining this issue I am reminded of the decision in *Bel Porto School Governing Body v Premier, Western Cape*, where the Chief Justice stated:

"*I do not consider that item 23(2)(b) of Schedule 6 has changed this and introduced substantive fairness into our law as a criterion for judging whether administrative action is valid or not. The setting of such a standard would drag Courts into matters which, according to the separation of powers, should be dealt with at a political or administrative level and not at a judicial level.*"[7]

[69] Given that substantive fairness is not part of our administrative law, I am not of a mind to consider whether or not the second decision was fair or equitable in the substantive sense, but rather whether or not the respondent, in reaching the second decision, complied with the meaning ascribed to procedural fairness by Hoexter and Penfold[8]:

"*…procedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all-important: the content of fairness is not static but must be tailored to the particular circumstances of each case. There is no room now for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant. In this regard the relevant parts of the PAJA are generally a positive contribution to our law. The principle of legality, too, may in limited instances demand procedural fairness,*

[7] 2002 (3) SA 265 (CC) at [88]
[8] Hoekstra C and Penfold G: Administrative Law in South Africa, 3rd ed. Juta at 501.

*but so far it has done so only as a matter of rationality. In other words, as the Constitutional Court*[9] *has indicated, this is a form of 'procedural rationality' rather than 'procedural fairness' as such*."

[70] With this in mind, can the respondent justify his second decision as being rational in the sense of there being a rational objective basis justifying the conclusion made by the respondent given the information properly available to him and the conclusion the respondent arrived at?[10]

[71] It is beyond dispute that the respondent afforded the applicant a hearing at which he was able, with the capable assistance of his attorney, to be properly heard, indeed given the provisions of section 9 of the TAA, the applicant was afforded the proverbial "*second bite at the cherry*". In that sense, as I understand the respondent's argument, and absent a challenge to the "*pay now, argue later*" principle, the applicant simply has not acquitted himself of the onus of establishing that he was not afforded a fair opportunity to present evidence in support of his request for suspension of payment of his tax debt and, as such, his right to administrative justice was not transgressed by the respondent.

[72] This cannot be gainsaid by the applicant. At first blush, this would appear to be the end of the matter.

[73] I am not however convinced that this brings the enquiry to an end. Mr Snyman argues that the applicant has failed to tender adequate security for the tax debt.

[9] Law Society of South Africa v President of the Republic of South Africa 2019 (3) SA 30 (CC) at [64].
[10] See Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC) at [37].

The main thrust of this argument is that there is a lack of an explanation for the increase in the value of the TMM shareholding, which is not adequately explained. He argues further that the respondent could reject the valuation, and accordingly the value of the TMM shareholding as security for the tax debt was inadequate. This, of course, raises more questions than answers, and certainly not answers that were canvassed on the papers. On affidavit, the applicant accepts the value of the TMM shareholding to be in excess of R 1 billion. Nothing has been put up by the respondent to challenge the valuation of the shares. To my mind it is not open to the respondent to now suggest that the respondent may reject the valuation. Surely, if the basis of the valuation was an issue, that was an issue that the respondent ought to have raised with the applicant before it reached its second decision?

[74] Of considerable concern to me is the averment of the applicant that the respondent's Independent Debt Committee was not informed of the applicant's tender of the TMM shareholding. Although this state of affairs is denied by the respondent, the respondent does not put up facts to support the denial.

[75] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[11], MURRAY AJP stated:

*"While it may well be, once a genuine dispute of fact has been shown to exist, that a respondent should not be compelled to set out his full evidence in his replying affidavits, a bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to*

[11] 1949 (3) SA 1155 (T) at 1165

*enable the Court (as required in Peterson's case (supra)) to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious, intended merely to delay the hearing. The respondent's affidavits must at least disclose that there are material issues in which there is a* bona fide *dispute of fact capable of being decided only after* viva voce *evidence has been heard."* (My emphasis.)

[76] I am of the view that on a conspectus of the evidence, the admission of the valuation of the TMM shareholding and the reasons supplied for the second decision, the respondent does not raise a *bona fide* dispute of fact in regard to the applicant's averment. I accordingly accept, for the purposes of this judgement, that that Independent Debt Committee was not informed of the applicant's tender of the TMM shareholding.

*Conclusion*

[77] In reaching the second decision, and refusing to reconsider the first decision after the provision of additional security, which was more than adequate to secure the tax debt, the respondent took into account a number of irrelevant considerations and ignored relevant considerations which ought to have been considered. I summarise these considerations as follows:

[77.1] The TMM shareholding was properly valued at R 1.25 . At least an amount of approximately R 1 billion has been conceded by the respondent. This is a highly relevant factor as 80% of TMM shareholding of R 1.25 billion is R 1 billion. This is almost double the

disputed debt. At R 1 billion, 80% of the shareholding would equate to R 800 million. By no means can this tender of security be considered as inadequate.

[77.2] Given the value of the tendered security and the fact that the security comprises shares, I am unable to understand the averment by the respondent that the recovery of the tax is in jeopardy. In order to comprehend what the respondent intends to convey by this statement, one would have expected the respondent, with reference to the tendered security of the TMM shareholding, to have explained why the recovery of the tax was at risk. This is nowhere to be found in the correspondence with the respondent nor is it canvassed in the papers.

[77.3] The proposition proffered that there exists a risk of dissipation of assets from which the respondent could recover the tax, similarly is confounding. A pledge is a limited real right of security in a moveable asset which arises on the delivery of the pledged asset (in this case the TMM shareholding) to the pledge creditor to secure the principal obligation (in this case the tax debt).[12] On delivery of the shares to the respondent the applicant would not be in a position to dissipate them. I understand the concern about other moveable assets in the applicant's possession but the security tendered is almost twice the value of the tax debt, and would be in the possession of the

[12] Vasco Dry Cleaners v Twycross 1979 (1) SA 603 (A) at 611

respondent. In such a case, it is difficult to cognise the alleged prejudice to the respondent from the tax not being collected.

[77.4] The only conceivable prejudice that the respondent may suffer were the immediate payment of the tax suspended would be one of cash flow. In the event that the applicant is correct (or even partially correct) in his appeal before the Tax Court, the respondent would not have been entitled to the full tax or part of the tax and it would have to repay the applicant the amount together with interest. On the other hand if the applicant is not successful, or only partially successful, and the tax or part of it is due, the respondent may demand payment of whatever amount is due, including interest, and if the applicant defaults on payment it has the pledged asset to rely upon for payment. On the other hand the prejudice to the applicant is manifest. To comply with the "*pay now, argue later rule*", the applicant would have to liquidate assets at what has been referred to as "fire sale" prices resulting in considerable and irrecoverable financial loss. Additionally the sale of the applicant's immovable property and motor vehicles would not settle the tax debt and the respondent could conceivably pursue execution proceedings against all the applicant's assets which would compromise both his business and his ability to maintain his family. Additionally, the applicant would be forced by immediate execution, to satisfy the debt and to lose his horse racing business which was becoming profitable. Subsequent success by the applicant would be pyrrhic. I am of the view that the applicant established severe financial prejudice and irreparable harm,

and such was not properly considered by the respondent in reaching the second decision.

[77.5] As the correct facts[13] were clearly material to the second decision, the failure by the respondent to take these into consideration means, to my mind, that these considerations were simply ignored when the respondent made the second decision.

[77.6] As a result of the respondent not taking the correct facts into account, the second decision could not be rationally connected to the purpose for which it was taken, being the refusal to suspend the "*pay now, argue later*" rule on the grounds that the tendered security was inadequate and there is a risk to the respondent of prejudice, jeopardy and dissipation of assets. It similarly lacks rationality when regard is given to the purpose of section 9(1) which is to suspend the "*pay now, argue later rule*" where such suspension is justified. The information which was before the respondent, on the respondent's version, but not the applicant's, indicates that the security offered by the applicant was adequate, there was no risk of dissipation of the assets comprising the security from which the respondent could recover the tax, and that the alleged risk of prejudice and jeopardy to the respondent does not exist.

[78] I have difficulty in reconciling the respondent's bare denial of the applicant's averment that that its IDC was not informed of the applicant's tender of the TMM

[13] See paragraph [24] *supra*.

shareholding. If this tender was before the IDC then there could not be a decision that the tendered security was inadequate or that there was a risk of dissipation of the applicant's assets which that would compromise the tendered security resulting in the risk of prejudice and jeopardy to the respondent. Accordingly I find further that the respondent based the second decision on incorrect facts rather than on the correct facts, and the second decision was so unreasonable that no reasonable person would have made it.

[79] The second decision was, in any event, procedurally unfair as the IDC could not have been informed about the applicant's tender of the TMM shareholding as security to the payment of the tax when the respondent declined the applicant's section 9 request. If I am wrong in this regard, then I am still of the view that the second decision was procedurally unfair as the applicant was not given the opportunity to explain the increase in the value of the TMM Shareholding in TMM Holdings' books from R400 in 2022 to R1.25 billion in 2023, or to provide the respondent with substantiating documentation pertaining to the valuation of the TMM shareholding to address any concerns that the respondent may have had in that regard. In fact no such concerns were raised.

[80] In all the circumstances I am thus of the view that the applicant has succeeded in establishing the grounds of review set out in paragraphs [26] – [33] *supra* and that the second decision ought to be set aside. Although I need not consider whether a legality review would have also succeeded, I am of the view that it too would have been successful.

*Remedy*

[81] I now turn to the remedy sought by the applicant.

[82] The applicant seeks the relief sought in section 8(1)(c)(ii)(aa) of PAJA which provides:

> *"8(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders—*
> *….*
> *(ii)in exceptional cases—*
> *(aa)substituting or varying the administrative action or correcting a defect resulting from the administrative action;*".

[83] The applicant argues, with some force, that exceptional circumstances exist which justifies the court substituting the respondent's decision with that of the court.

[84] The respondent, as would be expected in such a matter, argues that there are no exceptional circumstances which warrant the substitution of the respondent's decision with that of the court.

[85] The legal position on this thorny issue has been considered comprehensively by the Constitutional Court in the matter of *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another,*[14] to which both parties had recourse in their heads of argument to support their stance.

[14] 2015 (5) SA 245 (CC)

[86] Importantly, the Constitutional Court gave clear and unequivocal guidance to courts who were considering substitution as a potential remedy. I have attempted to summarise these guidelines for the purposes of my ultimate decision:

[86.1] an administrator and not the court is best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision;

[86.2] remittal of the decision back to the administrator, with or without directions is still almost always the prudent and proper course;

[86.3] a case implicating an order of substitution requires courts to be mindful of the need for judicial deference and their obligations under the Constitution;

[86.4] when making a substitution order the court must in the first instance determine whether or not it is in as good a position as the administrator to make the decision;

[86.5] in the second instance, the court must determine whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively;

[86.6] thirdly a court should still consider other relevant factors;

[86.7] the ultimate consideration is whether a substitution order is just and equitable. This involves a consideration of fairness to all implicated parties;

[86.8] a court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it;

[86.9] once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion;

[86.10] the nature of the decision may dictate that a court defer to the administrator. This is typical in instances of policy-laden and polycentric decisions.

[87] I have taken note of the caveat that an administrator is better placed than a court to make the right decision and that as a general rule it would be prudent to refer the matter back to the administrator to decide the matter afresh. I am acutely aware of the need for a court to show deference to the administrator and to caution against trespass into the realm of the administrator. In this regard I have specifically reminded myself of the difference between an appeal and a review and I have been extremely cautious to avoid confusion between the two. I have reminded myself at all times during my evaluation of the evidence, the record and the arguments presented, that my view on the correctness or otherwise of the respondent's second decision is not a valid consideration and that I am bound to the respondent's second decision unless the respondent's second decision was not performed in terms of the discretion

with which he was entrusted. The matter before me is not a policy based decision that has been reviewed but rather the exercise of a statutory discretion entrusted to the respondent by the legislature. I am furthermore mindful of the fact that it is common cause between the parties that the central issue in the matter is the tender of the TMM shareholding by the applicant as security for the for the tax.

[88] I have had regard to the record filed in this matter. It is comprehensive and I have considered it carefully in the preparation of this judgement. I reiterate: it is common cause between the parties that the central issue in this matter is the tender of the TMM shareholding by the applicant as security for the for the tax. Given that this is the central issue in dispute between the parties, and taken cumulatively, I am of the view that I am in as good a position as the respondent is to make the decision and I am of the view that the decision of the respondent is a foregone conclusion. In the circumstances I intend substituting my decision for that of the respondent.

*Costs*

[89] In the event of success both parties suggested that the costs of two counsel was warranted.

[90] I am of the view that the matter was of sufficient importance and complexity to have warranted the employment of two counsel.

*Order*

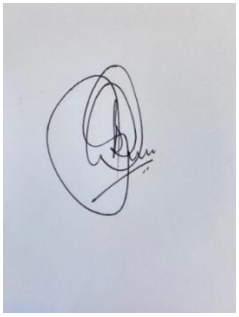
[91] In the result, the following order issues:

1. The respondent's decision, referred to as the second decision, to refuse the applicant's request, brought in terms of section 9 of the Tax Administration Act, 28 of 2021, that the respondent reconsider his decision to refuse to suspend the payment of the disputed tax, which arose as a result of additional assessments by the respondent, pending the outcome of proceeding before the Tax Court, is hereby reviewed and set aside;

2. The respondent's second decision is substituted with a decision in the following terms:

   "*The applicant's obligation to pay the disputed tax and the respondent's right to receive the disputed tax or to recover the disputed tax is suspended pending the outcome of the dispute between the parties regarding the applicant's liability for the payment of the disputed tax, subject to the applicant delivering a pledge of his 80% shareholding in TMM Holdings (Pty) Limited, within 5 day of receipt of this order*."

3. The respondent is directed to pay the costs of the application in accordance with Schedule C in respect of senior counsel and Schedule B in respect of junior counsel, of Rule 67A of the Uniform Rules of Court.



DYKE, AJ

JUDGE OF THE HIGH COURT

PRETORIA

For the applicant: S Miller SC and J Boltar instructed by Alan Allschwang & Associates Inc., Pretoria.

For the respondent: HGA Snyman SC and K Kollapen instructed by VZLR Attorneys Inc., Pretoria

Date Heard: 25 August 2025

Judgement Delivered 02 February 2026