

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
02/10/2026	<i>[Signature]</i>
DATE	SIGNATURE

Case No: 42076/2022

In the matter between:

**THE COMMISSIONER OF THE
SOUTH AFRICAN REVENUE SERVICE**

Applicant

and

**AFRICA CASH AND CARRY
(CROWN MINES) (PTY) LTD**
Registration Number: 2013/133954/07

First Respondent

AFRICA CASH AND CARRY (PTY) LTD
Registration Number: 2002/004971/07

Second Respondent

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Caselines/ CourtOnline. The date for hand-down is deemed to be 02 October 2026.

Summary:

Facts: The second respondent was owned by four family trusts, three of which were different Hathurani families and the other the Aysen family, each holding 25% shares. SARS assessed the second respondent for its tax liabilities. Pending the outcome of the finalisation of objections to the assessments and suspensions of

payment the second respondent's assets of a certain value were set aside to satisfy the tax debt once it has become due and payable. However, SARS learnt that the second respondent, in violation of this arrangement, was disposing of all its assets at nil value to the first respondent and that a sale agreement had been entered into. The Hathurani families own the first respondent after the Aysen family sold its shares to all three family trusts. The tax debt was confirmed by the tax court and finally by the Supreme Court of Appeal when the respondents' appeal failed. Some of the issues that arise are whether the tax assessments raised longer than three years have prescribed and whether the second respondent can be held jointly and severally liable with the second respondent if the debt has not prescribed.

Issues: Declaratory relief in terms of section 21(1)(c) of the Superior Courts Act – new company (first respondent) jointly and severally liable for tax debts of former owner (second respondent).

Section 20(9) of the Companies Act – incorporation of second respondent to evade the first respondent's tax debt an unconscionable abuse of juristic personality.

Section 45 of the Companies Act – first respondent's undertaking to pay the second respondent's tax liability – not financial assistance to a related entity as contemplated and therefore exonerating it from such liability.

Prescription of tax debts – tax debts prescribe after 15 years in terms of section 171 of the Tax Administration Act (TAA) and not 3 years in terms of the Prescription Act.

Section 182 and section 184 of the TAA – the applicant's notice to hold the first respondent (as transferee receiving the second respondent's assets at nil value) liable for the second respondent's tax liability fell outside the one year within which to do so against the first respondent but there was substantive notice in the context of engagements between the applicant and respondents, and court judgments in favour of the applicant.

Hearsay evidence – the applicant's affidavits in previous proceedings and an expert's report admitted as admissible hearsay evidence in a separate judgment by the same court.

JUDGMENT

MALINDI J et AMIEN AJ:

Introduction

- [1] This is an application for declaratory relief in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013, which provides that a High Court has the power, 'in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'
- [2] The applicant is the Commissioner of the South African Revenue Service (SARS), responsible for the performance of SARS' functions, one of which is the effective collection of revenue.¹ In this judgment we refer to the applicant as 'SARS'; the first respondent, Africa Cash and Carry (Crown Mines) (Pty) Ltd, as 'Crown Mines'; and the second respondent, Africa Cash and Carry (Pty) Ltd, as 'ACC'.

Factual background

- [3] ACC is a private company with limited liability, duly incorporated in accordance with the company laws of South Africa, with registration number 2002/004971/07 and a registered address at 2nd Floor, Central House, 69 8th Avenue, Mayfair, Johannesburg, Gauteng. It conducts a retail business, much of it on a cash basis.
- [4] The shareholders of ACC comprise four family trusts, namely the Edrees Hathurani Family Trust, the Iqbal Ahmed Hathurani Family Trust, the Mohammed Edrees Hathurani Family Trust, and the Cassim Aysen Family Trust. Each trust held a 25% shareholding in ACC. ACC's directors are Mr Cassim Aysen, Mr

¹Section 9, read with s 4 of the South African Revenue Service Act 34 of 1997.

Mohammed Edrees Hathurani (son of Mr Edrees Hathurani), and Mr Iqbal Hathurani (brother of Mr Edrees Hathurani).

- [5] Crown Mines is a private company with limited liability, duly incorporated in accordance with the company laws of South Africa, with registration number 2013/133954/07 and the same registered address as ACC. The shareholders of Crown Mines comprise the same family trusts as ACC, save for the Cassim Aysen Family Trust, which sold its 25% shareholding in ACC in the circumstances explained below.
- [6] Ms Faayza Hathurani ('Ms Hathurani') was a director of Crown Mines and resigned in that capacity on 31 October 2021. Mr Jackie de Beer ('Mr de Beer'), a SARS official appointed as Manager: Forensic Debt, Illicit Economy Unit, deposed to the founding and replying affidavits on behalf of SARS.
- [7] Mr Bryce David Cawood ('Mr Cawood') deposed to the answering affidavit in his capacity as the sole director of Crown Mines. It is common cause that Mr Cawood was appointed in that capacity during October 2021 by Mr Cloete Murray (Mr Murray') of Sechaba Trust. Mr Murray was the curator bonis appointed pursuant to a preservation order granted against Crown Mines on 1 October 2014. Mr Cawood confirms that, by virtue of his appointment, he has no personal interest in the affairs of Crown Mines, including its tax affairs, and no personal knowledge of the facts alleged by SARS prior to October 2021, and therefore cannot dispute them. However, he submits that should not be construed as an admission that those facts, as alleged by SARS, are correct.
- [8] Mr Cawood describes his role in Crown Mines as follows:

"From the time of my appointment in October 2021, I have overseen Crown Mines' business, operations and financial affairs with the knowledge and cooperation of the curator bonis. Crown Mines' erstwhile directors and shareholders were not involved in the management of its business since my appointment as director."
- [9] Since Mr Cawood could not comment on the activities of ACC and Crown Mines prior to his appointment as director in October 2021, most of the factual narrative

in this judgment is drawn from the founding and replying affidavits of SARS, which were admitted as admissible hearsay evidence.

- [10] SARS avers that the former directors of ACC and Crown Mines, and the representatives of the Hathurani Family Trusts (the shareholders of ACC and Crown Mines), all directly affected by this application, were invited to challenge the facts on which SARS relies for the relief sought and chose not to do so. SARS' founding and replying affidavits, insofar as they relate to the period prior to October 2021, therefore stand undisputed.
- [11] Prior to the main application being heard on 10 November 2025 and 27 January 2026, three interlocutory applications were brought: (a) SARS' application to admit hearsay evidence; (b) Crown Mines' application to strike out certain portions of SARS' founding and replying affidavits; and (c) SARS' application to strike out portions of Crown Mines' answering affidavit to the extent that the evidence answered the portions of the founding affidavit that Crown Mines sought to strike out.
- [12] The interlocutory applications were heard by a full bench comprising Malindi J, Rautenbach AJ and Amien AJ. Before judgment was delivered, Rautenbach AJ sadly passed away, and the judgments in the interlocutory applications were accordingly delivered by Malindi J and Amien AJ.
- [13] The hearsay application was granted on 4 November 2025, and the whole of SARS' founding and replying affidavits, including annexures, was held admissible in the main application. Costs were ordered to be costs in the cause.
- [14] Judgment in the striking-out applications was delivered on 23 January 2026. Both applications were dismissed, with costs in the cause.
- [15] In the main application SARS seeks declaratory relief against Crown Mines in the following terms:

- "1. Declaring that the first respondent is jointly and severally liable to the applicant for the tax indebtedness of the second respondent in respect of the tax periods 1 March 2002 to 28 February 2014, in the amount of R5,139,894,370.10, as at

28 October 2022, in terms of the agreement of sale entered into between the first and second respondents dated 31 December 2013 ("first declarator");

2. Declaring that the first respondent is jointly and severally liable to the applicant for the tax indebtedness of the second respondent in respect of the tax periods 1 March 2002 to 28 February 2009, in the amount of R1,499,692,534.63, as at 28 February 2009, in terms of the undertaking given by the first respondent on or about 25 September 2015 ("second declarator");
3. Declaring that the first respondent is jointly and severally liable for the tax indebtedness of the second respondent, limited to R550 million, in terms of s 182 of the Tax Administration Act 28 of 2011, alternatively s 183, further alternatively both ss 182 and 183 ("third declarator");
4. Declaring that the first respondent's incorporation and the transfer of the second respondent's business to the first respondent constitute an unconscionable abuse of the juristic personality of the first respondent as a separate entity, and that, for the purposes of recovery of the second respondent's indebtedness to the applicant, the first respondent is deemed not to be a separate juristic person ("fourth declarator");
5. The first respondent is ordered to pay R5,139,894,370.10 to the applicant, jointly and severally with the second respondent, with interest from 28 October 2022 to date of payment;
6. In the alternative to prayer 5, if only prayer 2 is granted, the first respondent is ordered to pay R1,499,692,534.63, jointly and severally with the second respondent, with interest from 1 March 2009 to date of payment;
7. Further in the alternative to prayers 5 and 6, if only prayer 3 is granted, the first respondent is ordered to pay R550 million, jointly and severally with the second respondent;
8. The first and second respondents are ordered to pay the costs of this application on the attorney and client scale, jointly and severally, the one paying the other to be absolved, only in the event of opposition, which costs are to include the costs of three counsel;
9. Further and/or alternative relief."

- [16] In essence, the four declarators relate to: (a) the sale-of-business agreement between Crown Mines and ACC (first declarator); (b) a conditional undertaking given by Crown Mines to be liable for ACC's tax debts for the 2003–2009 tax periods (second declarator); (c) Crown Mines' liability for ACC's tax debts under ss 182 or 183 of the Tax Administration Act 28 of 2011 ('the TAA') (third declarator); and (d) whether the incorporation of Crown Mines and the transfer of ACC's business to it constituted an unconscionable abuse of ACC's separate juristic personality, such that, for purposes of recovering ACC's tax debt, Crown Mines and ACC are to be treated as one (fourth declarator).
- [17] Mr Coetzee SC, for SARS, informed the Court that SARS was proceeding on the second declarator (prayer 2), the fourth declarator (prayer 4) and prayer 8, and would pursue the third declarator only if the fourth declarator were not granted.
- [18] Crown Mines submits that, once the first declarator was abandoned, the evidence underpinning it fell away with it. SARS contends that the evidence remains relevant to the application as a whole. We agree with SARS and refer to the sale agreement where relevant.
- [19] The grant of declaratory relief is a matter for the court's discretion, exercised having regard to the circumstances of the case. The exercise of that discretion depends on two things: first, that the court is satisfied the applicant has an interest in an existing, future or contingent right or obligation; and, if so, second, whether the court should exercise its discretion to grant the order.²
- [20] As a creditor of ACC and a potential creditor of Crown Mines, SARS has an interest in an existing, future, or contingent right to be compensated for ACC's tax liability. It remains for this Court to decide whether to exercise its discretion in SARS' favour, having regard to the facts and the arguments advanced, and to what is in the interests of justice.
- [21] This judgment proceeds with the background to the application that is, ACC's tax indebtedness over three tax periods, namely 2003–2009, 2010–2014 and 2012–2014 (much of which is also set out in the hearsay judgment and is repeated here

²*Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at paras 17–18.

where necessary), before turning to the merits of the second and fourth declarators, the exercise of the Court's discretion, and Crown Mines' prescription defence.

ACC's tax indebtedness for the 2003 to 2009 tax periods

- [22] On 15 June 2011 SARS issued assessments against ACC for income tax and VAT for the 2003 to 2009 tax periods.³ ACC objected, and the matter proceeded on appeal before a full bench of the Tax Court.⁴ In the appeal, SARS relied on the evidence of Ms Pretisha Khoosal ('Ms Khoosal'), a former SARS official employed as a Specialist Auditor and tasked with managing the tax audit process relating to ACC.
- [23] The Tax Court confirmed ACC's tax liability for the 2003–2009 tax periods and the methodology followed by Ms Khoosal, but amended the assessments, which SARS revised on 21 May 2018 in accordance with the judgment. SARS then issued a letter of demand to ACC on 13 June 2018 based on the revised assessments.⁵
- [24] ACC appealed to the Supreme Court of Appeal (the SCA'). On 21 November 2019, the SCA confirmed the Tax Court's judgment.⁶
- [25] Since ACC did not apply for leave to appeal to the Constitutional Court, the amended assessments became final and conclusive on 13 December 2019 — the 15 days within which an application for leave to appeal to the Constitutional Court could have been noted having lapsed.⁷
- [26] On 28 June 2011 ACC requested suspension of the 2003–2009 tax debt, which SARS rejected on 19 August 2011. On 6 September 2011 ACC made a second suspension request, which SARS accepted on 22 March 2012. The terms of the suspension agreement included that: (a) ACC's business would continue provided SARS did not enforce the tax debt; (b) ACC would hold stock at its

³Letter of assessment, Annexure "JDB4" (CaseLines 009-1 to 009-18).

⁴*Africa Cash and Carry (Pty) Ltd v Commissioner for the South African Revenue Service* [2018] JOL 40512 (TC).

⁵Annexures "JDB6" and "JDB34" (CaseLines 011-1 to 011-82, 039-1).

⁶*Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* 2020 (2) SA 19 (SCA)

⁷Rule 19(2) of the Rules of the Constitutional Court

premises worth more than R300 million; (c) SARS could, if necessary, register a general notarial bond over ACC's movable assets; and (d) SARS would apply retained VAT refunds to the undisputed portion of ACC's VAT liability.

- [27] On 20 November 2013 the Cassim Aysen Family Trust and Mr Aysen launched an urgent application in the then South Gauteng High Court interdicting ACC from dissipating assets,
- [28] On 31 December 2013 ACC and Crown Mines concluded an agreement of sale (the sale agreement') in terms of which ACC sold its business as a going concern to Crown Mines for nil consideration,⁸ with effect from 31 October 2013. We return below to the manner in which this sale subverted the suspension agreement between SARS and ACC.
- [29] The sale agreement was signed on behalf of both the seller and the purchaser by the same shareholders of ACC and Crown Mines, namely the Iqbal Hathurani Family Trust, the Edrees Hathurani Family Trust and the Mohammed Hathurani Family Trust (collectively, 'the Hathurani Family Trusts').
- [30] While preparing for the tax appeal, SARS became aware that ACC had breached the suspension agreement by divesting and transferring the very assets it had tendered as security, to Crown Mines. SARS learnt of this dissipation through an urgent interdict application brought by one of ACC's shareholders, the Cassim Aysen Family Trust, in the South Gauteng High Court on 20 November 2013⁹ against the remaining shareholders of ACC ('the South Gauteng application').
- [31] In the South Gauteng application, Mr Cassim Aysen ('Mr Aysen') told the court that the Hathurani Family Trusts were unlawfully transferring ACC's business and assets to Crown Mines, to the prejudice of the Aysen Trust as a shareholder of ACC. He described how ACC's trading premises, fixtures, fittings, stock, computer and other equipment, telephone systems and numbers, employees, accounting systems, debtors, and suppliers were divested to, and taken over by, Crown Mines. Mr Hathurani, on behalf of ACC, Crown Mines and the Hathurani

⁸Annexure "JDB21" (CaseLines 026-1 to 026-39).

⁹Case number 43667/2013.

Family Trusts, confirmed a winding-down of ACC involving the divestment of its assets and business to Crown Mines.

- [32] The South Gauteng matter was settled, and the settlement agreement was made an order of court ('the South Gauteng order') on 6 December 2013.¹⁰ The effect of the settlement was that the Cassim Aysen Family Trust sold its entire 25% shareholding in ACC to the Edrees Hathurani Trust.
- [33] On 2 July 2014 SARS applied for a preservation order over the assets of ACC and Crown Mines and their shareholders and directors. At this point SARS notified Crown Mines that it intended to hold Crown Mines liable for ACC's tax debts.
- [34] A provisional preservation order was granted on 10 July 2014, made final on 1 October 2014. As noted above, Mr Murray was appointed curator bonis over the assets of ACC and Crown Mines.
- [35] On 14 July 2015 Mr Murray applied for the contempt of Mr E A Hathurani and other members of the Hathurani family, for having acted in contempt of the 1 October 2014 preservation order. Ms Hathurani, in a supplementary affidavit, undertook that her father, Mr E A Hathurani, would not attend at ACC's business premises until the tax appeal was finalised; that undertaking was made an order of court on 11 March 2016.¹¹
- [36] On or about 13 August 2014 SARS revoked the suspension agreement, citing a material change in the circumstances on which it had been based, and demanded payment from ACC and Crown Mines, after affording ACC an opportunity to make representations as to why the agreement should not be revoked.
- [37] On or about 27 August 2014 ACC and Crown Mines applied for a postponement of the preservation application, without taking issue with whether Crown Mines could be held liable for ACC's tax debts. Between 19 August 2014 and 22 October 2014, the parties corresponded further, with additional requests for

¹⁰Annexure "JDB20".

¹¹Annexure "JDB50".

suspension of payment, all of which SARS declined. Crown Mines appears to have participated actively in these various requests for suspension of ACC's tax debt.¹²

- [38] In a letter dated 28 August 2015, SARS informed Crown Mines that it intended to hold Crown Mines liable on the basis of its acceptance of liability for ACC's tax indebtedness, referring also to letters of 31 October 2014, 6 November 2014 and 25 September 2015 from Crown Mines' attorneys, which SARS contends confirm that liability.¹³ On 10 September 2015 SARS declined the request for suspension and invited ACC to submit a payment proposal.
- [39] On 16 June 2016 the Hathuranis and Crown Mines applied to vary the preservation order. In her founding affidavit, Ms Hathurani confirmed that Crown Mines had furnished guarantees for the tax debt to the extent confirmed by the Tax Court.¹⁴
- [40] During the tax appeal, SARS compiled a list of issues for the pre-trial conference of 15 October 2015, to which ACC and Crown Mines' attorneys responded. That response recorded Crown Mines' acceptance of liability for ACC's tax indebtedness, confirmed that Crown Mines took transfer of ACC's business and assets on 1 November 2013, and recorded that SARS would be entitled, among other things, to recover the amount for which Crown Mines had accepted liability once established by the tax appeal judgment.¹⁵
- [41] ACC's tax indebtedness for the 2003 to 2009 tax periods arose from a manual sale-suppression system applied by ACC to evade tax. SARS levied section 89(2) interest on the outstanding balance of R647,596,801.42 for the 2003 to 2009 tax periods.¹⁶ On 18 June 2018, before the SCA hearing, ACC made a further suspension request, which SARS declined on 1 October 2019.
- [42] On 28 February 2020 ACC requested a compromise of its 2003–2009 tax indebtedness, which SARS rejected on 19 March 2020. In its compromise

¹²Annexure "JDB54".

¹³Annexures "JDB57" to "JDB60".

¹⁴Annexure "JDB64".

¹⁵Annexures "JDB61" and "JDB62".

¹⁶Annexure "JDB8".

request, ACC admitted that it was unable to pay its tax debt and was insolvent. SARS declined the suspension request, and the compromise offer but indicated the settlement proposals would be considered.

- [43] A further compromise offer was submitted by ACC and Crown Mines on 29 March 2020 regarding their 2003–2009 tax indebtedness. Negotiations followed, culminating in a draft agreement furnished by SARS for signature, and further correspondence about its wording, ending in a final agreement offered by SARS.
- [44] ACC and Crown Mines withdrew from the compromise on 7 September 2020. The compromise offer included resolutions by shareholders and directors of connected parties such as Elephante Import and Export (Pty) Ltd ('Elephante'), which SARS says confirm Elephante's shareholders' acceptance of Crown Mines' liability for ACC's tax debts. Elephante is relevant because three of ACC's shareholders are also shareholders of Elephante.
- [45] On 14 October 2020 ACC submitted a new compromise offer, together with a settlement proposal by Crown Mines regarding its disputed VAT liability for the November 2013 to July 2014 tax periods. On 28 October 2020 SARS informed ACC that, following the withdrawal of its objection, its total liability was due and payable,¹⁷ and rejected the new compromise offer.¹⁸
- [46] In a letter dated 28 July 2022, Crown Mines denied liability in law for ACC's tax debts. On 10 August 2022 SARS asked Crown Mines to provide the facts and legal basis for its denial; Crown Mines responded that it was not obliged to disclose its internal findings.
- [47] During May 2022, Elephante and the same three shareholders of ACC applied against SARS for payment of funds held in the trust account of SARS' attorneys. SARS contends Crown Mines acknowledged liability for ACC's tax debts in Ms Hathurani's replying affidavit in that application.¹⁹

ACC's alleged tax indebtedness for the 2010 to 2014 tax periods

¹⁷Annexure "JDB43" (CaseLines 048-1 to 048-3).

¹⁸Annexure "JDB44" (CaseLines 049-1 to 049-6).

¹⁹Annexures "JDB77" to "JDB79".

- [48] ACC submitted VAT returns for the 2012 to 2014 tax periods, resulting in a tax debt based on SARS' assessments, which ACC did not object to. SARS contends that ACC's 2012 financial statements and its draft 2013 financial statements show that Crown Mines took over all ACC's known assets and liabilities, including the loan accounts of the remaining shareholders.²⁰
- [49] SARS also provided ACC's unaudited financial statements for the year ended 28 February 2013 to PwC, who valued ACC's business to determine what would have been available to satisfy SARS' claims, had that business not been transferred to Crown Mines.
- [50] Based on Crown Mines' financial statements for the year ended 28 February 2021,²¹ PwC valued the shareholder loans at R71.6 million and concluded that total equity, comprising ordinary equity and shareholder loans, was between R550 million and R625 million on a non-marketable, controlling basis. Crown Mines disputes this, relying on a valuation by DG Capital of R191 million, and argues in any event that shareholder loans should be deducted from any presumed liability.
- [51] During November 2018 SARS raised additional income tax assessments against ACC for the 2010 to 2014 tax periods. ACC initially objected, but withdrew the objection on 14 October 2020, after which SARS advised that ACC's total liability was due and payable. On 5 December 2018 ACC requested suspension of the 2010–2014 tax debt, which SARS declined on 1 October 2019. On 16 October 2019 ACC submitted a settlement proposal for the 2010–2014 tax debt, which SARS declined on 14 February 2020.
- [52] On 14 October 2020 ACC withdrew its objection to the 2010–2014 assessments and submitted a compromise offer, which SARS rejected on 25 March 2021. On 16 March 2021 Crown Mines' attorneys disputed Crown Mines' liability for ACC's tax debts in a letter to SARS' attorneys. SARS' attorneys replied on 23 March 2021, reiterating Crown Mines' contractual acceptance of responsibility for that liability.

²⁰Annexures "RA1" and "RA2".

²¹Annexure "RA3".

[53] On 26 May 2021 ACC applied to review and set aside SARS' rejection of its compromise offer; that application was withdrawn on 29 October 2021. SARS avers that, in a letter dated 20 March 2020 to Ms Hathurani, Crown Mines' attorneys accepted liability for ACC's tax debts.²²

[54] On 29 March 2021 Crown Mines applied urgently to interdict SARS from collecting a disputed VAT assessment against it, denying liability for ACC's tax debts. Part A of the urgent application was determined by Fisher J on 31 May 2021 in SARS' favour.²³ Part B — a review of SARS' refusal to suspend payment pending the tax appeal — was not pursued by Crown Mines.

[55] SARS also issued statements of account for income tax and VAT against ACC as at 28 October 2022. SARS has separately applied for ACC's liquidation.

[56] This background is what led to the present application, in which SARS seeks, among other things, to hold Crown Mines liable for ACC's tax debts, proceeding on the second and fourth declarators, with the third as an alternative to the fourth. We turn to consider them.

Second Declarator

[57] SARS' second prayer seeks to hold Crown Mines jointly and severally liable for ACC's tax indebtedness for the 2003 to 2009 tax periods, in the amount of R1,499,692,534.63 as at 28 February 2009, in terms of an undertaking given by Crown Mines on or about 25 September 2015. The undertaking is contained in a letter dated 25 September 2015 from Crown Mines' attorney, Ms Jennifer Faber ('Ms Faber'), referred to in paragraph [38] above. The relevant parts of the letter read:

"1. Our letter dated 16 September 2015 has reference.

2. We confirm that, in light of the notice provided to the taxpayer dated 28 August 2015 and the request made therein, we have now had the opportunity to peruse

²²Annexure "JDB70".

²³*Africa Cash and Carry (Crown Mines) (Pty) Ltd v The Commissioner for the South African Revenue Service*, case no 15467/2021 (31 May 2021).

all relevant documentation submitted to SARS by previous representatives, as well as to consult with those representatives personally.

3. We accordingly hold instructions from Africa Cash and Carry (Crown) Proprietary Limited to confirm that it will accept liability for the tax liabilities, if any, that arise in the hands of Africa Cash and Carry Proprietary Limited after the pending appeal in the Tax Court under Case Nos 13251 and VAT 077 has been adjudicated and finalised. Very specifically, ACC Crown accepts liability only in respect of a proven tax liability relating to tax periods prior to ACC Crown taking transfer of the business, and in respect of which assessments have been issued prior to ACC Crown taking transfer of the business.

4. We accordingly request the Commissioner to give due consideration to the taxpayer's request for suspension of payment dated 1 and 14 September 2015.

5. We await the Commissioner's response to the request for suspension of payment in due course".

[58] On the strength of the 25 September 2015 letter ('the undertaking'), SARS contends that Crown Mines accepted liability for the amended income tax and VAT assessments against ACC for the 2003 to 2009 tax periods, finally determined when the SCA dismissed ACC's appeal on 21 November 2019, which became final on 13 December 2019.

[59] SARS avers that, despite demand and Crown Mines' undertaking to pay ACC's tax debt once confirmed by the SCA, Crown Mines now disputes liability and refuses to pay. Payment, SARS contends, was contingent only on quantification of the debt by the SCA.

[60] Crown Mines contends it is not liable under the 25 September 2015 letter because: (a) Ms Faber was merely offering additional security in support of ACC's suspension request, i.e. a guarantee or suretyship for ACC's tax obligation; (b) the TAA does not authorise SARS to hold a third party liable for another's tax debt, whether by way of suretyship or otherwise; and (c) the undertaking, if it constituted an acceptance of liability, amounted to financial assistance to a related company as contemplated in s 45 of the Companies Act 71 of 2008.

[61] SARS contends that Ms Faber was duly authorised to act for, and bind, Crown Mines, given that Crown Mines and ACC were represented by, among others, Ms Faber over a lengthy period, and SARS accepted that mandate.

[62] The SCA, per Cachalia JA, in *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga*,²⁴ held that a party is estopped from denying its attorney's authority where the attorney has purported to act on its behalf, especially over a period of time. As Cachalia JA put it:

"It would mean practically that attorneys can no longer assume that their colleagues are authorised to make important decisions in the course of litigation without the principal's independent confirmation. This cannot be countenanced."²⁵

[63] We accordingly accept that Ms Faber was duly authorised to act on Crown Mines' behalf when she penned the letter of 25 September 2015. The more pertinent question is whether the undertaking amounted to financial assistance in the form of a guarantee or suretyship for ACC's tax liability under s 45 of the Companies Act.

[64] If the undertaking constituted such financial assistance, s 45(3)(a)(ii) of the Companies Act required a special resolution of Crown Mines' shareholders approving it. No such resolution was placed before the Court. In the absence of a special resolution, financial assistance inconsistent with section 45 is void in terms of section 45(6). Had Ms Faber intended merely to record financial assistance, one would have expected the letter to say so. Indeed, section 45 does not engage on either of SARS' alternative bases for Crown Mines' liability.

[65] If, as SARS' primary case has it, Crown Mines' acceptance of liability arose from its own involvement, alongside ACC's controlling shareholders, in a scheme to place ACC's business and assets beyond SARS' reach, an admission of liability made in those circumstances cannot amount to financial assistance as

²⁴2010 (4) SA 122 (SCA).

²⁵*Id* at para 21.

envisaged by s 45; a party implicated in such conduct cannot invoke that section's formalities to avoid the consequences of its own wrongdoing.

- [66] Alternatively, if the transfer is treated simply as the sale of ACC's business as a going concern, the disposal falls to be considered under ss 112 and 115 of the Companies Act, which govern the disposal of the whole or the greater part of a company's assets and require a special resolution of the disposing company's own shareholders — here, ACC's — rather than of the transferee under s 45; Crown Mines has not contended that ss 112 or 115 were not complied with. In any event, the onus of proving the absence of a special resolution rested on Crown Mines, and its evidence on this point falls short of discharging that onus.
- [67] The wording of the letter, however, indicates that Crown Mines intended to accept ACC's tax liability once: (a) the pending Tax Court appeal had been adjudicated and finalised; (b) in respect of a proven tax liability relating to tax periods before Crown Mines took transfer of the business; and (c) in respect of assessments issued before that transfer.
- [68] The 2003–2009 assessments were issued on 15 June 2011, before ACC's business was sold to Crown Mines, and the SCA confirmed ACC's tax liability arising from those assessments, notwithstanding that the appeal judgment (which amended but did not extinguish that liability) was delivered after the sale. Since no appeal was taken to the Constitutional Court, the SCA judgment is conclusive of ACC's tax liability for that period, and both the tax periods and the assessments themselves predate Crown Mines' transfer of the business on 31 December 2013.
- [69] The conditions in Crown Mines' own undertaking having thus been met, Crown Mines accepted liability for ACC's 2003–2009 tax liability as finally determined in *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service*. The SCA dismissed Crown Mines' appeal against the assessment as reasonable. Crown Mines was thus acknowledging a known tax liability that was deliberately omitted from Annexure "A" to the sale agreement.

- [70] Given our finding that Crown Mines' undertaking to accept liability for ACC's tax debts is valid, it is unnecessary to consider the parties' further arguments on ss 182 and 183 of the TAA.

Fourth Declarator

- [71] SARS seeks a further declarator, under s 20(9) of the Companies Act, that Crown Mines' incorporation and the transfer of ACC's business to it constitute an unconscionable abuse of Crown Mines' separate juristic personality, such that, for purposes of recovering ACC's indebtedness to SARS, Crown Mines is deemed not to be a separate juristic person.

- [72] Section 20(9) provides:

"If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may— (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)."

- [73] An interested person is one who has a direct and sufficient interest in the relief sought.²⁶ In light of Crown Mines' undertaking, SARS is a confirmed creditor of Crown Mines, and therefore an interested person in this matter.

- [74] In *Ex parte Gore NO and Others*,²⁷ Binns-Ward J noted that section 20(9) 'supplement[s] the common law regarding piercing of the corporate veil'. It enables a court to pierce the corporate veil and hold a company, or its

²⁶*Ex parte Gore NO and Others* 2013 (3) SA 382 (WCC) at para 35; *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 533J–534E.

²⁷2013 (3) SA 382 (WCC) at para 34.

shareholders, liable where the company's separate legal personality is used in an unconscionable manner.

[75] In *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others*,²⁸ Schippers AJA, for the SCA, observed:

“... It suffices to say that the unconscionable abuse of the juristic personality of a company within the meaning of s 20(9) of the 2008 Act includes the use of, or an act by, a company to commit fraud; or for a dishonest or improper purpose; or where the company is used as a device or facade to conceal the true facts.”²⁹

[76] SARS contends that Crown Mines was incorporated so that ACC's business could continue without ACC having to meet its tax liabilities to SARS. SARS relies on the following, drawn from the background above, as showing that Crown Mines was established primarily to frustrate collection of ACC's tax debt:

- a. The transfer of ACC's business to Crown Mines was not disclosed to SARS by either company, and was never published as required by s 34 of the Insolvency Act 24 of 1936.
- b. While preparing for the tax appeal, SARS discovered that ACC was divesting and transferring assets it had tendered as security under the 22 March 2012 suspension agreement, learning of this via the South Gauteng application.
- c. Under the sale agreement of 31 December 2013, effective from 31 October 2013, ACC divested its entire business and the bulk of its asset base, including all movable assets, to Crown Mines during the 2014 tax period. ACC then ceased trading, and Crown Mines continued the business.
- d. The relevant provision is clause 7 of the sale agreement, read with Annexure “A”.

²⁸2018 (4) SA 71 (SCA).

²⁹ *Id* at paras 29–30.

- e. Despite repeated requests, SARS received a copy of the sale agreement only on 29 February 2020.
- f. Immediately after taking over ACC's business, Crown Mines continued to use ACC's bank accounts, traded from its premises, and used the same employees, fixtures and fittings, accounting systems, computers and equipment, telephone systems and numbers, stock, customers and suppliers — on the same or similar terms as previously applied between the suppliers and ACC. Rebates and discounts that would have benefited ACC were diverted to Crown Mines. In short, Crown Mines stepped into ACC's shoes and continued its business under a different name.
- g. Crown Mines purchased ACC's stock at cost and sold it at a profit that was not shared with ACC.
- h. The Tax Court judgment confirms that ACC's directors and shareholders, who were also Crown Mines' shareholders, knew of, or participated in, the sale-suppression system that benefited them.
- i. ACC and Crown Mines made numerous suspension requests and settlement and compromise proposals, all of which SARS rejected.
- j. On 29 March 2021 Crown Mines brought an urgent two-part application: Part A sought to interdict SARS from collecting the same VAT assessment that ACC had unsuccessfully appealed to the Tax Court and the SCA (subject to an amendment of the assessments); Part B, a review of SARS' refusal to suspend that debt, was not pursued.
- k. On 31 May 2021 Fisher J delivered judgment on Part A, finding that Crown Mines had been established primarily to evade payment of ACC's tax debts — the very reason SARS had obtained the preservation order, while ACC's business and assets were being dissipated to Crown Mines with ACC's tax debt to SARS unpaid. Fisher J observed that, although there were two companies, this was in truth 'one family business conducted by the Hathurani family'.

I. Fisher J continued, and we quote from her judgment:

"[15] I pause to make clear that the fact that reference is made in this judgment to the sale transaction between ACC and the applicant [Crown Mines], pursuant to which the business was purportedly moved from one to the other, should not be construed as an acceptance that the transaction was legitimate. The business remains a family-controlled business regardless of the vehicles in which it was conducted.

...

[18] In the face of all this undisputed evidence it is contended on behalf of the applicant that the sale was 'at arm's length'. This submission is so far removed from the incontrovertible facts as to be jaw-dropping. That this allegation is made evidences a serious amount of bad faith on the part of the applicant and the Hathuranis generally.

[19] It is now not in dispute that for the period 2003–2009 this family business was conducted on the basis that income tax and VAT was deliberately under-declared to the extent that the unpaid debt to SARS amounts to more than R1.2 billion. ...

...

[22] The Hathurani family were not true to their word from the perspective of the undertakings given to secure the suspension. They purportedly concluded the sale of business agreement which had as its purpose the complete divestiture of the business and assets of ACC to the applicant. In this period, the management of the business continued seamlessly and the same fraudulent systems which were in place simply moved into the new company. ...

...

[34] There can be no doubt whatsoever that SARS was a known creditor for the unpaid debt at the time. The effective date was 31 October 2013. The consideration paid for the business by the applicant was nil. Clearly then this sale provided for the takeover of this family business as a going concern by the applicant, including the liability for the unpaid debt.

...

[36] The approach now taken as to the lack of liability of the applicant is opportunistic ...

...

[50] [T]he game was thus up. It was clear to the Hathuranis that a plan to pay the debt would have to be made if the business were to survive. They, as management of the business, had been roundly implicated in the fraudulent scheme. So began a series of exchanges on behalf of ACC and the applicant with a view to reaching a compromise ...

...

[60] The falsity and misguidedness of this proposition is clear when reference is had to the manner of transfer of the business; the various written communications between the parties in which the applicant has unequivocally accepted liability for this debt and attempted to compromise with SARS in relation thereto, the various offers of security made by the applicant for the debt; the terms of the sale agreement; the profoundly incestuous relationship between the two family entities; and, most significantly, the clear findings of the Tax Court. I do not accept this premise."

[77] The evidence points clearly to ACC's shareholders and directors having attempted to defraud SARS, and to their having established Crown Mines to escape ACC's tax liabilities. The parties who signed the sale agreement on behalf of both seller and purchaser were the same — the Hathurani Family Trusts. In other words, Crown Mines' shareholders and directors were the same parties who in ACC engaged in tax evasion against SARS. Crown Mines therefore participated in the scheme to enable ACC to avoid paying tax, as confirmed in separate judgments of the Tax Court³⁰ and the Johannesburg High Court. It is unsurprising, given ACC's uncooperative and disingenuous conduct,

³⁰*Africa Cash and Carry (Pty) Ltd v Commissioner for the South African Revenue Service* [2018] JOL 40512 (TC) at paras 90, 96–97, 101 and 103–104.

that SARS could not initially raise a correct assessment; it is telling that it took seven years for SARS to obtain a copy of the sale agreement.

[78] We therefore find that Crown Mines was incorporated to evade tax, or put more strongly, to commit fraud, for a dishonest purpose, and as a facade to conceal the true position, namely, the evasion of ACC's tax liabilities to SARS. Crown Mines' establishment accordingly constitutes an unconscionable abuse of ACC's separate juristic personality, and for the purpose of recovering ACC's tax indebtedness, Crown Mines is deemed not to be a separate juristic person.

Exercise of the discretion to grant the declaratory orders

[79] Crown Mines seeks dismissal of SARS' claims, arguing that SARS is seeking a substitute for a remedy it lost by failing to follow the correct administrative procedure for recovering a tax debt from Crown Mines, specifically that SARS failed to give Crown Mines proper notice under s 182(3) of the TAA, depriving it of the opportunity to make representations under s 184(2) before being held liable.

[80] Sections 182 to 184 of the TAA relevantly provide:

"182. Liability of transferee for tax debts

- (1) A person (referred to as a transferee) who receives an asset from a taxpayer who is a connected person in relation to the transferee without consideration or for consideration below the fair market value of the asset is liable for the outstanding tax debt of the taxpayer.
- (2) The liability is limited to the lesser of—
 - (a) the tax debt that existed at the time of the receipt of the asset or would have existed had the transferor complied with the transferor's obligations under a tax Act; and
 - (b) the fair market value of the asset at the time of the transfer, reduced by the fair market value of any consideration paid, at the time of payment.

- (3) Subsection (1) applies only to an asset received by the transferee within one year before SARS notifies the transferee of liability under this section.

183. Liability of person assisting in dissipation of assets

If a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt of the taxpayer, the person is jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's debt.

184. Recovery of tax debts from other persons

- (1) SARS has the same powers of recovery against the assets of a person who is personally liable under section 155, 157 or this Part as SARS has against the assets of the taxpayer and the person has the same rights and remedies as the taxpayer has against such powers of recovery.
- (2) SARS must provide a person referred to in subsection (1) with an opportunity to make representations—
 - (a) before the person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183, if this will not place the collection of tax in jeopardy; or
 - (b) as soon as practical after the person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183."

[81] The requirements of section 182(1) are met: ACC's business was sold as a going concern, including its assets, for nil consideration to Crown Mines on 31 December 2013. ACC and Crown Mines are 'connected persons' because their sellers, purchasers and shareholders are the same persons, and Crown Mines simply continued ACC's business under another name. ACC's tax liabilities can accordingly be recovered from Crown Mines.

- [82] SARS argues that it notified Crown Mines of its intention to hold it liable for ACC's tax debts during the preservation proceedings in or about July 2014, less than a year after ACC's business and assets were dissipated to Crown Mines. Crown Mines contends that conveying such an intention during preservation proceedings is not proper notice.
- [83] In *Metcash Trading Limited v Commissioner for the South African Revenue Service*,³¹ the Constitutional Court held (in the context of the Value-Added Tax Act 89 of 1991, but reasoning applicable here) that notice of liability must be given in writing and must inform the recipient that an objection to the assessment may be lodged.
- [83] The Constitution requires that administrative action be reasonable and procedurally fair,³² and that a person whose rights are adversely affected be given written reasons.³³
- [84] This constitutional right is given effect in section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), which requires an administrator to give a person: (i) adequate notice of the nature and purpose of the proposed action; (ii) a reasonable opportunity to make representations; (iii) a clear statement of the action; (iv) adequate notice of any right of review or internal appeal; and (v) adequate notice of the right to request reasons.
- [85] These provisions require that a transferee under section 182 of the TAA be informed of the nature and basis of the liability, the amount claimed, be afforded an opportunity to request reasons and make representations and be informed of any right of review or appeal.
- [86] The question is whether the preservation application constituted notice for purposes of section 182(3) of the TAA.
- [87] A preservation order is, at the outset, a protective remedy and not necessarily a determination of liability under section 182. To satisfy section 182(3), the preservation application would have had to meet the five requirements of section

³¹2001 (1) SA 1109 (CC) para 21.

³²Section 33(1) of the Constitution of the Republic of South Africa, 1996.

³³Section 33(2) of the Constitution

3(2)(b)(i)–(v) of PAJA, that is, it would have had to communicate expressly that SARS intended to, and would, assert liability against Crown Mines as a transferee under section 182, identify the nature and factual basis of that liability and the amount claimed, and afford Crown Mines an opportunity to request reasons, make representations, and be informed of its rights of review or appeal.

[88] The preservation application met none of these requirements. No formal notice under section 182(3) was given accordingly to Crown Mines by way of that application.

[89] SARS delivered a letter dated 28 August 2015 wherein it purports to inform Crown Mines of its intention to hold it liable for ACC's tax debt. However, this notice does not meet the time requirement that such a notice be issued within one year of the transferee receiving the asset. As SARS avers to have gained knowledge of the dissipation of assets to Crown Mines in June 2014, this notice is out of time by some two months.

[90] The remaining question is whether Crown Mines nevertheless had substantive notice. The question is whether, notwithstanding the absence of formal written notice, there were circumstances in which it knew, or ought to have known, that it could be held liable for ACC's tax debts. At the very least, the SCA's judgment in *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service*³⁴ and Fisher J's judgment in *Africa Cash and Carry (Crown Mines) (Pty) Ltd v The Commissioner for the South African Revenue Service*³⁵ gave Crown Mines that knowledge. Crown Mines therefore had substantive notice that it could be held liable for ACC's tax debts.

[91] Having found substantive notice for purposes of section 182(3), the further question is whether Crown Mines was afforded an opportunity to make representations under section 184(2). On the record, that opportunity was not given. However, sections 182(3) and 184(2) must be read together: section 184(2) requires that opportunity only if doing so 'will not place the collection of tax in jeopardy'.

³⁴2020 (2) SA 19 (SCA)

³⁵Case no 15467/2021 (31 May 2021).

[92] The conduct of Crown Mines' directors and shareholders indicates collusion with ACC's directors and shareholders to dissipate ACC's business and assets to Crown Mines in order to evade ACC's tax liabilities. Collection of tax from either or both companies was already in jeopardy before the preservation order was even sought. Indeed, that jeopardy was precisely why SARS sought the order. ACC and Crown Mines' conduct accordingly justified dispensing with the section 184(2) requirement, particularly given the parties' demonstrated resourcefulness in devising schemes to evade ACC's (and hence Crown Mines') tax liability, including by omitting the liability from Annexure "A" to the sale agreement.

[93] We accordingly find that it is in the interests of justice to exercise our discretion in favour of the declaratory relief SARS seeks.

Has the tax debt prescribed?

[94] Crown Mines submits that SARS became aware of the facts giving rise to the tax debt during June 2014, when the Aysen Trust sought ACC's liquidation, and earlier still when ACC and Crown Mines concluded the sale agreement on 31 December 2013.³⁶ It contends for a three-year prescription period under section 10(1), read with section 11(d), of the Prescription Act 68 of 1969.

[95] In its heads of argument, Crown Mines relies on sections 64 and 65 of the Close Corporations Act 69 of 1984 and on *Burley Appliances Ltd v Grobbelaar NO and Others*,³⁷ *Barnard NO v Bezuidenhout en Andere*³⁸ and *Duet and Magnum Financial Services CC (In liquidation) v Koster*,³⁹. In *Burley Appliances*,⁴⁰ the Western Cape High Court held that those provisions afford a creditor a remedy to apply to court for a declaration of a close corporation member's liability. *Barnard* reached the same conclusion, holding further that 'debt' in the Prescription Act includes an obligation to perform an act — here, for SARS to invoke its powers under section 63 of the Close Corporations Act to commence the process of holding a member liable, within the three-year prescription period.

³⁶CL 102-67.

³⁷2004 (1) SA 602 (C).

³⁸2004 (3) SA 274 (T).

³⁹2010 (4) SA 499 (SCA).

⁴⁰*Burley Appliances* footnote 38 above at 612I–614F.

[96] Crown Mines contends the SCA confirmed this in *Duet and Magnum*, where it was said:

"I agree with the conclusion of Nel J in *Burley*, and with his reasons for that conclusion, and in my view, they apply as much in this case. I think it is clear that the sections of the Insolvency Act with which we are concerned give a right to a liquidator, in prescribed circumstances, to have a person declared to be a debtor of the estate, and its complement is a 'debt' for purposes of prescription, in that the person concerned is liable to have such a declaration made. This case is distinguishable from *Burley* only in this respect, that under the Insolvency Act the right accrues only in a winding-up. Whether the relevant date for the commencement of prescription is the date that the winding-up commences, or the date that a liquidator is appointed, is not a matter with which we need concern ourselves — the effect of s 12(3) of the Prescription Act is that that question will never arise. It is sufficient to say that prescription ordinarily commences to run no later than the date upon which a liquidator is appointed. Whether the commencement of prescription has been delayed in this case under the provisions of s 12(3) of the Prescription Act is not a matter that we are called upon to decide."⁴¹

[97] On this basis, Crown Mines contends that SARS' claim under section 20(9) of the Companies Act is not a claim for a 'debt' as contemplated in the Prescription Act, and as contemplated in sections 64 and 65 of the Close Corporations Act, and cannot on that footing be invoked to establish liability — alternatively, that even if SARS succeeds on that point, it will be after the debt has prescribed.⁴² Crown Mines put the point thus:

'130. While SARS' new allegations regarding the nature of Ms Faber's undertaking is disputed (and have been comprehensively addressed hereinabove), SARS' arguments are incorrect, for the following reasons:

130.1 First, s 171 of the TAA expressly only applies to "recovery proceedings of a tax debt". Until such time as liability for a taxpayer's tax debt is imposed against a third party under

⁴¹*Duet and Magnum* footnote 40 above at para 27.

⁴²First respondent's heads of argument, para 130.

Chapter 11 in terms of a valid administrative act in accordance with those empowering provisions, such alleged liability does not constitute a “tax debt” for purposes of recovery under Chapter 11 of the TAA. SARS cannot take 15 years (under s 171 of the TAA) to hold third parties liable under either the TAA, or under other remedies that SARS alleges to be entitled to exercise in law. Second, SARS asserts that the corporate veil should be pierced under s 20(9) of the Companies Act, premised on certain conduct by ACC and Crown Mines’ shareholders. Ignoring the fatal issue that SARS failed to raise the interruption of prescription in its replying affidavit, for the interruption of prescription to find application, an acknowledgment of liability must necessarily be made in respect of the specific “debt” sought to be claimed. It is common cause that no acknowledgement by Crown Mines exists in respect of SARS’ claim under s 20(9) of the Companies Act to the effect that Crown Mines’ juristic personality may be disregarded, which claim has been raised for the first time in this application.

130.3 Third, SARS seeks declaratory relief to disregard the juristic personality of Crown Mines under s 20(9) of the Companies Act. As held in *Burley* and by the SCA in *Duet* and *Magnum*, such remedy created a new right that had to be exercised once the right accrued to SARS.”

[98] SARS, in its replying affidavit,⁴³ contends that its claim has not prescribed, because it has 15 years under s 171 of the TAA to recover a tax debt and, in any event, its claim was launched within three years, and within a year of Crown Mines receiving transfer of ACC’s assets on 31 December 2013.

[99] The questions are therefore: (a) whether, if the three-year period under the Prescription Act applies, prescription was interrupted; and (b) whether s 171 of the TAA gives SARS 15 years within which to establish liability for tax — that is, a tax debt. Crown Mines contends that the 15 years is to recover a tax debt

⁴³Replying affidavit, CL 099-32, para 166.

whose cause of action arose, at the latest, three years before institution under the Prescription Act.

[100] During June 2014 SARS became aware of ACC's dissipation of assets — specifically the assets offered as security for the tax liability under the undertakings ACC gave on 22 March 2012, when it learnt of the South Gauteng application. On this footing, and applying a three-year prescription period, prescription would have run in June 2017.

[101] SARS argues, in the alternative, that prescription was interrupted by successive admissions of liability, namely: the 25 September 2015 undertaking; Ms Hathurani's admission of Crown Mines' liability in the founding affidavit to the application to vary the preservation order (deposed to on 14 June 2016); and Crown Mines' admission of liability in its compromise offer of March 2020. Crown Mines denied liability for the first time only in March 2021.

[102] Crown Mines contends that, even under section 171 of the TAA, the debt prescribed within three years, section 183(2) not having been invoked, on the basis that a 'debt' as defined in the Close Corporations Act prescribes after three years. It submits that SARS' reliance on section 20(9) of the Companies Act, raised for the first time in this application, comes more than three years after SARS became aware of ACC's liability, and that section 20(9) creates a new right that has to be exercised only once it accrued.

[103] Crown Mines argues there was no acknowledgment of debt, and hence no interruption of prescription.⁴⁴ This overlooks that ACC acknowledged the tax debt when it concluded the sale agreement on 31 December 2013 and set aside assets to satisfy the debt once quantified. Moreover, given our finding of an abuse of juristic personality, ACC's acknowledgment binds Crown Mines too.

[104] SARS' position on prescription is that section 171 of the TAA provides that:

⁴⁴First respondent's heads of argument, para 130.2.

“Proceedings for recovery of a tax debt may not be initiated after the expiration of 15 years from the date the assessment of tax, or a decision referred to in section 104(2) giving rise to a tax liability, becomes final.”

[105] SARS contends it therefore has 15 years within which to institute proceedings to recover a tax debt from the date the assessment becomes final.

[106] Section 169 of the TAA defines a tax debt:

- “(1) An amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund
- (2) A tax debt due to SARS is recoverable by SARS under this Chapter, and is recoverable from – (a) in the case of a representative taxpayer who is not personally liable under section 155, any assets belonging to the person represented which are in the representative taxpayer’s possession or under his or her management or control; or (b) in any other case, any assets of the taxpayer.
- (3) SARS is regarded as the creditor for the purposes of an amount referred to in subsection (1) as well as any other amount if SARS has entered into an agreement under section 4(1)(a)(ii) of the SARS Act in terms of which SARS is the creditor for the State or the organ of state or institution concerned. (4) SARS need not recover an amount under this Chapter if the amount is less than R100 or any other amount that the Commissioner may determine by public notice, but the amount must be carried forward in the relevant taxpayer account.”

[107] Section 100 of the TAA provides that an assessment becomes final when: (a) an objection is withdrawn; (b) a notice of appeal is withdrawn; or (c) an appeal has been determined by a higher court with no further right of appeal. In short, when there is no further right to dispute it.

[108] The Prescription Act itself provides for a three-year period from the date the cause of action arose. Other legislation such as the Close Corporations Act and the Insolvency Act, on which Crown Mines relies, dictates the circumstances in which a cause of action arises and how a debt is to be recovered. SARS relies

on the TAA as the legislation pertinent to when its cause of action arose and the process prescribed for collecting the tax.

[109] In that regard, sections 10 and 16 of the Prescription Act, respectively, provide:

“PRESCRIPTION OF DEBTS

10(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

(2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.

(3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.

...

16. (1) Subject to the provisions of subsection (2)(b), the provisions of this Chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.

(2) The provisions of any law— (a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; or (b) which, if this Act had not come into operation, would have applied to the prescription of a debt which arose or arises out of an advance or loan of money by an insurer to any person in respect of an insurance policy issued by such insurer before 1 January 1974, shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation.”

[110] SARS submits that the assessments became final as follows: the additional income tax and VAT assessments for the 2003–2009 tax periods (‘the tax appeal assessments’) became final and conclusive only once ACC’s right to appeal

further against the SCA judgment (delivered 21 November 2019) lapsed, i.e. on 13 December 2019; and the additional income tax assessments for the 2010–2014 years ('the further IT assessments') became final on 14 October 2020, when ACC withdrew its objection. Both assessments therefore became final less than three years before this application was instituted on 2 November 2022.⁴⁵

[111] As to the undertaking of 25 September 2015, SARS submits that, on its wording, and read with s 11 of the Prescription Act and s 171 of the TAA, Crown Mines accepted liability for ACC's tax debts only once that liability was finally determined by the courts, and that the claim based on the undertaking therefore has not prescribed.⁴⁶

[112] This follows because prescription under the Prescription Act runs only once a debt is due, in the sense that the debtor is under an obligation to pay immediately (*Master v IL Black & Co Ltd* 1983 (1) SA 986 (A) at 1004F–H); and where completion of a cause of action is subject to a condition, the debt becomes due, and prescription begins to run, only once that condition is fulfilled (*List v Jungers* 1979 (3) SA 106 (AD) at 127H–128; *Big Rock (Pty) Ltd v Hoffman* 1983 (1) SA 534 (TPD) at 539–540).

[113] Since Crown Mines' undertaking was, on its own terms, conditional upon ACC's tax liability being finally established by the courts, SARS' claim on the undertaking became due, and prescription began to run, only once the SCA's judgment took final effect on 13 December 2019. Whether the applicable period thereafter is three years under the Prescription Act or 15 years under s 171 of the TAA, this application, instituted on 2 November 2022, was brought well within either period.

[114] The Prescription Act and the Close Corporations Act do not avail Crown Mines where specific legislation defines when a debt arises, prescribes the steps for its recovery, and governs its prescription. Chapter 11 of the TAA, being such

⁴⁵Applicant's heads of argument, paras 62.3, 67–68, 70 and 72–74.

⁴⁶Applicant's heads of argument, paras 76–77.

specific legislation, overrides the general provisions of the Prescription Act. The notice of motion is dated 1 November 2022 and was filed on 2 November 2022.⁴⁷

[115] SARS accordingly acted within three years of final assessment which would satisfy the three-year period, were it to apply, while it still had a further 12 years available under the TAA.

[116] We have held that SARS met the substantive notice requirement.

[117] On 25 September 2015 Ms Faber made an undertaking which, among other things, states:

- "2. We confirm that, in light of the notice provided to the taxpayer dated 28 August 2015 and the request made therein, we have now had the opportunity to peruse all relevant documentation submitted to SARS by previous representatives as well as consult with those representatives personally.
3. We accordingly hold instructions from Africa Cash and Carry (Crown) Proprietary Limited to confirm that it will accept liability for the tax liabilities, if any, that arise in the hands of Africa Cash and Carry Proprietary Limited after the pending appeal in the Tax Court under Case Nos 13251 and VAT 077 has been adjudicated and finalised. Very specifically, ACC Crown accepts liability only in respect of a proven tax liability relating to tax periods prior to ACC Crown taking transfer of the business, and in respect of which assessments have been issued prior to ACC Crown taking transfer of the business."

[118] Crown Mines cannot say it did not know of the tax debt when it took transfer of ACC's assets, given that the same shareholders and directors were party to the Aysen urgent application of December 2013, in which it was stated, on advice of senior counsel, that the transfer was intended, among other things, to avoid liquidation resulting from the tax debt.⁴⁸

⁴⁷Notice of motion, CL 001-2.

⁴⁸Founding affidavit, para 21 (CL 002-10): "21. In opposition to Mr Aysen's urgent interdict application, it was alleged on behalf of the Hathurani Family Trusts that there were two primary reasons for the transfer of ACC's business and assets to ACC Crown, being: 21.1 the business of ACC had to be

[119] We conclude that s 171 of the TAA applies, such that an established tax debt prescribes only after 15 years of it not being claimed by SARS, and that this debt was established at the latest when the SCA delivered judgment on 21 November 2019, Crown Mines taking no further judicial action to challenge it. Even if we are wrong in that regard, Crown Mines assumed ACC's tax debt through the sale agreement of 31 December 2013 — a debt known to Crown Mines, whose shareholders and directors are the same Hathurani Trusts that transferred ACC's business to it. We find that the debt was deliberately omitted from Annexure "A" to the sale agreement, with the intention of evading its payment through the sham agreement discussed above.

[120] Whether a 15-year or a three-year prescription period applies, on our analysis the debt has, in either event, not prescribed.

[121] Given the disingenuous and fraudulent conduct of ACC and Crown Mines, costs are awarded against them on a punitive scale.

Costs

[122] That we are of the view that Crown Mines, in concert with ACC, conducted themselves in a highly objectionable manner in contravention of the Companies Act, their conduct of business and an unrelenting resistance to meeting their tax liability, is apparent from the judgment. In these circumstances, a costs order expressing the court's great displeasure is justified. Such costs must be on the scale as between attorney and client.

Orders

[123] We accordingly make the following order:

- [1] it is declared that the first respondent is jointly and severally liable to the applicant, for the tax indebtedness of the second respondent in respect of

protected from Mr Aysen; and 21.2 ACC wanted to avoid liquidation in circumstances where it would be trading in insolvent circumstances as a result of the assessment that had been raised by SARS in respect of the 2003 to 2009 tax years."

the tax periods 1 March 2002 to 28 February 2009, in the amount of R1,499,692,534.63 with interest from 21 November 2019.

- [2] it is declared that the first respondent's incorporation and the transfer of the second respondent's business to the first respondent constitute an unconscionable abuse of the juristic personality of the first respondent as a separate entity, and declaring that, for the purposes of recovery of the second respondent's indebtedness to the applicant, the first respondent is deemed not to be a separate juristic person.
- [3] The first and second respondents are ordered to pay the costs of this application and of the interlocutory applications, on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved, which costs are to include the costs of three counsel.



G MALINDI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

et



W AMIEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

Counsel for the Applicant:

Adv EM Coetzee SC, Adv C Naudé SC, and Adv
KG Ramaimela instructed by Gildenhuis Malatji
Inc.

Counsel for the Respondents: Adv PA Swanepoel SC, Adv LP Sigogo SC, and
Adv CA Boonzaaier instructed by Edward Nathan
Sonnenbergs Inc.

Date of Hearing: 10 November 2025 and 27 January 2026

Date of Judgment: 2 October 2026