THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 12 May 2025

Status: Immediate

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Henque 3935 CC t/a PQ Clothing Outlet v Commissioner for the South African Revenue Service (846/2023) [2025] ZASCA 56 (12 May 2025)

Today the Supreme Court of Appeal (SCA) upheld an appeal, with costs, and set aside the order of the Gauteng Division of the High Court, Johannesburg (the high court).

The appellant, Henque 3935 CC t/a PQ Clothing Outlet (Henque), traded as a retailer of apparel and beauty products in 40 stores throughout South Africa. On 29 November 2017, the Commissioner for the South African Revenue Service (SARS) issued a notice of an original assessment for the 2017 year of assessment. On 31 January 2018, Henque commenced business rescue in terms of the Companies Act 71 of 2008 (the Companies Act) and SARS was informed accordingly on the same day. On 4 April 2018, SARS gave notification of an adjustment to assessment. On 1 May 2018, SARS raised an additional assessment for the 2017 income tax year of assessment. On 2 August 2018, SARS lodged a claim with the business rescue practitioner recording the 2017 additional assessment as a pre-business rescue debt. The business rescue practitioner submitted Henque's VAT returns for the period 06/2018 to 03/2019. At that stage Henque had accumulated a VAT credit of R1 018 320. 80. On 14 February 2019, SARS informed the business rescue practitioner that it had set the VAT credit off against the 2017 additional income tax assessment debt and the VAT liability for the period 01/2018. Henque subsequently sought declaratory relief in the high court, which was dismissed. The high court found that such debt constitutes a post-commencement debt which is not subject to the business rescue plan and that it could be set off against the VAT refund that became payable by SARS to the company after it was placed in business rescue.

The issues before the SCA were therefore, firstly, whether Henque's liability arising from the 2017 additional tax assessment and the VAT period 01/2018 was a pre- or post-commencement debt; and secondly, whether SARS is entitled to set off VAT refunds, to which Henque became entitled after the commencement of business rescue, against Henque's liability in the 2017 additional income tax assessment and for the VAT period 01/2018.

The SCA held that the January 2018 VAT accounting period ended on 31 January 2018, which coincided with the commencement date of the business rescue and accordingly found that all the VAT supplies made or received by Henque in January 2018 up to and including 31 January 2018 are pre-commencement claims, subject to the business rescue plan by reason of provisions of s 154(2) of the Companies Act. As a result, Henque's liability for VAT for the 01/2018 VAT period were claims to which SARS was entitled to be paid in terms of the dividend distribution plan, for so long as the business rescue plan is being implemented.

The SCA found further although s 191 of the Tax Administration Act 28 of 2011 (TAA) entitles SARS to apply set-off of an outstanding tax debt against an amount refundable to a taxpayer and treat the amount refundable as a payment, that section is subject to the provisions of s 133(1)(c*)* of the TAA, which recognises that a tax debt is irrecoverable at law if it is subject to a business rescue plan. The SCA held that the re-quantification of the debt in the additional assessment did not create a new liability and therefore any income tax liability that Henque owed to SARS in respect of the 2017 financial year was owed at the end of the 2017 financial year before the commencement of the business rescue on 31January 2018.

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