



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 34564/2016

2/11/17

DELETE WHICHEVER IS NOT APPLICABLE

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

2/11/2017 _____
 DATE SIGNATURE

In the matter between:

**ZIKHULISE CLEANING MAINTENANCE
AND TRANSPORT CC (Reg. No. 1997/006175/23)**

APPLICANT

and

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

RESPONDENT

REASONS FOR JUDGMENT

RANCHOD J:

Introduction

[1] This review application is one of three applications I heard together. The other two are a business rescue application by Ms M.F.J Mpisane under case No. 18101/2016 and a liquidation application by the Commissioner for the South African Revenue Service (SARS) to place the applicant in this matter in liquidation under case No. 14886/2016. Counsel for SARS said that if, due to time constraints, I was not able to deliver a reasoned judgment immediately, SARS would be content with an order, with reasons to follow later. Counsel for ZCMT did not object to this suggestion. Orders were made in the three matters with reasons to follow later. Both the review application and the business rescue applications were dismissed while the application for the liquidation of the applicant in this matter was granted provisionally. I made the following order in the review application:

1. The application is dismissed with costs including the costs of two counsel.
2. Whether the costs are to form part of the liquidation application under case number 14886/2016 is to be determined when the liquidation application is determined.
3. Reasons for the order will be furnished later.

[2] In what follows are the reasons for the dismissal of the review application.

[3] The matters were allocated by the Deputy Judge President to be heard together at the request of the parties. The main reason for the matters to be heard together without an order for consolidation was because of the

considerable overlap of the facts in each matter but the relief sought in each is different. In chronological order the first application was launched by SARS for the winding up of ZCMT. The second application was launched by Ms Mpisane (who is a member of ZCMT) for an order that ZCMT be placed under business rescue (including a review application which was withdrawn). The third application is by ZCMT for the review and setting aside of a decision by SARS not to enter into a deferred payment arrangement with ZCMT for its tax liabilities. The common thread that runs through the applications is the tax liability of ZCMT which prompted the liquidation application by SARS, which in turn led to the business rescue and review applications by ZCMT.

[4] The relief sought by the applicant (ZCMT) in the review application may be summarised as follows-

- 4.1 to review and set aside the administrative decision by SARS on 3 December 2015, to revoke its approval of the deferred tax payment arrangement (also referred to as the 'instalment payment arrangement') with ZCMT;
- 4.2 a declarator issue that the deferred tax payment arrangement as evidenced in annexure 'MF8'¹ to the founding affidavit, be of full force and effect with certain amendments as to the date of commencement and the dates on which ZCMT ought to comply with it.

In the alternative-

¹ This is incorrect. It is common cause that the reference should be to annexure 'ZCM27'

4.3 that SARS be directed to reinstate the instalment payment arrangement as per 'ZCM27' on similar conditions as referred to in 'ZCM27", save for the dates to be amended.

Further alternatively-

4.4 that the issue as to SARS' consent to the payment arrangement as per 'ZCM27' and the issue of a tax compliance certificate, be remitted to SARS for reconsideration by it;

and ancillary relief.

The factual background

[5] ZCMT is a close corporation which apparently has been primarily in the business of building low cost housing for local authorities on the strength of successful tenders. Ms Mpisane has been its controlling mind and driving force. There are several other companies and close corporations, namely Zikhulise Auto Restorers CC, Inyanga Trading 559 (Pty) Ltd, a trust called the Mkhimpi Family Trust in which Ms Mpisane has some or other interests which have not been clearly defined in these papers except that they too have claims against them for various taxes including Value Added Tax (VAT) Pay As You Earn (PAYE) and income tax. These other entities are referred to either as 'the group of taxpayers' or 'the associated taxpayers'. By all accounts the various enterprises have been very successful and so has Ms Mpisane. According to the papers their collective tax liabilities run into millions of Rands. The undisputed and disputed tax liabilities about which ZCMT and Ms Mpisane have been at loggerheads with SARS over a number of years are, according to SARS, in excess of R120 million.

[6] Ms Mpisane states that SARS victimised her and refers to a criminal prosecution against her and ZCMT, which, she says, was 'abandoned in midstream'². Much is alleged in the founding affidavit about SARS having obtained her confidence, when she went to it on her own initiative to sort out her tax affairs, but subsequently, and hypocritically, used the information so gained, against her in the subsequent criminal trial.

[7] Counsel for SARS submitted in his heads of argument that what ZCMT and Ms Mpisane do not disclose is that she, in the prior criminal proceedings, pleaded guilty to contravention of the Valued Added Tax Act No 89 of 1991 (the Vat Act), in that she unlawfully raised VAT on invoices of ZCMT using another vendor's VAT number, when ZCMT was not registered as a VAT vendor. I do not deem it necessary to traverse these allegations of the parties as they are, in my view, not relevant to this application.

[8] The crux of this review application is that SARS, being an organ of state, had taken certain an administrative decision, pursuant to its powers under the Tax Administration Act No 28 of 2011 (the TAA), which were, *inter alia*, procedurally unfair and therefore subject to review. It is alleged that SARS had agreed to ZCMT's request for a deferred tax payment arrangement for an undisputed tax liability of about R40 million and a disputed tax liability of approximately R80 million but then unilaterally, without informing ZCMT of its intention, reneged on the agreement.

² Paragraph 7.1 of ZCMT's heads of argument.

[9] After allegedly reneging on the agreement, SARS launched an urgent application for the liquidation of ZCMT under case number 14886/2016 in this court. ZCMT filed a notice of opposition to the liquidation application, but instead of filing an answering affidavit, its sole member, Ms Mpisane, thereafter launched an application for the business rescue³ of ZCMT on 7 March 2016 under case number 18101/2016. In the same proceedings, Ms Mpisane also sought the review of certain administrative decisions by SARS, *vis-à-vis* ZCMT. ZCMT alleged that those administrative decisions precipitated the liquidation application.

[10] SARS took the point that Ms Mpisane lacked *locus standi* to, in her own name, take on review an administrative decision by it pertaining to ZCMT. Ms Mpisane conceded the point and withdrew that review application but then launched the present one in the name of ZCMT itself.

[11] As I said there is a considerable overlap between the factual matrices which found this review application and the business rescue application. It seems to me that it is in this context that Ms Mpisane acknowledges that should this review application fail, the business rescue application should also fail. She states in her founding affidavit at para 5-

‘ . . . the relief regarding the business rescue of the Applicant is dependent upon the grant of the present relief sought herein and there is, in any event, a substantial factual overlap between the two applications.’

SARS is of a similar view but, it says, the business rescue application should fail for other reasons as well. As part of its opposition to the business rescue

³ In terms of the Companies Act No. 71 of 2008.

application, SARS relies on facts set out in the winding-up application. However, I will deal with them in the business rescue application.

[12] It appears from the papers that ZCMT, through its driving force, Ms Mpisane, has been a successful tenderer (through ZCMT and, it appears, the associated business entities) for many low cost housing and other projects for a number of local authorities in KwaZulu-Natal. In the process, Ms Mpisane and her husband have acquired considerable wealth. However, their tax affairs were not in order and this led to investigations by SARS and the raising of income and other tax assessments against ZCMT, the Mpisanes, the associated business entities and a trust.

[13] It is a legislative requirement that a successful tenderer must have a Tax Clearance Certificate (TCC) issued by SARS stating that the tenderer's tax affairs are in order. ZCMT had obtained it from SARS. However, when the tax liability issue arose, at some point SARS unilaterally withdrew the TCC. ZCMT applied for a *mandamus* against SARS to reissue the TCC. Wright AJ (as he then was) granted the order on 29 May 2012. It was held that notwithstanding the non-tax compliance status of ZCMT, it was entitled to a hearing before the TCC was withdrawn. SARS reissued the TCC and afforded ZCMT an opportunity to make representations.

[14] Thereafter, SARS constituted a new audit team and enlisted the assistance of Price Waterhouse Coopers ('PWC'). PWC conducted a forensic

investigation into ZCMT's tax affairs for the period 2008 to 2012 and a verification of the audit which was conducted by SARS.

[15] On 6 December 2013, SARS issued a '*Letter of Findings Relating to the Verification Process Followed*' in which a number of findings adverse to Ms Mpisane and ZCMT were made and the latter was called upon to submit representations why SARS should not raise tax understatement penalties at the maximum rate of 200%, to which ZCMT responded.

[16] SARS then instituted a tax inquiry into the affairs of ZCMT in terms of part C of chapter 5 of the TAA, pursuant to which it issued two reports.

[17] An attempt to reach consensus for purposes of an agreed assessment as envisaged in section 95(3) of the TAA was unsuccessful. SARS therefore raised a final estimated assessment for the 2008-2012 tax years on 26 February 2015. ZCMT requested reasons for various adjustments made in the assessment to which SARS responded. ZCMT was not happy and lodged an objection dated 6 August 2015 to the assessment. SARS has partially disallowed the objection and ZCMT has lodged an appeal against the disallowed portion. The appeal is currently pending before the Tax Court. For this reason the tax liability of ZCMT is divided into so-called 'disputed' and 'undisputed' parts.

[18] The common cause facts are that –

- 18.1 There is an undisputed tax indebtedness of about R40 million.
ZCMT admits as much in its replying affidavit.
- 18.2 There is a disputed tax indebtedness in excess of R80 million;
- 18.3 ZCMT failed to make payment of its tax indebtedness; and
- 18.4 ZCMT is a non-compliant tax payer who failed to pay all its taxes
timeously or at all.

[19] As I said, what is in issue is whether SARS agreed to a deferred tax payment and then reneged on it as alleged by ZCMT and to which I now turn. But first, the applicable legal framework is set out.

The legislative framework in terms of the TAA

[20] The legal principles regulating any deferred payment agreement entered into between a taxpayer and SARS are contained in ss 164, 167, 168 and 256 of the TAA.

[21] Section 164(1) provides-

‘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.’

The rest of section 164 essentially deals with circumstances in which a senior SARS official may suspend the payment of tax or a portion thereof, or deny a

request for suspension of payment of the tax and the circumstances in which this may be done.

[22] Sections 167 and 168 deal with deferral of payment.

'167. Instalment payment agreement-

(1) A senior SARS official may enter into an agreement with a taxpayer in the prescribed form under which the taxpayer is allowed to pay a tax debt in one sum or in instalments, within the agreed period if satisfied that—

- (a) criteria or risks that may be prescribed by the Commissioner by public notice have been duly taken into consideration; and
 - (b) the agreement facilitates the collection of the debt.
- (2) The agreement may contain such conditions as SARS deems necessary to secure collection of tax.
- (3) Except as provided in subsections (4) and (5), the agreement remains in effect for the term of the agreement.'

(Subsections (4), (5) and (6) of s167 relate to the termination or modification of an instalment payment agreement and are not relevant for purposes of this judgment.)

'168 Criteria for instalment payment agreement.—

A senior SARS official may enter into an instalment payment agreement only if—

- (a) the taxpayer suffers from a deficiency of assets or liquidity which is reasonably certain to be remedied in the future;
- (b) the taxpayer anticipates income or other receipts which can be used to satisfy the tax debt;
- (c) prospects of immediate collection activity are poor or uneconomical

but are likely to improve in the future;

(d) collection activity would be harsh in the particular case and the deferral or instalment agreement is unlikely to prejudice tax collection; or

(e) the taxpayer provides the security as may be required by the official.'

[23] Section 256 provides –

'256. Tax compliance status.—

(1) A taxpayer may apply, in the prescribed form and manner, to SARS for a confirmation of the taxpayer's tax compliance status.

(2) SARS must issue or decline to issue the confirmation of the taxpayer's tax compliance status... if a senior SARS official is satisfied that the confirmation of the taxpayer's tax compliance status may prejudice the efficient and effective collection of revenue.

(3) A senior SARS official may provide a taxpayer with confirmation of the taxpayer's tax compliance status as compliant only if satisfied that the taxpayer is registered for tax and does not have any—

(a) outstanding tax debt, excluding a tax debt contemplated in section 167 or 204 or a tax debt that has been suspended under section 164 or does not exceed the amount referred to in section 169(4); or

(b) outstanding return unless an arrangement acceptable to the SARS official has been made for the submission of the return.

....'

The negotiations for a deferral of payment

[24] In what follows is a brief chronology of events that transpired regarding the negotiations for a deferred tax payment arrangement.

[25] ZCMT's TCC was due to expire on 31 October 2015. It was anxious to obtain a new TCC valid from November 2015. Protracted negotiations ensued from early in 2015 regarding the payment of ZCMT's tax liabilities as well as those of Ms Mpisane and the associated taxpayers.

[26] SARS alleges that the full indebtedness of ZCMT is R122,913,093.58 as at 1 February 2016 which is accruing interest on a daily (PAYE) and monthly (VAT and income tax) basis.

[27] In a letter dated 4 November 2015 ZCMT and the other associated taxpayers⁴, through their attorneys, informed SARS that they wished to enter into a deferred payment arrangement for the undisputed tax liabilities in accordance with s 168 of the TAA. ZCMT and the other associated taxpayers offered, *inter alia*, payment of the full proceeds of certain mortgage bonds, which would have amounted to R20.4 million as well as payment of the retention funds of R7.6 million and R2, 951,838.50 due to them for two contracts identified by them. They offered to pay, all told, a total of R30 951 838.50 to SARS in part payment of the undisputed indebtedness, which at the time was in excess of R40 million.

[28] As far as the provision of security by ZCMT is concerned in terms of s168(e) of the TAA it is stated in the letter that –

‘ . . . the taxpayer's representation, Ms Mpisane has agreed to provide SARS with security in the form of a notarial deeds over the following movables’.

⁴ Paragraph 135, winding-up application, pp A52.

There follows a list of plant, machinery and vehicles (including 'exotic' motor vehicles) belonging to various entities within the group of taxpayers.

[29] In addition, the taxpayers within the group, were prepared to provide SARS with the authority to register a *caveat* against immovable properties owned by them.

[30] On 13 November 2015, the SARS Group Executive: Debt Management, Mr Vusi Ngqulana, considered the request for deferment submitted by the taxpayers.

[31] Thereafter, in a letter dated 16 November 2015 SARS (through its attorneys) informed the taxpayers' attorneys that SARS would approve the request for a deferred payment arrangement (on the terms offered) but subject to certain conditions:

31.1 that outstanding returns be submitted;

31.2 that the R30 million (as offered), be paid on or before 30 January 2016 and that the taxpayers were to indicate the exact date on which the three payments would be made;

31.3 a new request for deferment was to be submitted for consideration on 15 February 2016 for the remainder of the undisputed indebtedness; and

31.4 the taxpayers were required to sign a security of debt agreement, in terms whereof the directors, shareholders, business entities, trust and trustees, bound themselves as sureties for both the

disputed and undisputed indebtedness of the taxpayers and related entities.

[32] In a letter dated 17 November 2015 the taxpayers' attorneys wrote to SARS' attorneys informing them that –

'the proceeds of the bonds will no longer be R20.4 million, but R8.2 million and the directors, members, shareholders, Trustees and individuals will accept to bind themselves as security in respect of 'the undisputed liability that currently reflects on the SARS system.' (My underlining.)

The letter was received by SARS' attorneys on 18 November 2015.

[33] In the letter of 17 November 2015, ZCMT's attorneys go on to say that the various 'local authorities who held retention monies due to ZCMT should pay them by 30 January 2016 but that they will not do so unless ZCMT was in possession of a TCC. For this reason SARS should issue a TCC once the deferred payment arrangement has been finalised. Significantly, it is then stated –

'Insofar as SARS are not prepared to provide the taxpayers with a Tax Clearance Certificate we formally place on record that these retention amounts cannot and will not be paid to SARS timeously.'

[34] Finally, in ZCMT's attorneys' letter of 17 November 2015 it is stated that –

'... we confirm that the directors, members, shareholders, Trustees and individuals will accept to bind themselves as security in respect of the

undisputed liability that currently reflects on the SARS system.’ (My underlining).

In the business rescue application Ms Mpisane attempts to explain this by saying that the paragraph in her attorneys’ letter was ‘unhappily worded’ as it was not the intention to limit the security to the undisputed tax liability only⁵. However, the very same day (18 November) SARS’ attorneys wrote to ZCMT’s attorneys and asked for clarification, *inter alia*, about why the offer of proceeds from the mortgage bonds was now reduced from R19.2 million to R8.2 million; why the taxpayers would limit the signing of a security for debt agreement only for the undisputed portion of the debt and their failure to address the query regarding the acquisition of a television set from Hirsch’s seemingly for business purposes.⁶ ZCMT’s attorneys gave a somewhat vague response in a letter dated 19 November 2015 to the issue of what amount would be available to pay towards the tax liability. Instead of pertinently explaining why the amount was now drastically less than what was stated will be available they simply say –

‘As indicated in our letter dated 17 November 2015 we confirmed that the “full proceeds of the mortgage bonds” were in the amounts as set out in the said letter.’

[35] What ZCMT’s attorneys fail to state is that they were under the impression that the bonds being registered were additional bonds (as per their letter dated 17 November 2015) whereas in fact the new bounds were to replace the existing bods. The result was that the balances owing on the

⁵ Founding affidavit in the Business Rescue Application at para 15.23.

⁶ During the hearing I was informed that the issue about the television set was no longer relevant.

existing bonds had to be settled first from the proceeds of the new bonds and only the remainder was available for the tax liability. It seems that it was for this reason that it was stated that the amounts available would be the much lesser amounts.

[36] As regards the issue whether security will be provided for the disputed and undisputed tax liability nothing was said about the letter of 17 November being 'unhappily worded' and that the intention was to cover the undisputed tax liability as well. ZCMT's attorneys said they were awaiting further instructions. It is common cause that they did not revert to SARS's attorneys again in this regard.

[37] As the taxpayers failed to comply with the offer they made (by reducing the amount offered after SARS indicated it will accept the original amount offered and also because they failed to provide the requested security) SARS wrote to the taxpayers' attorneys on 3 December 2015 that it was not prepared to enter into an instalment payment agreement. The essence of SARS' decision is contained in paragraphs 4-6 of the letter which read as follows-

'4. From your letter dated 17 November 2015, as supplemented by your letters dated 17 November and 19 November 2015, it is apparent that your clients are no longer able or willing to perform in terms of the offer that they made alternatively with the above conditions, in that:

4.1 The amount to be paid will not be R30 million to be paid by no later than 30 January 2016 in 3 instalments.

4.2 The security of debt agreement offered will not be that the directors, shareholders, business entities, trusts and trustees of your clients will bind themselves as sureties for the disputed and undisputed tax debts of the taxpayers and related entities;

5. Your clients have now even added the condition to their offer that the retention amounts referred to in your letter dated 4 November 2015, would only be paid to SARS if SARS issues a Tax Clearance Certificate to Zikhulise Cleaning Maintenance and Transport CC ("ZCMT").
6. Under the circumstances, taking the requirements of sections 167 and 168 of the Tax Administration Act into account, SARS is not prepared to enter into an instalment payment agreement with your clients, as it does not appear that'

Reference is then made to the provisions of s168 of the TAA. The letter continues-

- '7. As you are aware, the amounts in question are due and payable. In the result, your clients are afforded until 15 January 2016 to pay the full outstanding undisputed amount, failing which SARS will proceed with collection steps in terms of the Tax Administration Act to recover these amounts. This may include that SARS may, without further notice, if payment is not received by 15 January 2016, take judgment against your clients for the full outstanding undisputed amount of the tax debts as envisaged in section 172(1), read with section 174 of the Tax Administration Act. This letter therefore serves as the 10

business days' notice of the aforesaid as required in terms of section 172(1) of the Tax Administration Act.'

It is this decision that is attacked on review as being procedurally unfair in terms of s3(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)

The relevant provisions of the PAJA

[38] Section 3(1) of the Promotion of Administrative Justice Act 3 of 2000 provides—

'Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection

(a) adequate notice of the nature and purpose of the proposed administrative action;

(b) a reasonable opportunity to make representations;

(c) a clear statement of the administrative action;

....'

Discussion

[39] In prayer 1 of the notice of motion ZCMT seeks an order –

'That the administrative decision by the respondent on 3 December 2015 to revoke the approval of the deferred tax payment arrangement with the applicant be and is hereby reviewed and set aside.'

ZCMT's contention is that SARS should not have taken the decision without giving it an opportunity to be heard as it was an administrative decision and therefore the PAJA was applicable. The facts do not bear out this contention.

[40] Firstly, the order sought is based on an alleged deferred tax payment arrangement that was already made (approved) and that it was then revoked. The facts of the matter do not support such a conclusion. The letter dated 16 November 2015 from SARS' attorneys to ZCMT's attorneys clearly states—

' . . . your client's request for the deferred payment arrangement was considered and that it was approved, *subject to the following conditions*: . . . '

(My emphasis.)

[41] Counsel for ZCMT was at pains to dissect the letter from SARS' attorneys dated 16 November 2015 to argue that various aspects referred to in the letter as 'conditions' were in fact 'terms'. In my view, attempting to interpret the letter in this manner is misplaced. This application by ZCMT is one for review of an administrative decision by SARS in terms of the TAA. ZCMT cannot approbate and reprobate as counsel for SARS correctly pointed out. On the one hand it is alleged that a deferred payment arrangement was entered into on 16 November 2015 and thereafter revoked, and on the other hand, that on the 3rd December 2015 an administrative decision was taken not to enter into a deferred payment arrangement. Furthermore, the letter cannot be looked at in isolation. It was but one of several letters exchanged between the parties. SARS can also not act contrary to the peremptory provisions of

the TAA especially, in this instance, ss167 and 168. It is a creature of statute and must act in accordance with the provisions of the TAA.

[42] Later, counsel submitted that the crucial question is not whether there was an agreement but whether the decision arrived at fell foul of the provisions of the PAJA. This argument misses the point that ZCMT seeks to set aside the decision to revoke a deferred payment arrangement which it alleges was already in place.

Conclusion

[43] It was clearly conveyed to the taxpayers that the approval was subject to certain conditions being complied with. They were not complied with and SARS informed the taxpayers it will not enter into an agreement. Hence, an agreement that never came into being cannot be, or was not, revoked.

[44] Secondly, ZCMT could have been in no doubt that if it did not comply with the conditions set out by SARS (which were in accordance with the provisions set out in ss167 and 168 of the TAA) SARS would not and could not enter into any deferred payment arrangement. There was, in my view, no further obligation upon SARS to give it notice of the proposed administrative action (the decision) and give it a further opportunity to make representations when it had already indicated it could not comply with the conditions. The decision SARS took had been clearly spelt out. In any event, ZCMT could have again applied for a deferred tax arrangement as it done in the present instance when a previous application earlier in 2015 had been declined.

[45] In all those circumstances I made the order that I did.



RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	:Adv W.J Vermeulen (SC) Adv F. Strydom
Instructed by	:Faber Goertz Ellis and Austen
Counsel on behalf of Respondent	: Adv E. Coetzee (SC) Adv C. Naude Adv K. Ramaimela
Instructed by	: MacRobert Attorneys
Date heard	: 12 June 2017
Date delivered	: 2 November 2017