In the High Court of South Africa
(Western Cape Division, Cape Town)

CASE NO: 23141/2017

In the matter between:

BARNARD LABUSCHAGNE INC	**Applicant**
and	
SOUTH AFRICAN REVENUE SERVICES	**First Respondent**
MINISTER OF FINANCE	**Second Respondent**

JUDGMENT DELIVERED ON 15 MAY 2020

MANTAME J

INTRODUCTION

[1] On 20 February 2018 the applicant brought an application for a rescission of a judgment that was obtained by the first respondent ("*SARS*") in terms of the recovery

of tax provisions under Chapter 11 of the Tax Administration Act 28 of 2011 ("*the TAA*"). On 15 December 2017, SARS filed with the Registrar of this Court a certified statement ("*certified statements*") in terms of Section 172 of the TAA setting out the amount of tax due and payable by the applicant for an outstanding liquid debt in respect of VAT, PAYE, UIF and SDL due and payable to SARS.

[2] In bringing this application, the applicant relied on Rule 32(2)(B) (*sic*), Rule 42 of the Uniform Rules of Court and on the common law. At the hearing of this application, the applicant's Counsel stated that reference to Rule 32(2)(B) was made in error. In fact, the applicant relied on Rule 31(2)(b) of the Uniform Rules of Court and further grounds as stated above.

[3] Initially, SARS was the only respondent in this matter. After the constitutional points were raised, the second respondent was joined as SARS resort directly under the command of the second respondent.

[4] This application was opposed by the first and the second respondent on the basis that the judgment that is sought to be rescinded and or set aside does not exist. The judgment, though a civil judgment in terms of Section 174 of the TAA is however not a judgment in the ordinary sense; it does not determine any dispute or contest between the taxpayer and SARS and is not susceptible to rescission. In essence, this Court does not have jurisdiction to entertain this application.

[5] In as much as it might be necessary, the applicant applied for condonation for the late filing of this application as it came to its attention on 02 February 2018.

However, it was contended that the application was brought within twelve (12) court days of the applicant becoming aware of the judgment. As there has been no certainty as to which ground the applicant was relying on in bringing this application, it made sense that the applicant was unable to assess the period of lateness. To the extent that this application was not opposed by the respondent, and that no prejudice would be caused should it be granted, it therefore succeeds.

BACKGROUND FACTS AND SUBMISSIONS

[6] The applicant is a small law practice which has been in existence for a period of some twenty-five (25) years. Over the years, it had encountered some difficulties with SARS in respect of the payments that it made and were not properly allocated to the relevant accounts. As the dispute is said to have occurred over the years, it is apparent that the applicant left it unresolved. This led to the arrear amounts being disputed. It was the applicant's contention that this dispute dates back from 2009 to 2017.

[7] On realising these continuous errors and the fact that notwithstanding its religious payments, the debt did not decrease, a meeting was scheduled between SARS employees and the representatives of the applicant, one Ms Labuschagne (*"Ms Labuschagne")* and one Mr Barnard *("Mr Barnard"*) to trash out these issues. This meeting was followed up with some correspondence which gave more clarity to

some disputed items. According to the applicant some of the allocations were done and some were not. However, in a correspondence dated 17 November 2011, SARS indicated that the allocations have been made as requested by the applicant. The respondent disputed that this was indeed so and further chose not to comment on this aspect.

[8] In 2013, it was the applicant's assertion that SARS filed a similar certificate as the one which is the subject matter of this application and it was strenuously opposed by the applicant on the basis that payments made were not allocated correctly. SARS raised interest and penalties on the amounts that were paid on time. Upon being advised, SARS then considered the unallocated amounts, and the amount which SARS alleged to be owed by the applicant significantly dropped. This resulted in penalties being remitted and the judgment that was granted against the applicant was withdrawn.

[9] In the course of 2017, SARS again threatened to apply for a judgment based on the incorrect arrears. It was the applicant's contention that despite the fact that this was pointed out, SARS continued to apply for the judgment on 15 December 2017.

[10] SARS disputed that this dispute dates back to 2009. According to SARS, the applicant's non-compliance with its obligations dates back to 2013. In fact, the tax debt in which the judgment was obtained arose from the applicant's self-assessment.

This dispute was well-known to SARS as it has been ongoing, and in order to resolve the issues of its outstanding debt, it made its employees available to the applicant for assistance, but the applicant did not utilise the opportunity afforded to it.

[11] SARS accepted that a meeting took place on 5 December 2013 in order to assist the applicant to fulfil its tax obligations, however due to shortfalls in payment or non-payment, the applicant remained indebted to SARS. Moreover, certain payments remained unallocated on the applicant's electronic account with SARS as a result of either not being correctly allocated by the applicant or due to the applicant's use of incorrect references and / or old references.

[12] In the period between December 2013 to March 2014, a further effort was made by SARS to provide its employee on a full-time basis to try and sort out the unallocated funds. This exercise resulted in a considerable reduced debt. However, by September 2015, the applicant's tax debt had shot up again. When this issue was brought to the attention of Ms Labuschagne for the applicant, her response was *inter alia* that she needed to generate more fees in order to make ends meet. Meaning that she had no time to waste at SARS offices in order to resolve the matter. The applicant proceeded to pay off the tax debt as and when he could.

[13] In October 2015, SARS requested Ms Labuschagne to furnish an excel spreadsheet and the manner in which the unallocated funds should be dealt with. This request did not yield any response from Ms Labuschagne. In the contrary, the

applicant continued to make payments haphazardly. The funds continued not being allocated to the correct accounts and / or incorrect payment references. It was SARS contention that the applicant continued to file late tax returns, to make late payments and / or short payments. As this behaviour persisted, this resulted in new unallocated payments that attracted interest and penalties.

[14] In April 2016, SARS took it upon itself to send a list of unallocated payments to the applicant and furnished it with more information on how to use the e-filing system efficiently. It further informed the applicant that allocating payment to the correct reference number would curb repetitive non-allocation of payments in future. Notwithstanding, the same situation continued into 2017.

[15] Since the applicant was uncooperative with SARS, it issued a letter of final demand for the payment of outstanding tax debt. When this letter was not responded to, a notice of third-party appointment was issued to Absa Bank to recoup the outstanding tax debt. Having received a negative response from the bank on 19 October 2017 SARS issued a letter to the applicant advising that it intended to approach the Court to obtain a civil judgment against the applicant for failing to pay its tax debt. After no response was received from the applicant, SARS continued to obtain a judgment against the applicant on 15 December 2017.

[16] After the filing of this application, this matter was delayed on several occasions as the applicant filed an application in terms of Rule 10A to join the

second respondent and a Rule 16A which dealt with the applicant's intention to raise constitutional points. This necessitated further filing of affidavits and heads of arguments. Again, it would be unnecessary to deal with the late filing of these documents by the parties as the main matter is ultimately before this Court for adjudication.

[17] The applicant expressed appreciation of the fact that the onus to do a proper accounting lies with itself. However, it is impossible for it to do so as the first respondent did not provide the applicant with sufficient information with regards to the correct allocations. The respondent disputed this contention on the basis that it handed its hand to the applicant by allocating an employee to the applicant who was tasked to deal with the applicant's queries. Notwithstanding, the applicant elected not to respond to the SARS correspondence nor utilise its employee.

[18] In opposing this application, SARS contended that the applicant had several dispute resolution mechanisms at its disposal before approaching this Court with this application at great haste. For instance, Section 105 of the TAA provides that a taxpayer may only dispute an assessment or "decision" as described in Section 104 in proceedings under this Chapter, unless a High Court otherwise directs. Section 104 of the TAA provides as follows: -

"***104. Objection against assessment or decision***

(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.

> (2) *The following decisions may be objected to and appealed against in the same manner as an assessment –*
>
> > (a) *a decision under subsection (4) not to extend the period for lodging an objection;*
> >
> > (b) *a decision under section 107(2) not to extend the period for lodging an appeal; and*
> >
> > (c) *any other decision that may be objected to or appealed against under a tax Act.*
>
> (3) *A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'.*"

[19] The applicant did not agree with this contention. It stated that its grounds for the rescission of the judgment are not based on an objection against an assessment or decision of SARS as referred to in Section 104 of the TAA, as SARS has not raised assessments or made decisions referred to in Section 104 of the TAA to which the applicant would ordinarily object or appeal. The applicant stressed that it was therefore entitled to bring these proceedings before this Court in terms of Section 105 of the TAA. It appeared, according to the applicant, that Section 105 could be read in isolation or as a standalone section, without reference to Section 104.

[20] Despite the fact that the first and second respondent disputed that this Court has jurisdiction to grant this application, it was the applicant's contention that this Court has jurisdiction to rescind an incorrect judgment, it has jurisdiction to rescind judgments granted in terms of Section 172 read with Section 174 of the TAA.

[21] In the event that this Court find that not to be so, the applicant requested this Court to find that the provisions of the said sections should be declared constitutionally invalid to the extent that it ousts this Court's jurisdiction to hear such applications for rescission.

Constitutional Points raised by the Applicant

[22] It was the applicant's contention that should this Court not grant an order rescinding the judgment, it should find the following sections to be constitutionally invalid, i.e *Sections 172 and 174 of the TAA.*

[23] Section 172 and 174 read as follows: -

"***172. Application for civil judgment for recovery of tax***

(1) If a person has an outstanding tax debt, SARS may, after giving the person at least ten (10) business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct.

(2) *SARS may file the statement irrespective of whether or not the amount of tax is subject to an objection or appeal under Chapter 9, unless the obligation to pay the amount has been suspended under section 164*

...

174. Effect of statement filed with clerk or registrar

A certified statement filed under section 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement."

The applicant submitted that sections 172 and 174 of the TAA infringed his right as set out in section 34, 165 and 169 of the Constitution to approach this Court for relief when this Court granted a judgment. It was the applicants' contention that the appeal court and the Constitutional Court (In *Chief Lesapo v North West Agricultural Bank 1999 12 BCLR 1420 (CC); 2000(1) SA 409 (CC) and Metcash Trading Ltd v Commissioner, South African Revenue Service and Another 2001 (1) SA 1109 (CC))* found that a taxpayer can approach the high and the magistrate's courts to rescind a judgment.

[24] SARS argued that the Constitutional challenge to these aforementioned sections is unfounded. For instance, a judgment secured by SARS by filing a certified statement with the registrar of the Court, in terms of section 172 read with section 174 of the TAA lacks the rights determining character of a judicially issued

judgment in that if the certified statement was an ordinary court judgment, then it would not be open to be unilaterally withdrawn by the Commissioner of SARS as contemplated by section 176 (1) and (3) of the TAA and that, the Commissioner of SARS would not be at liberty to institute proceedings afresh based on the said withdrawn statement, as contemplated in section 176(2) of the TAA.

[25] To the extent that the applicant's main complaint with SARS was its allocation of payments of the tax debt, the provisions of section 104 of the TAA were available to the applicant as the issue complained about would have been decisions that could be objected to by the applicant. It was SARS argument that the contention by the applicant that the grounds for the application for the recession are not based on an objection on assessment or decision made by SARS as SARS has not raised assessments or made decisions to which the applicant objects or appeals, is flawed.

[26] In fact, SARS pointed out that the dispute resolution mechanism is dealt with under Chapter 9 of the TAA. It includes the dispute that was raised by the applicant. If the applicant was of the view that SARS has incorrectly allocated payments that were made, it should have raised its objections with the Tax Board or Tax Court. This Court is not the proper forum for this dispute.

[27] SARS submitted that there is no infringement of any constitutional right or principle in this matter. The applicant has not put up any affidavit to substantiate the relief it is seeking. SARS submitted that what is important in this regard are

considerations underpinning the "*pay now, argue later*" principle which include the public interest in obtaining full and speedy settlement of a tax debt and the need to limit the ability of recalcitrant taxpayers to use the objection and appeal procedures strategically to defer payment of their taxes. In fact, the legality of "*pay now, argue later*" principle has survived the scrutiny of the Constitutional Court in the context of the Value-Added Tax (VAT) when a taxpayer sought to impugn the VAT legislation contending it to be incompatible with section 34 of the Bill of Rights. This is equally what the applicant sought to argue in this case.

[28] It was SARS argument that the applicant has failed to show that Section 172 read with section 174 of the TAA violated any of the provisions of the Constitution. Further, there are numerous mechanisms available to the applicant in order to safeguard its rights. There is no prejudice or unfairness to the applicant who has failed to timeously pay its tax liabilities and further repeatedly failed to comply with the procedures as set out in the TAA.

[29] It was contended by SARS that it serves the public interest to have a mechanism to collect tax debts relatively swiftly and to bring finality to disputes relatively quickly. The applicant is a law firm and not a member of the public that may not be aware of the statutory mechanisms available. The following mechanisms are available to a taxpayer disgruntled with its tax liability, i.e, objection plus extension; appeal against disallowance of objection plus extension; application to Tax Court if SARS refuses extension; PAJA review to High Court (which has parallel jurisdiction to the Tax Court); complaint to the Tax Ombudsman; and applying for

debt relief under Chapter 14 of the TAA. None of these remedies were invoked by the applicant.

[30] For the reasons given by SARS, it was submitted that the relief sought in the main application should fail including the Constitutional challenge. This is a matter that could be resolved without the determination of any constitutional issue.

[31] The second respondent agreed with SARS that the judgment that is sought to be rescinded does not exist. The relief sought by the applicant in this application is not a judgment or order which this Court has made. In the event that this Court is not amenable to grant the main relief, the applicant asked that certain provisions of the TAA be declared invalid.

[32] The second respondent argued that before coming into existence of the TAA, the tax system was dodged by inefficiencies and duplications, arising, amongst the others, from the existence of separate statutes, each of which dealt with its own procedures, duties and remedies. The TAA resembles the New Zealand legislation by the same name, which was designed to create one coherent nationwide system, for efficient and effective collection of tax.

[33] To the extent that the applicant sought to impugn the constitutional validity of TAA, the views of the executive functionary responsible for the implementation of the TAA are warranted.

[34] It was the second respondent's submission that the interpretation of Sections 172 and 174 of the TAA (*"the Impugned Provisions"*) by the applicant that the certified statements, which may be of an interim nature should be treated as final judgment of this Court is incorrect. Also the applicant's attack on the Impugned Provisions on the basis that they violate the rule of law and Sections 34, 165 and 169 of the Constitution Act 108 of 1996 is flawed.

[35] Contrary to the applicant's submission, the question of whether the Impugned Provisions are constitutionally invalid does not arise, as the TAA does not purport to oust this Court's constitutional jurisdiction. In fact, it was contended that the enforcement of the Impugned Provisions would accordingly give effect to the rule of law rather than detracting from it.

[36] Similarly, the contention that the Impugned Provisions violate the applicant's right of access to courts in terms of Section 34 of the Constitution is unjustified. The dispute resolution provisions of the TAA under Chapter 9 set out a comprehensive framework for the fair hearing before an independent and impartial tribunal which is precisely what Section 34 of the Constitution requires. Even after the protections afforded to taxpayers under the TAA are exhausted, an aggrieved taxpayer may still approach a court for a fair public hearing thereafter, if required.

[37] The second respondent submitted further that there is nothing in the Impugned Provisions that violates either Section 165 nor Section 169 of the

Constitution. Both sections are concerned with judicial authority in South Africa which is vested in the courts. In fact, it is accepted that the courts are ultimately vested with the requisite authority of judicial oversight and that the TAA relies on the courts to enforce its tax mechanisms. It was further argued that any attempt by the applicant to rely on Sections 8, 9 and 10 of the Constitution may be given short shrift as they have not been adequately pleaded. Even if the applicant were able to demonstrate a violation of one of the rights in the Bill of Rights, which it has failed, the constitutional challenged fall to be dismissed. However, it was submitted that any limitation imposed by the Impugned Provisions is justifiable under Section 36 of the Constitution.

[38] According to the second respondent, Sections 172 and 174 of the TAA constitute a lawful enforcement mechanism for the achievement of its purpose. For one to fully comprehend the Impugned Provisions legal meaning, the correct starting point is to understand the language that is used. See *Commissioner of the South African Revenue Service v Bosch and Another 2015 (2) SA 174 (SCA)* at para [9] where it was held: -

> "*The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as*

syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA referred to as 'excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene.'"

[39] For instance, the language of Section 172 of the TAA permits SARS to utilise a summary procedure against a taxpayer, where SARS is satisfied that such a procedure is necessary to ensure the prompt collection of tax. Amongst others, the language of Section 172(2) of the TAA is such that a statement may be filed "irrespective of whether or not the amount of tax is subject to an objection or appeal", has important consequences to the issues for determination in this matter.

[40] Section 174 of the TAA is a complimentary provision of Section 172. For instance, SARS certified statements are imbued with heightened enforceability. Section 174 of the TAA states that a certified statement filed under Section 172 must be "treated as a civil judgment" lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement. In *Cool Ideas 1186 CC v Hubbard 2014 (8) BCLR 869 (CC)* at para [28], the Constitutional Court held that there are three important interrelated riders to this general principle which are that: -

- the statutory provisions should always be interpreted purposively;

-the relevant statutory provision must be properly contextualised; and

-all statutes must be construed consistently with the Constitution, that is, *where reasonably possible*, legislative provisions ought to be interpreted to preserve their constitutional validity.

[41] It was the second respondent's submissions that the applicant's interpretation of the Impugned Provisions does not properly engage with the principles. According to the applicant's interpretation, the certified statements that were presented to the Registrar in terms of Sections 172 and 174 of the TAA should be subjected to an ordinary process for the rescission of a civil judgment. It was submitted that such contention is totally flawed.

[42] According to the second respondent, the applicant's interpretation is untenable as it overlooks the clear language of the TAA. Section 174 explicitly requires the certificates to be treated as though they are civil judgment which was lawfully given. It was contended that if this Court were to treat the certificates as capable of rescission as per the applicant's application, the order so granted would be unlawful. It is trite that a court of law will not grant an order in violation of a statute.

[43] The second respondent asserted that only a civil judgment that has a final effect could be rescinded. In terms of Section 172(2) of TAA these certificates may be filed "irrespective of whether or not the amount of tax is subject to an objection or

appeal." Pursuant to the objection or appeal process in this section, Section 174 states that the amount must be treated as a "civil judgment" even though it may subsequently be altered or entirely erased. Further, Section 175 of the TAA even envisages a situation whereby SARS may "amend the amount of the tax due," if in the opinion of SARS, the amount in the statement is incorrect. The power of SARS to amend a certified statement is totally different to the powers of a court having handed down an ordinary and final judgment which may be subject to rescission proceedings. Furthermore, Section 176 of the TAA envisages a situation where SARS is permitted to "withdraw a certified statement filed under Section 172 by sending a notice of withdrawal to the relevant clerk or registrar," and further permits SARS to file a "new statement" thereafter. A court of law has no such powers, so it was submitted.

[44] Granting of a rescission order, it was argued, would offend on two statutes, that is, the dispute resolution procedures as set out under Chapter 9 of the TAA that is designed for that purpose and the requirement under Section 7(2) of the Promotion of the Administrative Justice Act 3 of 2000 ("*PAJA*") which requires the exhaustion of internal remedies – in this instance, disputes which the machinery under Chapter 9 of the TAA is meant to resolve. In such circumstances, the applicant's interpretation has to be rejected.

[45] In *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Service and Another 2011 (6) SA 65 (WCC)* at para [37] Binns-Ward J held that the filing of a

certified statement did not have "the rights determining character of a judicially delivered judgment" and stated the following: -

"*Although a statement filed by the Commissioner in terms of s 91(1)(b) has all the effects (i.e. consequences) of a judgment, it is nevertheless not in itself a judgment in the ordinary sense. It does not determine any dispute or contest between the taxpayer and the Commissioner. It has the effect of a judgment, however, in enabling the Commissioner to obtain a writ to attach and sell in execution the taxpayer's assets to exact payment of an amount that is payable.*"

[46] The same conclusion was reached in *Modibane v South African Revenue Service [2011] ZAGPJHC 152* at para [18] where it was held:

"*In my view, no judgment in the ordinary sense of the word was granted by the Registrar on 5 March 2009. There is consequently no judgment that is susceptible for rescission.....*"

[47] It was observed further by the second respondent that the SCA was faced with a similar situation where a judgment was obtained by the Commissioner pursuant to s 40(2)(a) of the Value-Added Tax Act 89 of 1991 and in *Singh v SARS 2003 (4) SA 520 (SCA)* at par 9 where it was held:

> "*The section is a recovery provision and nothing more. It does not empower the Commissioner to determine whether an amount is payable (or due). The jurisdictional element is that the tax must be payable before the Commissioner can invoke the procedure for which the section provides. When that element exists the Commissioner can rely on ss (5) and recover an amount which he certifies as (already) due or payable, despite the fact that an objection has been lodged or an appeal may be pending.*"

Further, in *South African Revenue Service v R D Van Wyk, Case No: A145/2014* paras 29 to 30 (delivered on 5 June 2015), the Free State High Court considered the meaning and import not of analogous legislative provisions, but of the Impugned Provisions. It considered the judgments in *Capstone, Modibane and Singh (supra)* as well as *Metcash*. The Court held that:

> "*The court a quo could not entertain the application for rescission as it was not a civil judgment in the ordinary sense. The certified statement filed on behalf of SARS could not be regarded as having the character of a judicially delivered judgment. The judgment procedure contained in Part B of Chapter 11 of the Tax Admin Act – in particular s 172 to s 174 thereof – is a recovery or collection provision and nothing more, as stated by the SCA in Singh …*
>
> *I quoted s 105 of the Tax Admin Act above. I re-iterate that a taxpayer may not dispute an assessment or decision as described in s 104 in any court or other proceedings except in proceedings under Chapter 9 of the Tax Admin Act or by application to the high court on review. The taxpayer could not*

attack the assessments or the certified statement issued by SARS in respect thereof in the court a quo. He should have utilized the dispute resolution process referred to above or applied to this court for review. He failed to elect either of these two options, but in any event, the principle, "pay now, argue later" would still apply, unless payment was suspended."

[48] Regard having been had to these judgments, the second respondent submitted that mischaracterization of these decisions by the applicant as distinguishable or incorrect has no merit. This Court should dismiss this application.

[49] The averment by the applicant that the Impugned Provisions violate Section 34 of the Constitution was rejected by the second respondent. The applicant's contention that it has nowhere to go to protect its right by warding off a judgment which overreaches what is due to SARS was further denied as factually incorrect. For instance, Sections 175 and 176 of the TAA empowered SARS to withdraw or amend any payable amounts; Chapter 9 of the TAA provides for a variety of internal remedies. The applicant's contention that Chapter 9 mechanisms are not applicable is incorrect and unfounded as no basis was put forward for such contention. In the event that the applicant was aggrieved by the decision of SARS, it was perfectly entitled to approach the court to review such a decision under PAJA or alternatively under the principle of legality – See *Gold Kid Trading CC v Commissioner for the South African Revenue Services (2016/31842) [2018] ZAGPJHC 710 (19 July 2018)*. In light of these mechanisms, there is no violation of Section 35 of the Constitution

that can be established. Even if there was a violation, such violation would be justifiable under Section 36 of the Constitution.

[50] Further, the constitutional challenge based on Sections 165 and 169 was baseless as argued by the second respondent. For instance, Section 165 vests the judicial authority of the courts in the Republic of South Africa. There is nothing in the Impugned Provisions which threatens the authority of the Courts. The Courts retain their judicial authority under the TAA. It was submitted that there is no basis advanced for this constitutional challenge. Similarly, Section 169 provides the constitutional authority of the High Courts. There is nothing to bear on the Court's authority to decide constitutional matters. Further, there is no conflict between the terms of the Impugned Provisions and Section 169 of the Constitution. This Court should dismiss the constitutional challenge.

ANALYSIS

[51] It is common cause that the applicant has been operating as a law practice for the past twenty-five (25) years. It is therefore accepted that its directors are well experienced and seasoned when it comes to the interpretation and application of the law or statutes.

[52] In turn, SARS is statutorily mandated to collect revenues due, ensure optimal compliance with tax and customs legislation, and provide a customs and excise service that will facilitate legitimate trade as well as protect the economy and society.

In realizing its mandate, amongst others, SARS has to ensure that the taxpayer complies with the applicable legislation (the TAA), it registers for a tax reference number, file the tax returns timeously and the taxpayer adhere to its obligation to pay tax timeously.

[53] SARS is therefore responsible for the administration of the TAA to ensure the effective and efficient collection of tax. It should not have escaped the applicant that it is bound by this legislation in the fulfilment of its tax obligations. It should therefore abide by this legislation. In fact, that was not denied by the applicant. Somehow, the applicant elected to remove its dispute from the jurisdiction of SARS to be adjudicated by the High Court.

[54] Now, is it permissible to disregard and / or undermine the procedure outlined by the Act of Parliament and in the process replacing it with the party's chosen one. An act of Parliament is a primary legislation. It is a system of rules, enforced through a set of institutions to regulate human conduct or bodies. The legislature was alive to the fact that the administration of tax is a specialised field. For the effective and efficient tax collection, a legislation tailor-made for this process was warranted.

[55] In fact, the second respondent gave an insight into the promulgation of this legislation that it was intended as a single piece of legislation, in which the administration of tax collection could be comprehensively and systematically

addressed. The content and import of the provisions of the TAA have been described as follows: -

> "*The TAA contains innovative tax administration strategies geared to ensuring that tax collection occurs in an orderly, structured, efficient and effective way. The features characterise a credible tax system. They advance the cultivation of a tax compliance culture that, if realised, will foster enhanced tax collection beneficial to the fiscus and, thus, the public purse. The promotion of tax compliance is a central value of the TAA*" – See Moosa, "*Tax Administration Act: Fulfilling human rights through efficient and effective tax administration*" Vol 1 [2018] De Jure 2 at Section 2.

Essentially, the TAA was promulgated for the cultivation of tax compliance other than to oust the jurisdiction of the Courts as alleged. Even then, if read properly, the TAA creates clearly defined dispute resolution mechanisms (Chapter 9) from objection against assessment or decision; appeal against assessment of decision; tax board; tax court and appeal against the decision of the tax court to the Supreme Court of Appeal. Nowhere it states that a party can choose where the dispute has to be adjudicated.

[56] The applicant contended that over the years it has encountered some difficulties with SARS with regard to the payments it had made. They were not allocated to the relevant accounts. This assertion is highly disturbing as it suggests

that the applicant was the author of its own misfortunes. It left the tax debt unresolved for more than ten (10) years without ensuring that it is resolved to the satisfaction of all parties involved.

[57] Had it been the obligation of the applicant to follow up the outcome of its self-assessment with SARS and paid timeously, it would not have found itself in a situation where it has been. The fact that payments were allocated to the wrong accounts could only bear consideration to the fact that several accounts were sent to the applicant for payment over a period of time and same were left unpaid. This resulted in payments that were made to the wrong accounts.

[58] Be that as it may, SARS took it upon itself to correspond with the applicant and to provide its employee on a full-time basis to try and resolve the unallocated funds between December 2013 – March 2014. Ms Labuschagne's response to SARS was that she needed to generate more fees to make ends meet. It seems, she downplayed the fact that the tax debt needed to be resolved. The applicant continued to make payments haphazardly. This is not the kind of response that SARS should be getting from a diligent tax payer, and a representative of a law firm who is the officer of this court. Primary to the applicant's obligations would have been to resolve the dispute rather than to prolong it.

[59] It appears that the same attitude continued for some time. Between 2015 to 2017, Ms Labuschagne on behalf of the applicant either did not respond to requests

by SARS to furnish an excel spreadsheet and the manner in which the unallocated funds should be dealt with. The mere fact that the applicant was uncooperative in resolving the arrear tax debt meant that it was not eager to resolve the dispute, hence SARS proceeded with an application for civil judgment for the recovery of the tax debt.

Does the High Court have jurisdiction to rescind a civil judgment granted in terms of Section 172 read with Section 174 of the TAA?

[60] As stated above, there must be a civil judgment of the Court in existence for the rescission of a civil judgment to take place. Section 174 of the TAA states that "*a certified statement filed under 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.*"

[61] I tend to agree with the second respondent's submission that Sections 172 and 174 constitute a lawful enforcement mechanism. For the achievement of its purpose, one has to understand their correct legal meaning, and the appropriate starting point is the language used - See *Commissioner, SARS v Bosch (supra)* at para [9].

[62] In fact, Section 172(2) is clear that "*SARS may file the statement irrespective of whether or not the amount of tax is subject to an objection or appeal under Chapter 9, unless the obligation to pay the amount has been suspended under*

section 164." This subsection confirms that despite the application for a civil judgment, the dispute resolution will still be in motion. The upshot is that there is no finality to this judgment and it cannot be accorded a status of a judgment.

[63] The language used in Section 174 is explicit. It states that "*a certified statement filed under Section 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS ...*". It does not state that a certified statement filed under Section 172 constitute a civil judgment or are a civil judgment. The interpretation put forward by the applicant, that it is a judgment, is at odds with the interpretation ascribed to this section.

[64] Chapter 11, Part B of the TAA deals with the judgment procedure. For instance, Section 172 Application for civil judgment for recovery of tax; Section 173 – Jurisdiction of Magistrates" Court in judgment procedure; Section 174 – Effect of statement filed with clerk or registrar; Section 175 Amendment of statement filed with clerk or registrar and; Section 176 – Withdrawal of statement and reinstitution of proceedings. If the applicant took some time to peruse Sections 172 – 176, it would have understood that it does not have any final effect for it to be elevated to a status of a civilly obtained judgment in a court of law. In fact, if regard is to be had on how the 2013 dispute was resolved between the parties, the applicant knew that SARS could withdraw the judgment. It follows that it is not final in nature.

[65] The fact that the certified statements can be amended, and / or withdrawn after they have been treated as a civil judgment unilaterally by SARS bears credence to the fact that the judgment obtained from the Registrar has no final effect and therefore not capable of rescission.

[66] The judgment procedure as laid down in Chapter 11 is for enforcement purposes. In *Capstone (supra)* Binns-Ward J referring so similar provisions stated:

> *Par 37 "Although a statement filed by the Commissioner in terms of s 91(1)(b) has all the effects (i.e. consequences) of a judgment, it is nevertheless not in itself a judgment in the ordinary sense. It does not determine any dispute or contest between the taxpayer and the Commissioner.. It has the effect of a judgment, however, in enabling the Commissioner to obtain a writ to attach and sell in execution the taxpayer's assets to exact payment of an amount that is payable."*
>
> *Par 38 "... the filing of a statement in terms of s 91(1)(b) is nothing more than an enforcement mechanism, as distinct from a means of determining liability ..."* ("my underline").

[67] Similarly, in *Singh, Modibane and R D Van Wyk (supra)* it was held that the filing by SARS of the certified statements does not result in an actual judgment in favour of SARS for the amount of tax, penalties and interest in question. The procedure merely sets in a process to enforce an assessment. It therefore follows that such a judgment is not capable of rescission in a manner appropriately accorded to a court judgment.

[68] This Court accepts that the applicant did not dispute the assessment as it was self-assessing. The applicant took issue with unallocated payments. Even then, the mere fact that there was a dispute of any kind, such dispute would have well been taken care of by the dispute resolution mechanism in Chapter 9 of the TAA – as stipulated in Part A, B, C, D, E and F. Actually, it does not assist the applicant to single out Section 105 of the TAA as granting it jurisdiction to approach the High court and in the process completely neglecting the provisions of Section 104 of the TAA.

[69] The applicant was supposed to have adopted the principle "*pay now and argue later*", it would not have caused any harm to do so, as all the parties were aware that the allocation of payments is in dispute. The applicant should have been acutely aware that its liability has not yet been judicially determined. A determination of the taxpayers' rights would have occurred when the Tax Court on appeal or when a superior court hand down a judgment upholding or setting aside the dispute in question. Simply put, there is no judgment to be rescinded by this Court.

[70] The applicant somehow submitted that its ground for the rescission of judgment is not based on assessment or decision of SARS as referred to in Section 104 of the TAA, as SARS has not raised assessments or made decisions as referred to in Section 104 of the TAA. The applicant sought to create a situation whereby a dispute such as its dispute is not provided anywhere in the TAA, hence it approached the High court. In my opinion, the fact that SARS allocated payments incorrectly and subsequently, made a decision to recover a debt based on an incorrect amount, was a legitimate reason for the applicant to have raised an

objection. I find the applicant's contention opportunistic and mischievous as the applicant was bent over backwards to confer to itself its own jurisdiction to hear its dispute and thereby disregarding the dispute resolution mechanism as set out in the TAA.

[71] To the extent that the applicant relied on Rule 32(2)(B) or Rule 31(2)(b), Rule 42 of the Uniform Rules of the Court, common law and further constitutional challenges, it would be of significant importance to analyse all of them in order to ascertain how it has failed to make out a proper case. In formulating its case, it is noted that the applicant has adopted a wider approach and thereby catering for any contingency which might be in its favour.

Common Law

[72] The legal principle applicable to the rescission of a civil judgment based on common law is settled, and it requires no further exposition to fit the case before the Court. The party seeking a rescission of judgment must present "sufficient cause" and / or "good cause" for the order to be granted.

In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) (31 March 2003)* the court gave guidance on the circumstances giving rise to the rescission of judgment under common law. The court held at para [4]: -

> "*The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the judge who delivered it. He becomes functus officio and may not ordinarily vary or rescind his own judgment (Firestone SA (Pty) Ltd v Gentiruco AG). That is the function of a court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, Justus error. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause ...*"

[73] It is trite that a civil judgment is a judicial decision, and / or determination by a court of law which is final in nature. In these proceedings, the applicant seeks to rescind the certified statements that were issued by SARS in recovery of debt and filed with the Registrar of this Court in terms of Section 172 of the TAA. The applicant acknowledged that although these statements are not final in nature, however, in terms of Section 174, they *"must be treated as a civil judgement lawfully given"* in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.

[74] According to the applicant, in 2013 SARS filed similar statements that are sought to be rescinded. The applicant opposed such statements on the basis that payments were not allocated correctly. As a result thereof, SARS considered the

unallocated amounts. The penalties were remitted and the judgment obtained against the applicant was withdrawn.

[75] When the similar situation occurred in December 2017, it would not have escaped the applicant that it should have employed the same process that resulted into the withdrawal of the judgment in 2013, if they were aggrieved. It was not the applicant's case that the said judgment was withdrawn by this Court, it was within their knowledge that SARS withdrew the 2013 judgment unilaterally.

[76] In my view, the applicant was well aware that these statements are not final in nature, they do not carry a force of a civilly obtained judgment by a court of law and therefore are not capable of rescission. The judgment obtained through the registrar of the court is **treated as** a civilly obtained judgment for recovery purposes.

[77] In the same vain, it is not the assertion of the applicant that the judgment was obtained by fraud, or justus error. This application should therefore be treated as an ordinary application under common law. Unfortunately, the judgment sought to be rescinded does not have a final effect and no "good cause" and / or "sufficient cause has been shown by the applicant for the rescission to be granted. In my view, the application for rescission under common law has no merit.

Rule 32(2)(B) (sic) or Rule 31(2)(b) of the Uniform Rules of Court

[78] There is no Rule 32(2) B in the Uniform Rules of Court that deals with rescission of judgment. Rule 31 deals with **Judgement on Confession and by Default.** Rule 31(2)(b) reads as follows: -

> "*A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.*"

The starting point in this regard would be whether is there a judgment to be rescinded. If there is, was it brought within the stipulated timeframe. The applicant contended that the judgment in terms of Section 172 of the TAA was brought to its attention on 02 February 2018, hence it proceeded with an application for the rescission of such judgment on 20 February 2018. It was within the time limits to bring such an application.

[79] As stated above, there was no judgment granted by this Court, it therefore follows that there is no judgment to be rescinded. It does not matter as to when the judgment was granted by the registrar and what explanation was put before court in the circumstances. Reliance on this Rule by the applicant is misplaced.

Rule 42 of the Uniform Rules of Court

[80] Rule 42 of the Uniform Rules of Court deals with **Variation and Rescission of Orders.** It reads as follows:

> *"(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
>
> *(c) an order or judgment granted as a result of a mistake common to the parties.*
>
> *(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.*
>
> *(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."*

The applicant's reasons to relying on this rule are the same as the ones stated above. Similarly, it follows that without a judgment, there cannot be any rescission of a judgment. The reliance on this rule similarly is misconceived.

[81] Having considered the aforementioned, it is trite that the civil judgment obtained in terms of Section 172 of the TAA cannot be elevated to a status of judicially delivered judgment and therefore not capable of being rescinded. It would not be necessary at this stage to characterise and / or analyse the authorities as relived to by the applicant as they do not come anywhere near to assisting its case. The applicant's application for rescission of judgment should fail.

Constitutional Challenge

[82] The applicant submitted that should this Court should not grant an order rescinding the civil judgment but that this Court should find Sections 172 and 174 to be constitutionally invalid as they infringed Sections 34, 165 and 169 of the Constitution. Both SARS and the second respondent strenuously opposed this application on the basis that the constitutional challenge is unfounded. In fact, no basis was laid for the granting of this order.

[83] As argued by the second respondent, the question of whether the Impugned Provisions are constitutionally invalid does not arise, as the TAA does not purport to oust this Court's constitutional jurisdiction. In fact, the converse would be applicable, the enforcement of the Impugned Provisions would give effect to tax compliance and the taxpayers would maintain and uphold the rule of law.

[84] It would appear that before a Court could determine whether it has jurisdiction to adjudicate a constitutional challenge, first, it has to ascertain if the application raised any important constitutional issues which attract the constitutional jurisdiction of the Court. A constitutional challenge is not for the mere asking, simply because the applicant was not successful in the main application.

[85] In the famous Constitutional Court decision of *Jacobs and Others v S [2019] ZACC 4; 2019 (5) BCLR 562 (CC); 2019 (1) SACR 623 (CC) (14 February 2019) at para [43]* Goliath AJ referring to *Fraser v ABSA Bank Ltd 2007 (3) SA 484 CC at para 40 which* stated: -

> "*This Court in Fraser held that an issue does not become a constitutional matter merely because an applicant calls it one.*" It held:
>
>> *A contention that a lower court reached an incorrect decision is not, without more, a constitutional matter. Moreover, this Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a bona fide constitutional question. An issue does not become a constitutional matter merely because an applicant calls it one.*" ("my underline")

In the like manner, the legislature promulgated a specialised type of legislation (the TAA) whose main purpose is to collect tax effectively and efficiently. The fact that the applicant misconstrued and / or misinterpreted the language used in these

provisions and / or chose its own jurisdiction (High court) and thereby disregarding the jurisdiction as stipulated in the TAA does not render the provisions unconstitutional. In the event that the applicant has failed to lay out a basis for the constitutional challenge in its application, it follows that an issue does not become a constitutional issue simply because the applicant calls it one. Sections 172 and 174 do not offend Sections 34, 164 and 169 of the Constitution or any other constitutional provision for that matter.

[86] The administration of tax is a specialised field. It would not have been ideal for the judicial officers (Magistrate and High courts) to sit as tax courts, as it would lack the required expertise to determine the issues involved. For the tax court to be properly constituted, it has to consist of a judge or acting judge of the High Court, who is the president of the tax court, an accountant selected from the panel of members appointed in terms of Section 120 of the TAA and a representative of the commercial community selected from the panel of members appointed in terms of Section 120 of the TAA.

[87] It is settled that judges of the High Court are better suited to adjudicate factual and legal matters and not to ascertain if, for instance, the rands and cents were allocated properly to the correct SARS account ledgers and / or journals.

[88] It therefore follows that if the applicant failed to demonstrate the existence of a *bona fide* constitutional question, the general principles that the Impugned Provisions should comply with as stipulated in *Cool Ideas (supra)* do not come to the fore. In

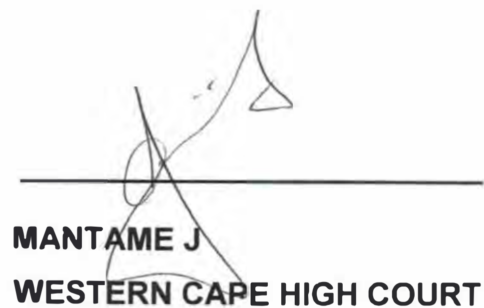
my view, the Impugned Provisions are not unconstitutional. The constitutional challenge therefore fails.

[89] In the result, this order shall issue:

89.1 The application for the rescission of judgment is dismissed.

89.2 The Impugned Provisions are not unconstitutional.

89.3 The applicant is ordered to pay costs of this application.



MANTAME J
WESTERN CAPE HIGH COURT