REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 15467/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO
31/05/2024
DATE SIGNATURE

In the matter between:

AFRICA CASH AND CARRY (CROWN MINES) (PTY) LTD Applicant

And,

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

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JUDGMENT

FISHER J:

Introduction

[1] This is part A of an application which was brought in the urgent court and subsequently given a special urgent allocation. It seeks interim relief to the effect that SARS be interdicted from collecting the assessed but disputed VAT liability of the applicant pending a review of the decision of SARS not to suspend what is known as

the '*pay first argue later*' provision (ie s164[1]) in the Tax Administration Act of 2011 ('TAA) . The liability which includes penalties and interest is an amount of nearly R 323 million and is in respect of the period November 2013 to July 2014. ('the VAT debt')

[2] Part B of the application is the application for the judicial review of a refusal by SARS (and the refusal to withdraw such refusal) to suspend payment of such VAT debt pending appeal. The remedy sought in the review is that the Court substitute SARS' decision with an order suspending the payment, alternatively refer the two decisions back to SARS for reconsideration.

[3] Ultimately, the aim is to avoid payment having to be made pending an appeal to the Tax Court in relation to the assessment.

[4] The applicant alleges that the refusals to suspend the provisions of s164, if allowed to stand pending the review and ultimately the appeal, will lead to its insolvency and that thus there will be no vindication of its position on review and the appeal will thus also be thwarted. Thus it argues that the balance of justice favours it.

[5] SARS contends that the review has no merit whatsoever and that this application for interim relief is vexatious. It points to a litany of non-compliance in the tax affairs of the family business in issue relating to an indebtedness to SARS which runs to more than R 1.2 billion ('the unpaid debt') and relies on the fact that there has been fraudulent conduct on the part of those conducting the business as well as considerable bad faith and dishonesty exhibited by the applicant and ACC in relation

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[1] Section 164 reads as follows:

> 1. **Payment of tax pending objection or appeal**
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> (1) Unless a senior SARS official otherwise directs in terms of subsection (3)—
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> (a) the obligation to pay tax; and
>
> (b) the right of SARS to receive and recover tax,
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> 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.'

to their tax affairs. It thus argues that there is no prospect of success in the review and that this is a determinative factor in deciding whether to grant the interim relief sought.

[6] The argument on behalf of the applicant is that these are irrelevant considerations at this stage of the inquiry in that the prospects of success on review are not a pertinent consideration when exercising a discretion as to the right to interim relief. It alleges that all it need show, on the cases, is that there is a triable issue in the review. It thus argues that it has done so on the basis that it has raised review grounds which are arguable.

Background facts

[7] The facts which inform this matter are relatively simple. An attempt has been made by the applicant to contrive complexity and dispute where there really is none.

[8] There are two companies involved in the saga – Africa Cash and Carry (Pty) Ltd ('ACC') and the applicant company known as Africa Cash and Carry Crown Mines (Pty) Ltd (interchangeably 'ACC Crown or the applicant'). The applicant was was formed by shareholders of ACC to take over the business of the ACC as a going concern at a time when a significant tax liability of ACC had been discovered.

[9] The purported takeover of the business of the applicant as a going concern occurred pursuant to a written sale of business agreement between the applicant and ACC which was allegedly entered into during 2013. This sale transaction is dealt with in more detail later.

[10] Whilst there are two companies, there is in truth one family business conducted by the Hathurani family. The business is involved in large scale cash sales of fast moving consumables. In the main these goods are sold to vendors and hawkers countrywide. The business thus generates a massive cash income.

[11] The fact that it is a family run business is important for present purposes. It is ,however, currently under curatorship in terms of a preservation order obtained by

SARS under the Protection of organised Crime Act (POCA)[2]. The main reason for the preservation order was the sale transaction in terms of which the business was dissipated in its entirety to the applicant under circumstances where the unpaid debt was due and owing to SARS but subject to a suspension agreement. The circumstances leading this preservation order are dealt with below.

[12] The shareholders of ACC, prior to the sale transaction, were three trusts conducted by the Hathurani family who are the main protagonists in this saga. These trusts together held 75% of the shareholding in ACC they are the Mohammed Edrees Hathurani Family Trust (25%); the Iqbal Ahmed Hathurani Family Trust (25%); and The Edrees Hathurani Family Trust (25%). The remaining 25% was held by the Cassim Aysen Family Trust.

[13] The directorships of ACC were held, at this stage by Mohammed and Iqbal Hathurani the son and brother respectively of Edrees and by Cassim Aysen.

[14] Mr Aysen and his trust were ousted as shareholders by way of the sale transaction in issue. It is alleged that the applicant took over the business of ACC with effect from 1 November 2013. Mr Aysen has since turned state witness for SARS as to the fraudulent operation of the business by himself and his co-directors.

[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 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 is conducted.

[16] At the time of the sale of the business, ACC Crown's directors were: Edrees, Iqbal, and Mohammed Hathurani. Edrees and Iqbal are brothers and Mohammed is the son of Edrees. They have now fallen away as registered directors in favour of the current sole director of the applicant Faayza Hathurani who is the daughter of Edrees and the sister of Mohammed. Faayza was appointed on 15 September 2014. She is the deponent to the founding affidavit in these proceedings. On her version of events in affidavits Edrees was always integrally involved in the business.

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[2] Act 121 of 1998.

[17] Edrees is now the only remaining director of ACC which has stopped trading pursuant to the sale of the business. These ever shifting family directorships between the two entities are ample evidence of family control of the business, whatever the family company in which it is housed.

[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. It is the existence of the unpaid debt that sets the stage for the current dispute.

[20] On 28 June 2011, subsequent to the raising of the assessments in relation to the unpaid debt, ACC submitted a request of suspension of debt on the basis that it offered security for the indebtedness in the form of a general notarial bond to be registered in favour of SARS over its trading stock It furthermore gave an undertaking that it would keep trading stock at hand to a value in excess of R300 million.

[21] In March 2012 and after some negotiation between SARS and ACC, SARS accepted the security offered and confirmed the suspension of liability. It was after this that the dissipation of the business to the applicant, including assets and stock took place without the knowledge of SARS.

The sale of the business

[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. This is important from the perspective of the VAT debt. More is said of this later.

[23] When the sale of business came to the attention of SARS, it brought the urgent ex parte preservation application in terms of the TAA which order was granted on 14 August 2014. The purpose of the order is the placing of the business and assets under the control of a curator bonis, Mr Cloete Murray. This order remains in situ. In essence the order seeks to preserve the assets of both companies – which covers the business on any case.

[24] But it seems that the Hathuranis have been less than co-operative in the manner in which he has dealt with the curator bonis.

[25] During the course of the implementation of the preservation order, the curator bonis brought an application against inter alia Edrees wherein he sought inter alia an order that Mr Edrees and others were in contempt of the preservation order. The order sought by the curator included relief aimed at stopping Edrees from interfering in the conduct of the business according to the preservation order. Ultimately an order was acceded to by Edrees to the effect that he would not attend on the business premises.

[26] It seems that Edrees is something of a paterfamilias and guiding mind behind the business. In the answering affidavit in these proceedings the following is tellingly said of him by Faayza:

'The First Respondent [Edrees Hathurani] has vast business experience and his expertise in the businesses conducted by the companies. His participation in their business on a day to day basis was and is invaluable to the continued success of the business which now vests in ACC Crown Mines. He does not act as a director. He conceived and implemented the business plan that animates the business and he was instrumental in building the business to its position of success. He is indispensable to the survival and future growth of the business'. (Emphasis added.)

[27] On 26 November 2015, the legal representative of both companies addressed a letter to the curator bonis, which letter was copied to GMI, wherein the following is stated regarding the role of Mr Edrees within ACC Crown:

'The return of Mr Hathurani to the business of ACC has previously been discussed and agreed to on the proviso that he adhere to very specific conditions imposed by the Curator. These conditions however remained very restrictive as his return was premised on his hands effectively being tied behind his back. Neither the Curator nor Mr Hinxman appear to appreciate the experience and knowledge that Mr Hathurani has and his ability to turn ACC around and to inevitably ensure the on-going success of the business. The return of Mr Hathurani is in the interests of both ACC and the Curator in preserving the assets'.

[28] Thus there was clearly something of a power struggle between the Hathuranis and the curator.

[29] It must be understood that this attitude of the Hathuranis was that taken whilst the objection and appeal processes in relation to the unpaid debt were still underway. SARS' inquiries at this time involved intensive investigation into the business and led ultimately to the uncovering of the fraudulent system applied in the conduct of the business known as the '*ooplang system*' which was dealt with at length in a judgment of the Tax Appeal Court (TAC) relating to the unpaid debt. This judgment was handed down pursuant to an oral hearing of witnesses. The judgment has also been referred to in the proceedings as 'the Satchwell judgment' although it is more properly the judgment of the Court.

[30] The TAC judgment was axiomatically a turning point in the affairs of ACC and the applicant in that it pronounced definitively on the unpaid debt and the circumstances which had led to it – including the involvement of the Hathuranis in the fraudulent system which led to the unpaid debt. The Hathuranis appealed to the SCA but the appeal failed.

[31] The TAC judgment pronounced finally on the significant tax evasion that had been the order of the day in relation to the conduct of the business. The judgment brought about a sea change in the tax affairs of the Hathuranis in relation to the unpaid debt. They had reached the end of the road. The debt was due and payable.

[32] The Hathuranis thus began to attempt to reach a compromise and suspension of the debt with SARS. On 28 February 2020, ACC and the applicant together presented SARS with a request for a compromise. As part of the documentation in support of the request for a compromise, they disclosed to SARS, for the first time, a copy of the agreement of sale of the business between ACC and the applicant.

[33] In terms of the agreement of sale, ostensibly dated 30 December 2013, the main reason alleged for the sale of the business by ACC was to prevent Mr Aysen from laying claim to any rights and interests in the business. It was specifically recorded that 'the sellers [ACC] do not wish any known bona fide and legitimate creditors as at the date of the sale to be prejudiced. To this extent, the purchaser as a condition of this sale, will take over the known liabilities as at the effective date.'

[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 liability for the unpaid debt.

[35] The suggestion appears to be that Mr Aysen is the sole villain of the piece and that it was he and his henchmen who, unbeknown to the Hathuranis, orchestrated the fraudulent conduct which led to the unpaid debt. But this contention is unsustainable on the findings in the TAC judgment. I will deal with this later.

[36] The unpaid debt has been the source of much negotiation between the Hathuranis and SARS over the past eleven years. In the context of these negotiations little if any real heed has been paid by the Hathuranis to any separation of the business from either themselves or the two ACC entities. The approach now taken as to the lack of liability of the applicant is opportunistic. I will deal further with this later.

[37] Since the discovery by SARS of the massive underreporting of for Income Tax and VAT purposes which discovery occurred during 2010, the claim for the unpaid debt has run the gamut of processes and remedies both internally and in the courts.

[38] In the TAC much evidence of an accounting expert nature was trawled through by the Court. The judgment of the Court is instructive from the perspective of the deception and lack of good faith which has been the order of the day in the conduct of the tax affairs of the business over time and currently.

[39] As I have said an appeal to the SCA by the Hathuranis failed. The judgment and findings of the TAC thus stand. I now embark on a discussion of the judgment with reference to how the findings therein bear on the current relationship between the parties and this application.

The judgment of the TAC

[40] The expert investigations which came to the fore in the case uncovered a system which operated within the business computer systems known as the *ooplang system*. This was a parallel and integrated system with the above board computer system. The function of the *ooplang* system was to understate the cash sales of the business to a significant degree, thus leading to the consequent understatement of income tax and VAT which led to the unpaid debt.

[41] The Court described it thus:

'What is clear is that ooplang was a parallel system to the supposedly open and above board one captured on REACT software. It was monitored on small pieces of paper which enabled the Taxpayer [ACC] to track it's undisclosed revenues and profits.

> Such a system was obviously planned and calculated and regularly and continuously implemented. *Ooplong* impacts on both income tax and VAT calculations and payments.'[3]

[42] The hearing ran on dates ranging from 12 September 2016 to 8 December 2018. Edrees should obviously have been a key witness for ACC if indeed he was not involved in the systematic fraud which cost the fiscus in excess of R1.2 billion. By all accounts this largescale fraud took place under his watch and that of his son and brother. However he did not testify and neither did Iqbal or Mohammed. Furthermore, the evidence which was given as to their involvement by an employee and the financial advisor was not challenged. The TAC drew adverse inferences against those who conducted the business from this failure to deal with the evidence.

[43] The Court had the following to say as to the conduct of the case by ACC:

> 'Significantly, counsel for Taxpayer did not dispute or challenge the evidence of either Ebrahim or Kara as to the existence of the "ooplang" system and it's diversion of monies out of the financial records of the Taxpayer into the coffers of senior management. In so doing, the legal representatives for the Taxpayer showed the highest professional restraint and Integrity.'[4]

And further:

'The existence of the ooplang system may have been described by two despicable Characters- Kara and Ebrahim [evidence led by SARS of accountant and former financial manager and an employee in the services of ACC]-but was not disputed by the Taxpayer [ACC] when either of them were under cross-examination. The evidence of Ebrahim relates to the period in question whilst that of Kara can be no more than corroboration of operations after the relevant period. Ebrahim was a pathetic individual, dearly not a mastermind and no more than an incidental collaborator in someone else's system of tax evasion. The usual cautions as to an accomplice hardly seem applicable. Kara's evidence confirms that of Ebrahim (for the subsequent period) and does have similar fact value in respect of the earlier period.' (Emphasis added)

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[3] Africa Cash & Carry (Pty) Ltd v The Commissioner for The South African Revenue Service - case no 13251/vat 077 (16 may 2018) at paras 13-14.

[4] Ibid at para 98

[44] Of Ebrahim the Courts said the following:

'Mr Ebrahim was an employee of the Taxpayer (and within the group of which the Taxpayer is an entity) ....He gave evidence on the 'ooplang'system operative during the relevant period under assessment where he was a cog in the chain of collection of cash from the daily business takings of the Taxpayer, placing such monies in a box and making it available to senior management of the Taxpayer, completing certain receipts and records in regard to the ooplang scheme including payments from this stash of monies. In short, he gave evidence that "ooplang is the sales which is not recorded in the books of accounting" and "where cash is diverted from your normal, daily takings of a business." [5]

[45] The Court concluded:

'On the evidence of both witnesses, the "ooplang" system was more than just an incidental and ad hoc event. There seem to have been many layers of ooplang: false suppliers, cheques endorsed, payment made in and out at certain tills only, cash not recorded, deliveries not made, rebates which did not exist, stock which was never acquired.' [6]

[46] The involvment of Edrees, in the business during the operation of the ooplang scheme cannot be disputed and the unchallenged evidence at the TAC hearing implicated him and those conducting the business.

[47] The Court went on to criticise the lack of compliance by ACC – which was under the Hathuranis directorship - as follows:

'The Taxpayer has given not even a hint of an explanation for the absence of statutorily required (in terms of the ITA, the TAA and the VAT Acts) ledgers, cash books, journals, cheque books, bank statements, deposit slips, paid cheques, invoices and stock lists and all other books of account and any electronic representations of information in any form. The Taxpayer has been unable or unwilling to explain what happened to all of it's original records for a period of 6 an half years- March 2003 until July 2008 (when the REACT data was obtained)

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[5] Ibid at para 97.
[6] Ibid at paras 111 -112.

The absence of such information is not only an issue of non-compliance with legislation but it also creates serious risk within the operational and financial affairs of this Taxpayer and not only allows for but also encourages manipulation, distortion, deception and obfuscation.'[7]

And further:

'When SARS initially attempted to obtain information from the Taxpayer it was fobbed off, When it pressed the issue and produced a search warrant the Taxpayer was not helpful and was, in fact, intimidatory - ranging from requiring a senior SARS official to arrive (Mr Makwakwa) to actually locking the gates and not allowing SARS staff to leave. There is every impression of non-cooperation or obstruction in the behaviour of the Taxpayer when asked and then required to produce documentation it is statutorily obliged to retain. The Taxpayer has an interest in the satisfactory outcome of any audit or assessment and one would expect provision of assistance but instead there was the exact opposite.'[8]

[48] The Court concluded the following:

' On the evidence available to this court, there has been more than mere occasional or innocent omission to include In any return any amount which ought to have been included, it is our view that there has been deliberate evasion through establishment, equipping, staffing and operating a system to manipulate suppression of sales.'[9]

[49] Thus, in sum on this judgment, the evidence as to the system of the computerised suppression of sales for the purposes of tax evasion and the distribution of the spoils in cash to senior management was not disputed.

[50] As I have said, the 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 was 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. I move to deal with the more pertinent features of such engagement.

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[7] Ibid at para 106.
[8] Ibid at para 106.
[9] Ibid para 101.

Negotiations as to compromise

[51] The writing being on the wall, the Hathuranis began dealing with SARS to seek a compromise and suspension. As I have said it was only at this stage that a copy of the sale agreement in respect of the purported transfer of the business was disclosed to SARS.

[52] On 29 March 2020, ACC and the applicant submitted another compromise offer in relation to the unpaid debt ('the March 2020 compromise offer').

[53] As part of the March 2020 compromise offer the applicant accepted its liability for the respondent's tax liability "pursuant to a purchase agreement between the applicant and[ACC] (clause 4.4 of the compromise offer). Furthermore, both ACC and the applicant confirmed that they are unable to pay the full amount of the tax debt (clause 9.1.11 of the compromise offer). The offer was signed by the children of Edrees, - Mohammed on behalf of ACC and Faayza on behalf the applicant.

[54] On 17 June 2020 SARS's attorneys Gildenhuys Malatji Inc (GMI) on SARS' instructions, addressed a letter to the attorneys of record of ACC and the applicant. In this letter, SARS, inter alia, confirmed that it had considered the March 2020 compromise offer and accepted it on the terms as detailed in a draft agreement which was prepared and provided to them.

[55] Negotiations then ensued concerning specific terms of the agreement and ultimately and on 26 August 2020 a final agreement was proposed by SARS. ACC and the applicant were put to terms and afforded four days to provide SARS with a duly signed compromise agreement.

[56] Part of the compromises which were suggested at this time included a settlement proposal by the applicant concerning the VAT debt.

[57] The period of the VAT debt is after the sale of business but before the curator was appointed. As I have said, the scheme of evasion was taken into the new vehicle. It was clearly business as usual. And Mr Kara did the necessary as to the filling out of

the VAT returns. The returns for this VAT period reflected that SARS owed the applicant a refund. Whereas SARS contends for an indebtedness of in excess of R 322 milion. The applicant now contends that this was a situation wrought by Mr Kara's fraud, and that it has now been corrected by a reversal – but that it objects to the assessment that puts the amount owing for this VAT period at more than R 322 million. In light of the fact that this 'reversal' only occurred after the evasion was uncovered by SARS, such protestations of innocence ring hollow.

[58] On 25 March 2021, SARS advised ACC that the compromise offer including that relating to the VAT debt was not accepted. Since then there has been a deterioration in the negotiations. This must be seen against the proven fact that it is incontrovertible that the unpaid debt is owed by both ACC, which is not trading, and by the applicant.

[59] The stance now adopted by the applicant that there is a bona fide dispute about its liability for the unpaid debt.

[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 TAC. I do not accept this premise.

[61] Mr Louw SC for the applicant seems to suggest that I should disabuse my mind of the existence of the unpaid debt and the systematic fraud which brought it about as it emerges from the judgment of the TAC and the undisputed documents which are attached to the papers in this application. He argues that SARS also should not have considered the history leading to this debt and the relationship between the protagonists in relation thereto when it made the impugned decisions not to suspend payment of the VAT debt. It appears that this is the gravamen of the complaints which found the review.

[62] Mr Coetzee SC for SARS adopts the position that the background of the unpaid debt and the numerous non-disclosures which have proliferated in the relationship between the Hathurani entities and those managing them is of pivotal importance in relation to the recovery of the taxes of these individuals.

[63] Mr Louw concedes that incorrect VAT returns were submitted to SARS and that in terms thereof SARS would have to pay refunds to the applicant. As I have said, the VAT returns which were put in for the period in issue were for the months after the sale transaction and before the curator was appointed. It seems clear that the same conduct of the scheme continued for this period. The infamous auditor and financial advisor of the business who assisted in the implementation of the *ooplang* system, Mr Kara and whose fraudulent dealings in relation to SARS on behalf of the business are laid bare in the TAC judgment was allowed a hand in these VAT returns as well. There is now an apparent attempt by the Hathuranis to distance themselves from Mr Kara. They say his 'moral turpitude' should not be visited on them and specifically the applicant.

[64] I move to deal with the conduct of this application by the applicant.

This application

[65] The applicant has taken a strategic approach to dealing with the allegations of SARS pertaining to the manner in which the business has been conducted by the Hathurani family and the significant allegations of fraud. It simply refused to deal with them and argues that it is entitled to do this because these facts are of no relevance to this interim inquiry. Faayza says the following as the sum total of her dealings in relation to these crucial issues:

'52 I wish to make it clear that the issue of the indebtedness of AC&C to SARS is of no consequence in the present urgent application and that I do not deal with it for this reason and this reason alone. It is irrelevant for the interdict.'

[66] Clearly such indebtedness is pervasively relevant to the case. The Hathuranis, ,by all accounts, still conduct the business although it is now monitored under the preservation order.

[67] I move on to deal with the applicable law.

Applicable legal principles

[68] In terms of s164(3) of the TAA, a senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, which are stated to include:

'(a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;

(b) the compliance history of the taxpayer with SARS;

(c) whether fraud is *prima facie* involved in the origin of the dispute;

(d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered; or

(e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*.'

[69] This provision makes plain what the core considerations of SARS must be in the making of its decision under 164(3) and any revisiting of such decision. Simply put the considerations include the risk of dissipation of assets; fraud; the endangerment of the *fiscus*, and whether the taxpayer has tendered adequate security.

[70] Mr Louw argues that any concerns around these considerations are taken account of by the fact of the preservation order. This order, he argues, is better than security and there is no chance of dissipation.

[71] SARS however makes the pertinent point that the Hathuranis have not been honest in the manner in which they have dealt with the dissipation of the business between family controlled companies. It makes the further point that such dissipation

took place without SARS' knowledge and against the undertakings of ACC given to secure the suspension of payment of the unpaid debt. The fact that such dissipation is now relied on to suggest a lack of liability for this substantial debt, is to my mind, unconscionable.

[72] A hallmark of the approach of the applicant in this matter has been a lack of co-operation with the authorities and this is of concern in relation to the payment of this VAT debt and generally. The curator has had to go to the extent of obtaining an interdict against Edrees to avoid his interference in the conduct of the business. This notwithstanding, the applicant now argues that the relationship between ACC (of which Edrees is Director) and the applicant should be ignored.

[73] As to the submission that the protection order constitutes security, or better, Mr Coetzee correctly submits that, whilst such protection may serve the purpose of containment of further dissipation, it provides no real security that can be drawn on by SARS to meet the indebtedness in due course.

[74] Mr Louw argues that the 'prima facie right' requirement in a case like the present is when the claim that is to be determined in due course (i.e. the review) is not frivolous or vexatious or, to put it differently, that there is a serious question to be tried. He relies for this on *Ferreira v Levin NO*[10] and *Johannesburg Municipal Pension Fund v City of Johannesburg*.[11] He argues on the application of this test there is no reason to classify the review application as vexatious, frivolous or untriable.

[75] Mr Coetzee argues that in *National Treasury v Opposition to Urban Tolling Alliance*[12] Moseneke DCJ made it plain that the *Setlogelo* test was still to be applied but that it should be applied in a way that promoted the objects and spirits of the Constitution. He argues that the traditional test is thus whether there are prospects of success on the review.

[76] Mr Coetzee argues further on the authority of *National Treasury* that courts should, in any event, be circumspect in granting interdicts of State power in that the separation of powers must be respected.

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[10] 1995 (2) SA 813 (W) at 824.
[11] 2005 6 SA 273 (W) 281 I to 282 A.
[12] 2012 (6) SA 223 (CC) at para 45

[77] I agree. Moseneke DCJ said the following in this regard in *National Treasury:*[13]

> The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.'

[78] On either and both of these approaches i.e. whether a triable issue is all that is needed or whether there should be prospects of success on review shown the admonishion against judicial overreach applies and must be seriously considered.

[79] To my mind, the case of the applicant on review is such that it would not even meet the threshold of the test contended for by it in these proceedings.

Conclusion

[80] There is no basis on which SARS, in the present circumstances can be said to have not undertaken a sound and proper assessment of the matter as to whether there should be a suspension of the debt pending the appeal. Section 164(3) makes plain that SARS must, in making its decision, be mindful of the risk of dissipation of assets and fraud, the endangerment of the *fiscus*, and whether the taxpayer has tendered adequate security. The widespread fraud which has already been pronounced on finally by the TAC is, to my mind, an overwhelmingly important consideration in this matter.

[81] In the particular circumstances of this case, SARS is performing and must be left to perform its statutory function and there is no basis on which this Court should exercise a discretion to interfere in the exercise by it of its statutory powers.

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[13] Ibid at para 44.

Order

[82] I thus make an order which reads as follows:

The application under part A of the application is dismissed with costs.

FISHER J
HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 11 May 2021.

Judgment Delivered: 31 May 2021.

APPEARANCES:

For the Applicant	: Adv P.F Louw SC. Adv L Sigogo SC
Instructed by	: Van der Merwe Greyling Attorneys.
For the Respondent	: Adv E Coetzee SC. Adv C Naude.
Instructed by	: Gildenhuys Malatji Inc.