REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 11521/2020

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

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Signature 30 April 2020

In the matter between:

SIP PROJECT MANAGERS (PTY) LTD **Applicant**

and

THE COMMISSIONER FOR **Respondent**

THE SOUTH AFRICAN REVENUE SERVICE

J U D G M E N T

M M Lingenfelder A J

INTRODUCTION

1. In this application the applicant asks for declaratory relief, namely that the respondent's notice to appoint a third party in terms of the provisions of sec 179 of the Tax Administration Act, 28 of 2011, as amended be set aside and declared null and void; and that the respondent is ordered to repay to the applicant the amount of R1 261 007, 00 which was paid over by the third party to the respondent in terms of the notice together with interest.

2. The applicant relies on various grounds for the relief sought. The applicant contends that no letter of demand was delivered prior to the issue of the third party notice as required by sec 179 of the Act. If the court should find that such a letter or letters were delivered, the applicant contends that the letters were either pre-mature as the tax debt was not yet payable at the time, or the 10-business day period prior to the issue of the third party notice had not yet expired by the time that the notice was in fact delivered.

3. The respondent contends that a valid letter of demand as required by the Act was delivered. The respondent relies on the letter of demand dated 7 November 2019 as a final letter of demand that was delivered to the applicant.

BACKGROUND

4. The applicant is a well-established construction company who has been in business for 36 years and is a registered taxpayer with an e-filing profile. In June 2019 a tax assessment was issued in terms whereof the respondent owed the applicant a refund amount of approximately R1,6 million. The respondent then chose to verify the assessment and requested certain additional documents. These documents were never furnished, and as a result an additional assessment was then issued by the respondent in terms whereof the previous assessment was reversed, and the applicant was assessed to owe the respondent an amount of R1 233 231.00. This assessment was uploaded on the applicant's e-filing profile, but due to no fault on the side of the respondent, it did not come to the applicant's notice.

5. The additional assessment complied with the requirements set out in the Act and the validity of the assessment is not in dispute for purposes of this application. The date for payment of the amount by the applicant as required by sec 96(*f*) is reflected on the assessment as 30 September 2019.

6. The applicant's accountant. Mr. Abrahamson, who is the deponent to the founding affidavit, states that he first became aware of the additional assessment on 6 February 2020. On this day the applicant informed him that Standard Bank had received notification to pay an amount of R1 262 007.00 over to the respondent from the applicant's bank account. He then scrutinized the applicant's e-filing profile and became aware of the additional assessment of 9 October 2019. There was no letter of demand to be found on the e-filing profile of the applicant, pursuant to the non-payment of the assessed amount. A copy of a screenshot of the applicant's e-filing tax profile is annexed to his affidavit as Annexure DA 7. This annexure reflects the correspondence uploaded by the respondent on the applicant's e-filing profile.

7. He immediately lodged an objection against the assessment, applied for condonation for the late-filing of the objection and applied for suspension of payment of the amount assessed until finalization of the objection. However, the funds had already been removed from the applicant's bank account and paid over to the respondent.

8. Mr. Abrahamson managed to contact the SARS official whose name was reflected on the third party appointment letter to Standard Bank, Mrs. Tati, telephonically on 7 February 2019. She advised him that 3 letters of demand were sent before the third party appointment letter was issued, namely on 7 November 2019, 11 November 2019 and 22 January 2020. She forwarded copies of these 3 letters to Mr. Abrahamson on this day.

9. Upon an enquiry from Mr. Abrahamson as to where these letters can be found on the applicant's e-filing profile, she stated that "the final demand show on the SARS e-filer view". Mr. Abrahamson is adamant that none of these letters were sent to either him or the applicant or loaded onto the applicant's e-file profile. What is of importance is that none of the 3 letters referred to by the respondent, appears on the e-filing profile Annexure DA 7.

10. The next day Mr. Abrahamson contacted a Mrs. Cambell, an employee of the respondent at their call centre, to ascertain where he could locate the letters on the applicant's e-filing profile. Mrs. Cambell advised him that there was no letter of demand uploaded on the applicant's e-filing profile. He was given a reference number for this call and challenged the respondent in the founding affidavit to obtain a transcription of this phone call, as he was aware that all calls to the call centre were recorded. The respondent does not deal with the telephonic discussion with Mrs. Campbell in its replying affidavit, safe for making the denial that the contents falls within the deponent's personal knowledge.

11. The applicant approached its legal advisors and a letter of demand for repayment of the amount paid over by Standard Bank in terms of the third party notice, was sent on 10 February 2020. Nothing came of this demand and the application was launched, initially as an urgent application. The matter was found not to be urgent and postponed to the ordinary opposed motion roll.

SECTION 179 OF THE ACT

12. The notice issued to Standard Bank requiring it to make payment of the amount to the respondent from the applicant's bank account, was done in terms of the provisions of section 179 of the Act. This section gives a senior SARS official the authority to issue a notice to a person who holds or will hold any money for a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.

13. Section 179 was amended in 2015 to include subsection (5) which states that such a notice *may only be issued* (my emphasis) after delivery to the tax debtor of a final demand for payment, which must be delivered at least 10 business days before the issue of the notice, and which demand must set out the recovery steps that SARS may take if the tax debt is not paid, as well as the available debt relief mechanisms under the Act in respect of recovery steps which may be taken under section 179.

14. The applicant contends that no final demand was delivered to the applicant prior to the issue of the notice to Standard Bank, furthermore, should the court find that a letter of demand was delivered to the applicant, the demand of 7 November 2019 was sent before the tax debt became payable and therefor it is null and void. The respondent relies on the final letter of demand dated 7 November 2019 as the letter of demand required by sec 179(5) delivered before the issue of the third party notice.

RESPONDENT'S VERSION

15. The answering affidavit on behalf of the respondent is deposed to by Mrs. Tati, the same official who issued the notice to Standard Bank and with whom Mr. Abrahamson was in telephonic contact. Mrs. Tati denies that the respondent did not issue letters of demand and states that three letters were issued, namely on 7 September 2019, 11 September 2019 and again on 22 January 2020. A stated above, the respondent's counsel abandoned relying on the letters dated 11 September 2019 and 22 January 2020 and only relied on the letter dated 7 September 2019 as the demand letter referred to in section 179(5). The respondent's counsel quite correctly made this concession, as the letter of 11 September 2019 was merely a reminder and did not comply with the requirements as set out in section 179; and the letter of 22 January 2020 was not issued at least 10 business days before the notice to Standard Bank was issued on 3 February 2020 and therefore does not meet the requirements for a demand as per section 179. I will accordingly only deal with whether the letter of 7 September 2019 was delivered to the applicant in terms of the provisions of the Act.

16. Mrs. Tati's version with regard to the sending of the final demand letter varies in the affidavit deposed to by her. In par 15 of the replying affidavit she states that the Debt Management Division of SARS issued and sent the final demand to the Applicant through e-filing. In paragraph 86 she states that the applicant was provided with copies of the letters issued (this was on 6 February 2020 after Mr. Abrahamson made enquiries). She states that these are copies of the actual letters sent by SARS. This is repeated in paragraph 96 of the replying affidavit, In paragraph 103 the deponent states that she sent the letters of demand and in paragraph 107 she states that the letters are system generated and are on the SARS system. These paragraphs are all contradictory as to who actually sent the letters. Nowhere does Mrs. Tati state that she has personal knowledge that the letters were sent through e-filing, and no affidavit is annexed by a person who has personal knowledge thereof. The applicant denies that this letter is on the e-filing profile of the applicant and refers to a screenshot of the e-filing profile in support of this. The respondent fails to deal with this crucial allegation and does not annex a copy of the applicant's e-filing profile reflecting the presence of the letter. The respondent annexes Annexures SARS 4 and 5 to support its contention that the letters were delivered. The difficulty with these annexures lies therein that the respondent conceded that for electronic communication to be complete and

regarded as delivered, the complete transaction must have been entered into the information system of SARS and correctly submitted by SARS to the electronic page of the registered user as is set out in Rule 3(2)(*b*)(ii) of the Rules for Electronic Communications issued in terms of the Act. The annexures SARS 4 and 5 do not counteract the applicant's contention that the letter/s were not on the applicant's electronic page. These annexures are merely copies of SARS service manager and at best show that the letters were created on the dates reflected.

17. It is not enough to proof the existence of a final letter of demand; the letter should be delivered to the taxpayer. The Rules for Electronic Communication prescribed in terms of the Act, state that an electronic filing transaction includes a communication in relation to payment made by SARS and other electronic communication that is capable of generation and delivery in a SARS electronic filing service. In terms of Rule 3(3) if an acknowledgment of receipt for the electronic communication is not received, the communication should be regarded as not delivered, except for an electronic filing transaction. It therefor follows that if the respondent did deliver the letter of demand via the applicant's e-filing profile, it will be deemed to have been delivered. The respondent accordingly only needs to show that the demand was delivered via the electronic e-filing profile of the taxpayer, once it was challenged by the applicant that these documents do not appear on the e-filing page of the taxpayer. It should have been relatively simple for the respondent to furnish proof that the letter does appear on the e-filing system, but this was not done. Furthermore, the respondent chose not to deal with the allegation by Mr. Abrahamson that he had a conversation with Mrs. Cambell and that she confirmed that the letters were not on the applicant's e-filing profile. The applicant's version that the letters were not sent on the dates reflected therein remains accordingly unchallenged, and there can be no bona fide dispute of fact on this point. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not rue or accurate but instead of doing so: rests his case on a bare or ambiguous denial. the court will generally have difficulty in finding that the test is satisfied.[1] I accordingly find that no letter of demand was delivered to the applicant herein.

[1] Wihtman t/a JW Construction v Headfour (Pty) Ltd and another 2008 (3) 371 (SCA)

RECOVERY OF TAX IN TERMS OF THE ACT

18. The respondent is a creature of statute and is given wide powers for the recovery of tax debts by the provisions of the Tax Administration Act, more specifically in Chapter 11 of the Act. The circumstances when and requirements of validity in exercising these powers are described in a peremptory manner in the Act.

19. Section 96(*f*) provides that a notice of assessment issued to the taxpayer must state the date for paying the amount assessed. In terms of section 162 tax must be paid by the day and at the place notified by SARS. It is common cause that the date for payment reflected on the additional assessment, was 30 November 2019.

20. The letter of demand of 7 November 2019 (which is the only letter that the respondent still relies on) was before the due date for payment in terms of the assessment, and accordingly also before the respondent could demand payment of the assessed amount, which was not yet payable. Part D of Chapter 10 of the Act deals with "Collection of Tax Debt from Third Parties" section 179 falls hereunder and states the following:

> **"179 Liability of third party appointed to satisfy tax debts.**—(1) A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the *taxpayer's outstanding tax debt."*

(my emphasis)

21. It is accordingly clear that the section deals with a scenario where there is an outstanding debt by the taxpayer, which in this instance, was not the position as at 7 November 2019 — the taxpayer would only have an outstanding debt after the due date of payment, namely 30 November 2019. Respondent's counsel conceded that on this date there was not yet an outstanding tax debt owed by the applicant.[2] In accordance with the *contra fiscum* rule the words "outstanding debt" must be construed against the respondent. The letter of demand dated 7 November 2019 was accordingly premature and therefore not lawful.

22. Subsection (5) to section 179 was introduced by an amendment to the Act in 2015. Prior to this amendment, there was no obligation on SARS to deliver a demand for an outstanding debt before issuing a third-party notice. The context of this

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[2] Oceanic Trust Co v The Commissioner for the South African Revenue Services 74 SATC 127 at pars 80 – 82

amendment is that the respondent may only use the method in sec 179 to obtain payment through a third party if it complies with the provisions of the requirements of the section. The wording of section 179(5) is unambiguous and clear – the notice to a third party "may only be issued after delivery of a final demand for payment which must be delivered at least 10 business days before the issue of the notice....". This is a peremptory requirement before the step can be taken to issue a third party notice for recovery of an outstanding tax debt.

23. The notice issued to the third party in terms of section 179(1) does not comply with the peremptory qualification as set out in subsection 5, in that the notice was issued in the absence of a letter of demand delivered to the applicant is required. The notice issued is therefor unlawful and declared null and void.

24. A finding that a legislative provision is peremptory is not the end of the matter. The Court must further enquire whether it was fatal that it had not been complied with. The Appellate Division as it then was laid down the test as "In deciding whether there has been compliance with the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance".[3]

25. Once it is established that a legislative provision is peremptory and the question arises whether exact compliance therewith is required, the answer is sought in the purpose of the statutory requirement which is to be found ascertained from its language read in the context of the status as a whole.[4]

26. The respondent's counsel argued that the court should not order the applicant to repay the amount to the applicant, in view of the fact that there is an outstanding tax debt at present even if the assessment has been objected to. The objection against an assessment does not suspend the payment of an assessment. The argument was that this will serve no purpose as the respondent can then merely again take steps for the recovery of the outstanding debt. I was referred to the Oceanic Trust matter referred to supra in support of this. It is so that there is still a tax debt owing by the applicant, but this cannot detract from the invalidity of the notice that was issued. At the time of the Oceanic Trust judgment supra, the Act had not yet been amended and section 179(5) had not yet been introduced. The introduction of this section was clearly done to limit the powers of SARS in

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3 Maharaj and others v Rampersad 1964 (4) SA 638 (a) at 646C

4 Ex parte Mothulhoe 1996 (4) SA 1131 (T) at 1137H – 11378F

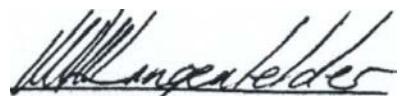
recovery of outstanding tax debts by means of the issue of a third-party notice without first advising the taxpayer thereof. Where a third-party notice stands to be issued, the taxpayer will probably always have an outstanding tax debt, otherwise there will be no need for the appointment of such a third party. It the respondent's argument is uphold that for that reason re-payment should not be ordered, this argument will be applicable in most cases where a third-party notice was issued. The respondent cannot for that reason be excused not follow the prescriptions of the Act and then state that it would serve no purpose to order a repayment of funds obtained in terms of an unlawful process. That would render the inclusion of sections 179(5) in the Act obsolete.

27. The application accordingly succeeds, and I make the following order:

1. The third-party notice is declared to be null and void

2. The respondent is ordered to repay the amount of R1 262 007.00 to the applicant, together with interest as from the date of payment of the amount to the respondent by Standard Bank.

3. The respondent is ordered to pay the applicant's costs of the application.



M M LINGENFELDER

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARENCES

For the Applicant: Adv. R.Mastenbroek Instructed by: Pierre Retief Attorneys

For the Respondent: Adv. T Chavalala Instructed by: State Attorney

Date of hearing: 24 April 2020

Date of judgment: 29 April 2020