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TAX & EXCHANGE CONTROL **ALERT**

IN THIS ISSUE >

About tax debts and civil judgments – the High Court considers sections 172 and 174 of the TAA

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About tax debts and civil judgments – the High Court considers sections 172 and 174 of the TAA

On 15 May 2020, the Western Cape Division, Cape Town, (WCHC) delivered judgment in *Barnard Labuschagne Inc v South African Revenue Service and another* 2020 ZAWCHC (15 May 2020), which concerned the application of sections 172 and 174 of the TAA.

Under the Tax Administration Act 28 of 2011 (TAA), the South African Revenue Service (SARS) has various powers to collect and enforce the payment of tax debts owing to it. One of the ways in which it can do so is by applying for a civil judgment for the recovery of tax, which is provided for in section 172 of the TAA.

Section 172 of the TAA states that if a person has an outstanding tax debt, SARS may 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. 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.

On 15 May 2020, the Western Cape Division, Cape Town, (WCHC) delivered judgment in *Barnard Labuschagne Inc v South African Revenue Service and Another* 2020 ZAWCHC (15 May 2020), which concerned the application of sections 172 and 174 of the TAA. More specifically, the taxpayer, Barnard Labuschagne Inc, sought to rescind a statement filed by SARS under section 172 of the TAA. The judgment deals with a number of related issues, but we focus mainly on the WCHC's interpretation of the TAA provisions.

Facts

- The taxpayer is a law practice which encountered some difficulties with SARS in respect of the payments that it made which were not properly allocated to the taxpayer's relevant accounts.
- Over the years, the taxpayer had encountered some difficulties with SARS in respect of the payments that the taxpayer made and which it alleged were not properly allocated to the relevant accounts.
- The taxpayer alleged that in 2013, SARS had previously filed with the registrar of court a similar statement to the one which the taxpayer sought to rescind in the current matter.
- The taxpayer further alleged that it opposed that statement on the basis that the payments to SARS were not allocated correctly. SARS had raised interest and penalties on the amounts that were paid on time and upon being advised of the payment allocation issue, SARS considered the unallocated amounts and the amount which SARS alleged the taxpayer owed decreased significantly. The judgment granted against the taxpayer was subsequently withdrawn.
- During 2013 and 2014, SARS made a further effort to resolve the payment allocation issue and made one of its employees available to the taxpayer on a full-time basis. This exercise resulted in a considerable reduced tax debt.

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About tax debts and civil judgments – the High Court considers sections 172 and 174 of the TAA...*continued*

After the taxpayer did not respond to SARS' letter, SARS continued to obtain a judgment against the taxpayer on 15 December 2017.

- However, by September 2015, the taxpayer's tax debt had shot up again.
- SARS engaged with the taxpayer to resolve the issue regarding the tax debt that had increased again, but due to the taxpayer's perceived failure to co-operate, SARS issued a letter of final demand for the payment of outstanding tax debt in 2017.
- As the taxpayer did not respond to the final demand, SARS issued a third-party payment instruction to Absa, but after receiving a negative response from the bank, SARS sent a letter to the taxpayer advising it of its intention to file a section 172 statement.
- After the taxpayer did not respond to SARS' letter, SARS continued to obtain a judgment against the taxpayer on 15 December 2017.
- The applicant subsequently brought an application to have the judgment rescinded.

Issue

The main issue that the court had to consider was whether the section 172 statement could be rescinded.

The taxpayer also challenged the constitutionality of sections 172 and 174, which aspect we deal with briefly.

Arguments before the WCHC

Some of the arguments raised by the taxpayer were the following:

- The grounds for rescission of the judgment were not based on an objection against an assessment or decision of SARS as referred to in section 104 of the TAA.
- The taxpayer argued that it applied for rescission as SARS had not raised assessments or made decisions referred to in section 104 of the TAA, against which the applicant could object or appeal. The taxpayer argued that it was therefore entitled to bring these proceedings before the WCHC in terms of section 105 of the TAA.

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About tax debts and civil judgments – the High Court considers sections 172 and 174 of the TAA...*continued*

It was further 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.

In opposing the application, SARS raised numerous arguments, including the following:

- It argued that the taxpayer had several dispute resolution mechanisms at its disposal before approaching the WCHC.
- The considerations underpinning the *"pay now, argue later"* principle were of importance in this matter. These considerations 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.
- It was further 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.
- There were numerous mechanisms available to the applicant in order to safeguard its rights. There was no prejudice or unfairness to the taxpayer who failed to timeously pay its tax liabilities and further repeatedly failed to comply with the procedures as set out in the TAA.

The Minister of Finance, who had been joined as second respondent following the constitutional challenge brought by the taxpayer, raised certain arguments, including the following:

- The taxpayer's interpretation was untenable as it overlooked the clear language of the TAA.
- Section 174 of the TAA explicitly requires section 172 certificates to be treated as though they are civil judgments which were lawfully given and if the court were to treat the certificates as capable of rescission as per the taxpayer's argument, the order so granted would be unlawful.
- Only a civil judgment that has a final effect could be rescinded and on the plain reading of sections 172 and 174, the certificates were not final in nature.
- In support of arguing that the section 172 statement did not have a final effect, reference was made to section 172(2) of the TAA, which states that the certificate may be filed irrespective of whether or not the amount of tax is subject to an objection or appeal. Furthermore, section 175 of the TAA even envisaged 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.
- According to the Minister of Finance, the granting of a rescission order would also offend 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 which requires the exhaustion of internal remedies.

About tax debts and civil judgments – the High Court considers sections 172 and 174 of the TAA...*continued*

According to the WCHC, section 172(2) was 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.

- In *Modibane v South African Revenue Service* [2011] ZAGPJHC and *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Service and Another* 2011 (6) SA (WCC), it was held that although the filing of a certified statement by SARS had all the effects of a judgment, it was nevertheless not in itself a judgment in the ordinary sense. It did not determine any dispute or contest between the taxpayer and the Commissioner.

Judgment

In respect of the main issue, the WCHC agreed with the Minister of Finance's submission that sections 172 and 174 constituted a lawful enforcement mechanism and for one to understand their correct legal meaning the appropriate starting point was the language used.

According to the WCHC, section 172(2) was 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 confirmed that despite the application for a civil judgment, the dispute resolution would still be in motion. The upshot of this was that there was no finality to this civil judgment, and it could not be accorded the status of a judgment.

Furthermore, the language used in section 174 was 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, but it does not, in and of itself, constitute a civil judgment.

The interpretation put forward by the taxpayer, that it is a judgment, was at odds with the interpretation that ought to be ascribed to this section. In fact, if regard was had as to how the 2013 dispute was resolved between the parties, the taxpayer knew that SARS could withdraw the judgment. It followed therefore, that the section 172 statement was not final in nature and was not capable of rescission in a manner appropriately accorded to a court judgment.

Simply put, there was no judgment to be rescinded by the court and the taxpayer was well aware that these statements were not final in nature. The judgment obtained through the registrar of the court is treated as a civilly obtained judgment for recovery purposes.

A related finding made by the WCHC was that the taxpayer should not have approached it to have the judgment rescinded. The WCHC explained that the TAA creates clearly defined dispute resolution mechanisms. It stipulates that an objection can be lodged against assessment or decision, followed by an appeal against the assessment or decision.

About tax debts and civil judgments – the High Court considers sections 172 and 174 of the TAA...*continued*

The WCHC held that the applicant failed to lay out a basis for the constitutional challenge in its application.

According to the court, the TAA does not state that a party can choose where the dispute has to be adjudicated. In this regard, the WCHC stated the following:

> *"The applicant [taxpayer] 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."*

With regards to the taxpayer's constitutional challenge the WCHC held that the taxpayer misconstrued the language used in section 172 and section 174. Furthermore, the WCHC held that the taxpayer failed to lay out a basis for the constitutional challenge in its application.

Comment

The court's finding that a section 172 certificate is not a final judgment that can be rescinded, is consistent with the *Modibane and Capstone* judgments that the court relied on. However, the WCHC's suggestion that it did not have jurisdiction and that the taxpayer should have approached the Tax Court for relief is slightly odd.

In the *Rampersadh* judgment, heard by the KwaZulu-Natal High Court (KZNHC) and discussed in one of our previous alerts, that court clearly explained that only where tax legislation expressly states that a decision is subject to objection and appeal, can the matter be heard by the Tax Court. In that case, the KZNHC held that SARS' decision not to alter an assessment in terms of section 93 of the TAA on the ground that there was an undisputed error, had to be taken on review to the High Court. Considering the facts of the *Barnard Labuschagne* matter, it appears that the rationale applied in *Rampersadh*, should also apply here and that the taxpayer was entitled to approach the WCHC for relief. In other words, while rescission was not the appropriate remedy that could be granted in the circumstances, the taxpayer appears to have been entitled to approach the WCHC and apply for relief, other than rescission of the judgment. The judgment should also serve as a reminder to taxpayers to consistently manage their tax affairs and constructively engage with SARS to manage their tax debts, within the scope of the TAA and without undermining their rights.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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