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# TAX & EXCHANGE CONTROL ALERT

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### No delivery, no pay: Another win for a taxpayer in the context of tax debt enforcement

It has been widely reported that South Africa faces a significant projected tax revenue shortfall for the 2020/2021 financial year, due to the COVID-19 pandemic and the concomitant lockdown. In light of this, taxpayers should appreciate that there is increased pressure on the South African Revenue Service (SARS) to collect outstanding tax debts. Under the Tax Administration Act 28 of 2011 (TAA), SARS is entitled to collect outstanding tax debt in different ways. One of its powers, is to instruct a third party to pay an amount owing by a third party to a taxpayer to SARS instead, in satisfaction of the taxpayer's tax debt. Prior to issuing such a notice to a third party, SARS must follow the process laid down in section 179 of the TAA, failing which the lawfulness of the third party notice and the collection of tax through this mechanism, can be challenged.

## No delivery, no pay: Another win for a taxpayer in the context of tax debt enforcement

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In the recent matter of *WPD Fleetmas CC v CSARS and Another* (31339/20) [2020] ZAGPPHC (19 August 2020), the Gauteng Division, Pretoria (High Court) had to consider whether the third-party notice issued by SARS to the second respondent, regarding moneys owing by the applicant (WPD) to SARS, was valid. WPD brought its application to set aside the third party notice on an urgent basis.

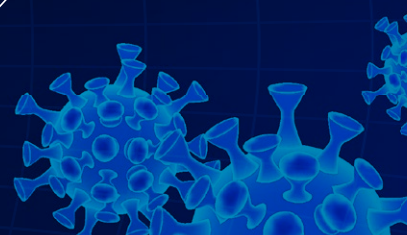
### Facts

WPD is a service provider to the second respondent for the supply of underground winch signalling device systems and is remunerated on a monthly basis. On 22 June 2020, SARS issued a third-party notice to the second respondent in terms of section 179 of the TAA (S179 Notice). On 8 July 2020 and in terms of the said notice, the second respondent paid the amount of R6,284,915.88 over to SARS. According to WPD, only on 7 July 2020 did SARS issue and address a "final letter of demand" to it. On the other hand, SARS alleged that it sent a "final demand dated 20 May 2020" to WPD on 20 May 2020, via an "electronic filing transaction" which means that the letter was delivered via WPD's e-filing profile.

In addition to requesting that the S179 Notice issued was null and void, WPD further requested the High Court to grant an interim interdict, interdicting and restraining SARS from initiating and/or continuing recovery proceedings against WPD.

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## No delivery, no pay: Another win for a taxpayer in the context of tax debt enforcement...*continued*

The second preliminary argument raised by SARS was that WPD had not complied with section 11(4) of the TAA, as it had not issued a notice to SARS indicating its intention to institute legal proceedings.

### Legal framework

Section 179(1) of the TAA states the following:

*"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."*

Section 179(5) of the TAA, which was the main provision that had to be considered in this matter, states the following, in relevant part:

*"SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of a notice, which must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act..."*

The High Court also considered section 11 of the TAA, which states that *"unless the court otherwise directs, no legal proceedings may be instituted in the High Court against the Commissioner, unless the applicant has given the Commissioner written notice of at least 10 business days of the applicant's intention to institute the legal proceedings."*

### Judgment

Before dealing with the merits of the matter, the High Court had to consider certain preliminary arguments raised by SARS. In response to SARS' argument that the matter was not urgent, the High Court held that the matter was indeed urgent. It based this finding mainly on WPD's argument that as a result of the amount of R6 million being paid over to SARS, it would be unable to pay its employees' salaries and its service providers for a second month, which would have a knock-on effect and result in WPD losing its service providers.

The second preliminary argument raised by SARS was that WPD had not complied with section 11(4) of the TAA, as it had not issued a notice to SARS indicating its intention to institute legal proceedings. On this issue, the High Court held that the provision does not require WPD to apply on notice or in the application itself to condone a failure to comply with it. The High Court is empowered with a wide discretion to condone a failure or to *"direct otherwise"*. It was then considered that SARS had an opportunity to file not only an answering affidavit, but also a supplementary affidavit and that both parties were given an opportunity to file heads of argument and make oral arguments on all the issues. As such, the High Court held that SARS had an opportunity to present its case properly, that there was no prejudice and thus held that it should *"direct otherwise"* and allow the matter to proceed without the notice requirement being met.

## No delivery, no pay: Another win for a taxpayer in the context of tax debt enforcement...*continued*

Considering that WPD's e-filing profile reflected that no final demand for income tax had been delivered via e-filing on 20 May 2020, the High Court held that SARS failed to comply with section 179(5) of the TAA.

The High Court then considered the merits of the application. The main issue was whether the final demand for payment had been delivered to WPD in the manner required by section 179(5) of the TAA. In support of its argument that the final demand was validly issued and delivered to WPD on 20 May 2020, SARS attached a "screen grab" indicating that a final demand for an overdue debt had been created on its system, which reflected the date of 20 May 2020. At the same time, WPD presented a "screen grab" of its e-filing profile, reflecting that no final demand had been received by WPD on 20 May 2020 for outstanding income tax.

Considering SARS and WPD's evidence, the High Court stated that the most important thing is that WPD's e-filing profile indicates that the S179 Notice was not received. The High Court held that to comply with section 179(5) in this matter, the demand had to be delivered via the electronic e-filing profile of WPD. According to the High Court, this was in accordance with section 179(5) of the TAA which refers to a "delivery to the tax debtor of a final demand." Considering that WPD's e-filing profile reflected that no final demand for income tax had been delivered via e-filing on 20 May 2020, the High Court held that SARS failed to comply with section 179(5) of the TAA. As such, the High Court held that the S179 Notice issued by SARS was null and void and that the amount of R6,284,915.88 had to be paid back to WPD, with interest.

The High Court rejected WPD's request for an interim interdict, to interdict SARS from initiating recovery proceedings against WPD on the basis that this would violate the separation of powers principle.

### Comment

The judgment shows that taxpayers can successfully enforce their rights against SARS, where SARS has not met the procedural requirements when using its powers to collect debt under the TAA. While the taxpayer in this matter was not properly notified of the final demand and SARS' conduct was therefore unlawful, the judgment should serve as a reminder for taxpayers with outstanding tax debts to ensure that they comply with the TAA and not get caught off-guard. While the taxpayer in this case was at least successful, it is safe to say that most taxpayers would likely want to avoid having to go to court and incur legal expenses to enforce their rights. The case is also further authority regarding the interpretation of section 179 of the TAA, which was also the subject matter discussed in our [Tax & Exchange Control Alert](#) of 14 May 2020.

What is also significant, is the High Court's finding that WPD was entitled to bring the application, despite the notice requirement in section 11(4) of the TAA not being met. This is particularly significant, as the section was recently amended to increase the notice period from one week to 10 business days. The judgment sheds light on the type of circumstances in which a high court application can be brought, without the notice requirement being met.

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### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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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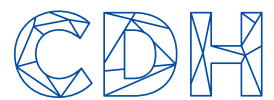
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