REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PRETORIA

CASE NO: 70549/2015

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

15 11 19
DATE

SIGNATURE

In the matter between:

IZAK HERMANUS BRITS	Applicant
and	
THE COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	1st Respondent
THE SOUTH AFRICAN REVENUE SERVICES	2nd Respondent

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] The applicant, Mr Izak Hermanus Brits ("the applicant"), seeks the following relief against the Commissioner for the South African Revenue Services ("first respondent"), and the South African Revenue Services ("the second respondent"):

1.1 That the applicant's tax assessment dated 27 December 2000 be reviewed and set aside;

1.2 That it be declared that-

1.2.1 the respondents are precluded by the provisions of section 171 of the Tax Administration Act 28 of 2011 ("the TAA") to recover VAT and/or interest from the applicant that emanate from the VAT period 2/1997;

1.2.2 the applicant's tax assessment dated 27 December 2000 (hereinafter referred to as "the December 2000 assessment") is null and void, alternatively, does not legally reflect an outstanding tax debt;

1.2.3 the second respondent may not appropriate any money in terms of section 191 of the TAA that is refundable, to the applicant in terms of his tax assessment dated 5 March 2014, as partial payment of the applicant's purported tax debt as reflected in the December 2000 assessment. Alternatively, that any decision by the respondent(s) to set-off the applicant's alleged tax debt (as reflected in the December 2000 assessment) against monies that are refundable to the applicant in terms of his tax assessment dated 5 March 2014, is hereby reviewed and set aside;

1.2.4 any monies that had been appropriated to pay the applicant's purported tax debt (as reflected in the

December 2000 assessment), are repayable to the applicant with immediate effect;

1.2.5 the December 2000 assessment is invalid and cannot be enforced or utilised to collate the monies reflected therein.

1.3 Insofar as may be necessary the 180 day period referred to in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), is hereby extended until service of this application.

1.4 Costs.

[2] The issues to be determined are the following:

2.1 whether the application was made following an unreasonable delay;

2.2 whether the applicant failed to exhaust internal remedies contemplated in s 104 of the TAA;

2.3 whether the second respondent has a lawful basis upon which to deduct the assessed amount from the refund that was due. In turn the following issues are to be determined:

2.3.1 whether or not the December 2000 assessment was ever raised;

2.3.2 whether or not the assessment was brought to the attention of the applicant; and

2.3.3 whether the second respondent had a lawful basis upon which to deduct the assessed amount from the refund that was due.

[3] It is apposite at this stage to set out in brief the factual background to the issues in dispute.

Factual background

[4] The applicant is a registered VAT vendor in terms of s 23 of the Value-Added Tax Act 89 of 1991 ("VAT Act"), with registration number 4170138673.

[5] During June 2013 and after having reactivated his VAT account, the applicant became aware that his account reflected an alleged VAT liability in respect of the VAT period 2/1997. The applicant's awareness of the tax liability was as a result of a tax refund which was due to him from which some amount had been deducted. According to the respondents this assessment was raised during April 1997 and authorised in December 2000. The amount of the alleged assessment is R 165, 602.81, together with arrear interest.

[6] The applicant, through his auditors sent an email, dated 7 May 2013, to the second respondent seeking an explanation as to how the 'December 2000' assessment was calculated. On 25 June 2013, the second respondent informed the applicant that it was unable to provide

him with the calculations as the matter had prescribed and the relevant documents were no longer available. Further, the second respondent indicated that the only information it had relating to the assessment in question was that the December 2000 assessment was based on an under-declaration of rental income and stock and assets on hand for the tax years 1996 and 1997. On the same day the applicant's auditors requested the second respondent to forward all correspondence sent to the applicant in relation to the assessment in question and the address on the second respondent's system at the time to which the correspondence was sent. Furthermore, the second respondent was informed that the applicant was not aware of the tax debt raised. In response the second respondent informed the applicant that the second respondent's system automatically issues what is known as a 'VAT217 notice' when there is an assessment raised and that the applicant should have received it. Further, the applicant's were informed that the assessment must have been sent to Box 379, Ladysmith and 536 Cove Crescent, Observation Hill, Ladysmith, the applicant's addresses which appeared on the second respondent's system during the relevant period.

[7] On 7 August 2013 the second respondent issued the applicant with a final demand for payment. On 23 August 2013 the applicant's auditors requested an explanation as to how the tax debt was reinstated in view of the fact that the 15 year prescription period, as envisaged in s 171 of the TAA, had expired. Section 171 of the TAA provides that:

"Proceedings for recovery of a tax debt may not be initiated after the expiration of 15 years from the date the assessment of tax, or a decision referred to in s 104 (2) giving rise to a tax liability, becomes final".

[8] On 27 August 2013 the second respondent informed the applicant's auditor that the tax debt had not prescribed because the assessment in question was raised in 2000.

[9] On 12 December 2013 the second respondent deducted an amount of R 13, 391.40 from the applicant's account. On 5 March 2014 another VAT assessment was raised in terms of which the applicant was entitled to a refund. The balance of the outstanding tax debt flowing from the December 2000 assessment was set off against the refund due.

[10] On 14 January 2014 the applicant's attorneys sought from the second respondent an explanation of the entries made in the VAT217 notice relating to the impugned assessment.

[11] On 11 April 2014 the applicant lodged an objection, in terms of s 103 of the TAA read with Rule 7(1)(a) of the Rules under the TAA, with regard to the December 2000 assessment. On 3 June 2014 the second respondent rejected the notice of objection on the ground that it was invalid as it had prescribed in terms of s 104(3) of the TAA. On 19 June 2014 a revised objection notice was submitted. This notice of objection made reference to the set-off applied to the refund due to an assessment made on 5 March 2014.

[12] On 16 July 2014 the applicant's attorneys wrote to the first respondent seeking his intervention to the dispute as contemplated in s 10(2) of the TAA.

[13] On 1 September 2014 the applicant filed a notice of appeal to the second respondent's notice of invalid objection. On the same day the second respondent informed the applicant' attorneys that the notice of appeal was invalid as an appeal could not be lodged in circumstances where the second respondent had not taken any decision whether or not to disallow the objection in full or in part.

[14] On 17 February 2015 the applicant obtained a default judgment, reviewing and setting aside the December 2000 assessment and granting the applicant other ancillary relief. The default judgment was, however, rescinded on 29 May 2015. 9 July 2015 the applicant withdrew this review application.

[15] On 20 July 2015 the second requested the applicant to give it an opportunity to reconsider whether a settlement was possible.

[16] On 17 August 201 the second respondent provided the applicant's attorneys with a duplicate VAT assessment of December 2000 which was generated on 7 April 2015.

[17] The respondents have raised two preliminary points, namely, that:

17.1 this application was instituted after an unreasonable delay; and

17.2 the applicant has failed to exhaust the available internal remedies as contemplated in s 104 of the TAA.

Unreasonable delay

[18] Section 7(1) and (2) of the Promotion of Administrative Justice Act ("PAJA") provides that:

> "(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons".

[19] The following submissions were made on behalf of the respondents in support of their contention that there has been an unreasonable delay in the prosecution of the review application. Counsel submitted that it is clear that by 7 May 2013 the applicant knew about the December 2000 assessment as it is the date on which his tax practitioner requested an explanation as to how the December 2000 assessment was calculated. Further that it was only on 12 December 2013 that the second respondent deducted the first amount (R13, 391.40) from the applicant' account. Furthermore, it was submitted that it was only in March 2014 that the balance of the assessment amount was deducted from the applicant' account when he qualified for a refund. Counsel argued that at no stage did the applicant challenge the substance of

the assessment. What has been challenged was whether or not the assessment was ever raised, whether or not the assessment was brought to the attention of the applicant and whether the second respondent was entitled to deduct from the refund which was due to the applicant. It was submitted that from the date on which the applicant became aware of the December 2000 assessment, he should have initiated the review application by 27 December 2013. Further, counsel submitted that even the final demand for payment issued on 7 August 2013 only elicited from the applicant a request for an explanation as to why the tax debt should not be considered as having prescribed after an explanation was provided on 27 August 2013 and no further action was taken by the applicant.

[20] On behalf of the applicant it was submitted that the review proceedings were initiated within a reasonable time in that since the second respondent could not provide the applicant with a plausible explanation for the assessment even by 7 March 2014, the time limits prescribed in s 7(1) could not commence. Further it was submitted that subsequent to the December 2013 partial deduction, there was on-going communication between the applicant and the second respondent with a view to reach a resolution and it was only when the talks deadlocked, that the applicant filed his initial review application on 9 January 2014. Further, it was submitted that after the default judgement was rescinded, further correspondence between the parties continued in order to try to resolve the impasse, which led to the applicant filing an

objection and a notice of appeal. When all failed, this application was issued on 2 September 2015.

[21] Counsel for the applicant submitted that the applicant was a lay person and needed the advice of experts and was under the impression that his tax practitioner had the requisite expertise to resolve the issue. It was only when he realised that the issue required a legally qualified person that he approached his attorneys.

[22] Taking into account the communication between the applicant's attorneys and the second respondent's officials during the period June 2013 until the institution of the first review application when the applicant's attorneys tried to ascertain the origin and the basis of the December 2000 assessment, it was not unreasonable therefore for the notice of objection to have been filed on 11 April 2014. Further, even after the objection was lodged, there was some communication between the applicant and the second respondent, which makes it unreasonable to expect the applicant to have launched these proceedings earlier. I am therefore satisfied that the period the applicant took before instituting these proceedings is not unreasonable and that failure by the applicant to institute these proceedings should be condoned.

Exhaustion of internal remedies

[23] Section 7(2) of PAJA provides that:

"(a) Subject to paragraphs (c), no court or tribunal shall review an administrative action in terms of this Act, unless any internal remedies provided for in any other law has first been exhausted.

(a) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(b) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice".

[24] It is the respondents' contention that the applicant failed to exhaust the internal remedies available to him after his notice of appeal was rejected as invalid. Respondents' counsel submitted that before launching the review application, the applicant had two potential remedies at its disposal.

[25] Firstly counsel relied on the provisions of s 106(1) of the TAA which reads as follows:

"(1) SARS must consider a valid objection in the manner and within the period prescribed under this Act and the 'rules'.

[26] It is the respondents' contention that the second respondent is only obliged to consider valid objections. With regard to the objection relating to the December 2000 assessment, the applicant had objected to the assessment on the ground that the assessment had never been raised and that the second respondent was not allowed to charge,

contrary to the *in duplum* rule, interest in excess of the capital amount. Counsel submitted that when the applicant lodged its revised objection after it was informed that the December 2000 had prescribed, the revised objection related to the March 2014 assessment on the same grounds as set out in the original notice of objection. It is common cause that in March 2014 no assessment was made except that a set-off was applied. It was counsel's contention that the applicant should have objected to the March 2014 set-off. Counsel further submitted that the final step the applicant should have taken with regards to the objection process was to lodge an appeal on 1 September 2014. Counsel denied that the second respondent had failed to enrol the appeal.

[27] In the alternative counsel argued that the applicant should have challenged the set-off decision in terms of s 190(6) which counsel suggested should be interpreted to mean that the taxpayer was entitled to lodge an objection not only against the decision not to authorise any refund at all but also a decision not to authorise the full amount that was lawfully due.

[28] Counsel further submitted that the applicant should have made an application to the tax court under rule 52(2)(b) which provides that:

> "A taxpayer or appellant may apply to a tax court under this Part-
>
> (c) If an objection is treated as invalid under rule 7, for an order that the objection is valid".

[29] In this regard counsel submitted that the notice issued by the second respondent, dated 5 August 2014, does not constitute a disallowance of the objection, but a notice of invalid objection in terms of s 104(5)(b) of the TAA. The respondents' counsel further submitted that since the second respondent had not made a decision whether to allow or disallow the applicant's objection, the applicant could not seek to appeal the rejection of a notice of appeal. Counsel argued that where an objection has been deemed to be invalid by the second respondent the appropriate course of action for an aggrieved taxpayer is to make an application on notice to the tax court for an order declaring the assessment to be valid.

[30] In conclusion counsel argued that failure by the applicant to utilise amounted to an abandonment of the internal appeal.

[31] Further, counsel submitted that since the applicant had failed to apply to be exempted from exhausting internal remedies before instituting these proceedings, this application should be dismissed.

[32] On behalf of the applicant it was submitted with regard to the institution of the review proceedings counsel submitted that there was an attempt to use the second respondent's internal processes in order to resolve the issue. However when two notices of objections were rejected by the second respondent on the basis the December 2000 assessment had prescribed, the applicant had no option but to institute legal proceedings. Furthermore counsel submitted that the applicant had no

other alternative but to institute the review proceedings as there was no further internal remedy that he could have used since the special tax court had no jurisdiction to hear an appeal to the decision to reject and to declare the notice of objection valid as the second respondent had rejected its objection to the December 2000 assessment and failed to enrol its notice of appeal.

[33] It was further argued on behalf of the applicant that it would have been to no avail for the applicant to object to the set-off in terms of s 191 of the TAA as the set-off was automatically applied and could not be objected to.

[34] It is common cause that there was no assessment on 5 March 2014 but that that date is the date on which the second respondent applied a set-off against a refund due to the applicant. As provided for in s 104, the correct procedure which the applicant should have followed was to object to the March 2014 set-off, and he did not. Further, it cannot be disputed that the second respondent had not taken any decision with regard to the applicant's revised notice of objection. And it was therefore not open to the applicant to have lodged an appeal.

[35] As correctly pointed out by counsel for the respondents, the applicant should have applied to the tax court in terms of rule 52(2)(b) for the invalid objection to be declared valid. I am therefore satisfied that the applicant, before launching this application, had not exhausted the available internal remedies available to him, contrary to the requirements of s 7 of PAJA. Further it is not in dispute that the

applicant has not applied to be exempted from exhausting internal remedies.

[36] In view of the conclusion I have reached in this regard, the applicant's application ought to be dismissed on this ground only. However, for the sake of completeness, the merits of the application will be dealt with.

[37] It is the applicant's contention that the December 2000 assessment was at no stage made; sent to and/or received by him and that the second respondent has no basis to set off the alleged assessment against the refund due.

[38] The applicant seeks to review and set aside the decision of the first respondent with regard to the December 2000 assessment on the grounds that:

38.1 the December 2000 assessment was at no stage raised; and

38.2 in the event of a finding that the December 2000 assessment was raised, that the applicant was never given notice of the assessment.

[39] The following provisions of the now repealed VAT Act are relevant.

[40] Section 31 of the now repealed the VAT Act provided that:

> "31(1) Where -
>
> (c) The Commissioner has reason to believe that any person has become liable for the payment of any amount of tax but has not paid such an amount;... the

Commissioner may make an assessment of the amount of tax payable by the person liable for the payment of such amount of tax, and the amount of tax so assessed shall be paid by the person concerned to the Commissioner.

(3) In making such assessment the Commissioner may estimate the amount upon which the tax is payable.

(4) The Commissioner shall give the person concerned a written notice of such assessment, stating the amount upon which tax is payable, the amount of tax payable, the amount of any additional tax payable in terms of section 60 and the tax period (if any) in relation to which the assessment is made, ...

(5) The Commissioner shall, in the notice of assessment referred to in subsection (4), give notice to the person upon whom it has been made that any objection to such assessment shall be lodged or sent so as to reach the Commissioner within 30 days after the date of such notice".

[41] Furthermore, section 71(2) and (3) read as follows:

"71(2) Any form, notice, demand, document or other communication required or authorised under this Act to be issued, given or sent to or served upon any person by the Commissioner or any other officer in terms of this Act shall, except where otherwise provided in this Act, be deemed to have been effectually issued, giving, sent or served-

(a) if delivered to him; or

(b) if left with some adult person apparently residing act or occupying or employed at his last known abode of office or place of business in the Republic; or

(c) if dispatched by registered or any other kind of post addressed to him at his last known address, which may be any such place or office as is referred to in paragraph (b) or his last known post box number or that of his employer;...."

"71(3) Any form, notice, demand, document or other communication referred to in subsection (2) which has been issued, given, sent or served in the manner contemplated in paragraph (c) or (d)(ii) ... of that subsection shall be deemed to have been received by the person to whom it was addressed at the time when it would, in the ordinary course of post, have arrived at the place to which it was addressed, unless the Commissioner is satisfied that it does not so received or was received at some other time or, where the time at which it was received or the fact that it was received is in dispute in proceedings under this Act in any Court having jurisdiction to decide the matter, the court is so satisfied: ..."

[42] The applicant seeks the review and setting aside of the December 2000 assessment on, *inter alia*, the following grounds:

42.1 That the assessment, if raised, is invalid and of no force and effect because the applicant was not notified of the assessment at the time it was raised and any steps taken to enforce the assessment or to rely on its validity are unlawful.

42.2 that the assessment was raised under circumstances which materially infringed upon the applicant's rights to fair administrative justice; and

42.3 that it was unreasonable for the second respondent to rely on an assessment raised 15 years ago.

[43] It is the applicant's contention that the December 2000 assessment does not exist and therefore that the second respondent is not entitled to apply a set-off.

[44] It is the applicant's contention that an assessment is valid only when it is raised; the assessment is sent to the taxpayer and there is a lawful basis for a deduction to be made.

[45] The applicant disputes that the December 2000 assessment was ever raised on basis that although the respondents allege that the assessment for 2/1997 was raised in December 2000, the applicant's account sent to his attorneys by the second respondent reflect that even though the assessment was raised in December 2000, the account reflects that a penalty was already imposed in March 1996 and withdrawn in 2006. Counsel for the applicant argued that it is apparent that the assessment was never raised as the respondents could not supply the applicant's attorneys with the original assessment or its copy.

[46] Further, it was argued that it appears that the impugned assessment was only in the mind of the second respondent's officials as the respondents could not produce the documentation relating to the December 2000 assessment. In this regard the applicant relies on the matter of *Irvin & Johnson (SA) Ltd v Commissioner for Inland Revenue* 1946 AD 483 where the court held at 486 that:

> "Now the word 'assessment' is defined in the Act as the "determination of an amount upon which any tax is leviable under this Act is

chargeable" unless the context otherwise indicates. An examination of various sections will show that the word is used in the Act in more services than one. The word may denote something subjective, i.e., the mental process or act of determining such amount, but it is more usually used, to denote something objective, i.e., the visible representation by with and figures of that mental process. Subjectively, an assessment is an abstraction that has no real existence until it is published by being expressed in symbols which convey a meaning to others. So long as it is locked up in the mind of the assessing officer, ..., it cannot be dealt with as required by the Act. Its particulars cannot be recorded by anyone except the assessing officer, they cannot be filed (see sec.67(2)); the Commissioner cannot issue the assessment (see sec.67(8)), nor he alter it. It seems clear, therefore, that in most cases in the Act the word "assessment" does not mean the unexpressed thoughts of the assessing officer but the written representation of those thoughts. Again, assessment must result in a figure, it is an "amount" which has to be determined and it is that "amount" or figure which the Commissioner may "reduce" or "alter" under sec. 77(6)), ...".

[47] On behalf of the respondents it was submitted that the December 2000 assessment was actually raised in 2000, even though the original verifying documents could not be produced in that once an assessment becomes final, the second respondent does not keep the documentation but destroys it. It was further submitted that the second respondent is unable to make a photocopy of the assessment as it ordinarily destroys all records of an assessment once five years from the date of assessment have passed. In this regard, the respondents rely on the provisions of s 97(4) of the TAA which provides that:

"The record of an assessment, including the return or records on which it was based, whether in electronic format or otherwise, may be destroyed by SARS after seven years from the date of assessment or

the expiration of a further period that may be required by the Auditor-General ...".

[48] As a result, the second respondent was able to produce a duplicate assessment. It was submitted on behalf of the respondents that the duplicate assessment was sufficient proof that the December 2000 assessment was made. In this regard this court was referred to the provisions of s 170(a) which read as follows:

> "The production of a document issued by SARS purporting to be a copy of or an extract from an assessment is conclusive evidence-
>
> (a) of the making of the assessment".

[49] Counsel for the respondents argued that based on s 170 the duplicate assessment purports to be an extract from the December 2000 assessment.

[50] Bearing in mind that the respondents are entitled to destroy assessments and any documentation relating to those assessments after the lapse of the prescribed period of time, it is unreasonable for the applicant to expect the respondents to be in a position to produce a copy of the original assessment which was raised in 2000. Furthermore, I am in agreement with the respondents' counsel's interpretation of s 170 that a duplicate assessment qualifies as an extract of an assessment, particularly as the respondents have contended in their answering affidavit that the duplicate assessment was drawn from information still on their system. Nothing turns on the fact that the duplicate assessment reflects a 2015 date as the

respondents have explained in their answering affidavit that the information pertaining to the December 2000 assessment was extracted from their system in 2015. I am therefore satisfied that an assessment was actually raised in December 2000.

[51] With regard to the second point, the applicant contends that he does not know anything about the December 2000 assessment in that it was either not sent or received.

[52] It was submitted on behalf of the applicant that the applicant was unaware of the VAT registration in his name. In his founding affidavit, the applicant alleges that during the period in question, he was farming in partnership with his brother under the name of Brits Boerdery with VAT number 468-015-8823. He became aware that he has a VAT registration number after his auditors informed him that he is already registered as a VAT vendor and that his number has been reactivated.

[53] Counsel for the applicant submitted further that the respondents were unable to prove that the assessment was sent to the applicant's address in that there was no proof of the dispatch of the assessment, which would indicate that the assessment was sent to the applicant's correct postal address and which would also indicate the Post Office date stamp. In this regard the court was referred to the *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) and *Kubyana v Standard Bank of South Africa* 2014 (3) SA 56 (CC), cases dealing with the National Credit Act where the Constitutional Court set out the

requirements of proof by creditors that a s 129(1)(a) notice was sent and received by a consumer. Currently creditors have to show that the notice was sent by registered mail to the consumer's correct branch of the Post Office; that the Post Office issued a notification to the consumer that a registered item was available for collection; and that the notification did reach the consumer. Counsel argued that the second respondent has to comply with the same requirements with regard to the dispatch of assessments to taxpayers.

[54] On behalf of the respondents it was submitted that when the applicant's December 2000 assessment was made, the second respondent's bulk printing, inclusive of tax assessments raised, notices and demands, were done at a secured regional venue. The printed documents would then be automatically mailed to the relevant taxpayer and no hardcopies would be kept. Counsel maintains that this process is still retained by the second respondent. Furthermore, it was argued that the applicant did receive the tax assessment in that it was sent to a postal address which he currently uses. Furthermore, it was submitted on behalf of the respondent that there is uncontroverted evidence that since August 1993 to 2000 the applicant had judiciously submitted his returns from which he received refunds and that the applicant's VAT account became inactive in 20000 until 2013 when he claimed a VAT refund.

[55] In its contention that the applicant did receive the 20 December, 2000 assessment, the respondents rely on the provisions of s 71(2)(c) read

with s 71(3) of the VAT Act and argue that the applicant is deemed to have received the assessment particularly as the applicant's address on the second respondent's system is still the same as the address he uses. It was argued that the fact that the deponent to the answering affidavit does not work in printing is irrelevant as the deponent has stated that because of her position, she was in a position to access documents relating to the applicant's tax affairs and was therefore able to confirm that she had personal knowledge that the December 2000 assessment was sent to the applicant.

[56] It is not in dispute that the applicant is still using the postal address he was using prior the raising of the December 2000 assessment. The applicant's assertion that he was not aware that he was a VAT registered vendor is not probable if one takes into account his evidence that in 2013 he discovered that there was a tax debt when he reactivated his VAT account. Secondly, the applicant did not dispute or deny the respondents' evidence that prior to 2000 he had submitted returns and claimed refunds and that subsequently his account became dormant until he was due for a refund in 2013. In light of the provisions of s 71(2), the applicant is deemed to have received the disputed assessment. I am of the view that the applicant's disavowing of receiving the December 2000 assessment cannot be admitted. I am satisfied that the respondents have proven on a balance of probabilities that the December 2000 assessment was dispatched to and received by the applicant who decided to ignore it.

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[56] It is not in dispute that the applicant is still using the postal address he was using prior the raising of the December 2000 assessment. The applicant's assertion that he was not aware that he was a VAT registered vendor is not probable if one takes into account his evidence that in 2013 he discovered that there was a tax debt when he reactivated his VAT account. Secondly, the applicant did not dispute or deny the respondents' evidence that prior to 2000 he had submitted returns and claimed refunds and that subsequently his account became dormant until he was due for a refund in 2013. In light of the provisions of s 71(2), the applicant is deemed to have received the disputed assessment. I am of the view that the applicant's disavowing of receiving the December 2000 assessment cannot be admitted. I am satisfied that the respondents have proven on a balance of probabilities that the December 2000 assessment was dispatched to and received by the applicant who decided to ignore it.

[57] No argument was presented with regard to the *in duplum* rule and therefore there is no necessity to deal with it.

[58] In view of the evidence before me and submissions made by counsel, and the fact that the assessment had not prescribed as the first demand for payment was made in August 2013, I am satisfied that the respondents are justified in applying a setoff of the December 2000 assessment against any refund due to the applicant.

[59] As a result the following order is made:

'The application is dismissed with costs'.

N P MNGQIBISA-THUSI
Judge of the High Court

Appearance

For Applicant: Advocate De Wet (instructed by Rossouw & Prinsloo Inc)

For the Respondents: Advocate Berger (instructed by Mothle Jooma Sabdia Inc)