REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 31339/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

19/8/2020 . .....
DATE SIGNATURE

In the matter between:

WPD FLEETMAS CC Applicant

and

COMMISSIONER: SOUTH AFRICAN REVENUE SERVICES First Respondent

IMPALA PLATINUM LIMITED Second Respondent

J U D G M E N T

D S FOURIE, J:

[1] This is an application in the Urgent Court for an order declaring that the first respondent's notice dated 22 June 2020 to appoint a third party in terms of the provisions of section 179 of the Tax Administration Act No 28 of 2011 be declared null and void. In addition

thereto the applicant applies for an order that the first respondent must repay the amount of R6,284,915.88 which was paid over by the second respondent as a third party to the first respondent. Finally, the applicant also applies for an interim interdict, pending the applicant's launching of a review application against the first respondent, interdicting and restraining the first respondent from *"initiating and/or continuing recovery proceedings".* The application is opposed by only the first respondent.

CASE FOR THE APPLICANT

[2] The applicant is a service provider to the second respondent for the supply of underground winch signalling device systems. The applicant is remunerated on a monthly basis.

[3] On 22 June 2020 the first respondent issued a third party notice to the second respondent in terms of section 179 of the Tax Administration Act. On 8 July 2020 and in terms of the said notice, the second respondent paid over to the first respondent the amount of R6,284,915.88.

[4] The applicant points out that only on 7 July 2020 (after the third party notice was issued) the first respondent issued and addressed a *"final letter of demand"* to the applicant and therefore, so it is contended, the first respondent has failed to comply with the provisions of section 179(5) of the Tax Administration Act.

[5] The applicant also applies for an interim interdict. It is alleged that it has a *prima facie* right to have the first respondent interdicted as requested in the notice of motion. According to the applicant there is a clear disregard for the law, including the rule of law, constituted as such by the behaviour of the first respondent.

CASE FOR THE FIRST RESPONDENT

[6] The first respondent has raised three points *in limine.* The first is that the application is not urgent, the second that the application is premature as the internal processes of the first respondent have not been exhausted and finally that no written notice of at least one week of the applicant's intention to institute legal proceedings, was given to the first respondent.

[7] According to the deponent on behalf of the first respondent there was proper compliance with the provisions of section 179 of the Act. Prior to the appointment of the third party, a *"final demand dated 20 May 2020"* was sent to the applicant by the first respondent on even date. A copy of this letter is attached to the answering affidavit ("RK1").

[8] According to the first respondent this letter was delivered via an *"electronic filing transaction"* which means that the letter was delivered via *"the applicant's e-filing profile".*

A copy of the screen grab/shot of the applicant's efiling profile (SARS Service Manager) is also attached to the answering affidavit ("RK2").

[9] It is further alleged that the final demand of 20 May 2020 was also sent to the address furnished by the applicant and that the applicant does not explain why it never received the said letter. However, in a supplementary affidavit filed by the first respondent it is pointed out that the deponent *"erred in stating that* a *copy of the aforesaid demand was sent to the applicant's address via the postal service".* It is then confirmed that the notice was *"only sent through electronically to the applicant".*

DISCUSSION

[10] The amount of money involved is no less than R6 million. According to the applicant it will not be able to pay the salaries of its employees and its service providers for a second month. This will have a *"knock-on effect"* and will result in the applicant losing its service providers. Having regard to this evidence, I am of the view that this application is indeed urgent.

[11] Counsel for the first respondent also submitted that the issue regarding urgency is *res judicata* as this matter was previously also in the Urgent Court before Neukircher J who struck it from the roll because of no urgency. One of the requirements of this defence is that the judgment or order must be a final and definitive one on the merits of the matter. It is common cause that Neukircher J never decided the merits of the matter. Furthermore, an order in terms whereof a matter is struck off the roll because of no urgency constitutes a procedural ruling as opposed to a judgment which finally determines the rights and obligations of the parties. I therefore conclude that there is no merit in this defence.

[12] During argument counsel for the first respondent made it clear that the point *in limine* regarding the applicant's failure to first having exhausted the internal processes only applies to the second part of the application (i.e. paragraphs 4, 5 and 6 of the notice of motion) and not to the first part thereof where the applicant applies for a declaratory order and payment (as referred to in paragraphs 2 and 3 of the notice of motion). I shall therefore refer to this defence again when I consider the second part of the application.

[13] The next point *in limine* relates to section 11(4) of the Tax Administration Act. The first respondent takes the point that no written notice of at least one week of the applicant's intention to institute legal proceedings, was given to the Commissioner.

[14] Section 11(4) of the Act provides as follows:

> "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 ten business days of the applicant's intention to institute the legal proceedings."

[15] Both counsel were unable to refer me to any authority where this subsection was considered. The words *"unless the Court otherwise directs"* are important in this matter. This sub-section does not require the applicant to apply on notice or in the application itself to condone a failure to comply with it. It appears that the Court is empowered with a wide discretion to condone a failure or to *"direct otherwise".* Obviously, this must be done in a judicial manner.

[16] In this regard I take into account the fact that the Commissioner not only had the opportunity to file an answering affidavit, but also a supplementary answering affidavit. I also take into account that both parties were given the opportunity to file heads of argument. Furthermore, I also afforded both parties the opportunity to orally address me on all the issues. This means, in my view, that the first respondent had the opportunity to put his case before Court and that there appears to be no prejudice in this regard. The matter came before me ready to be adjudicated. I therefore conclude that in this matter I should *"direct otherwise"* by allowing the matter to proceed before me without the applicant having complied with the provisions of this sub-section. This point *in limine* can therefore not succeed.

[17] That brings me to the merits of the application. I shall first consider the first part and thereafter the second part.

FIRST PART

[18] In the first part of the application the applicant applies for a declaratory order that the first respondent's notice of 22 June 2020 to appoint a third party in terms of the provisions of section 179 of the Tax Administration Act, be declared null and void and that the first respondent be ordered to repay the amount of R6,284,915.88 to the applicant which was paid over by the second respondent to the first respondent.

[19] Section 179(1) of this Act provides that 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 to a taxpayer, requiring that person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt. The issue of such a notice is subject to certain statutory conditions. Sub-section (5) states in this regard as follows:

> "SARS may only issue the notice referred to in ss (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest ten business days before the issue of the notice, which demand 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, including, in respect of recovery steps that may be taken under this section—
>
> (*a*)
>
> (*b*) if the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under ss (1), based on serious financial hardship."

[20] The main issue between the parties relates to the delivery of such notice to the applicant as a tax debtor. The applicant maintains that such a notice was never delivered to it prior to the issuing of the so-called third party notice to the second respondent. On the other hand, it is alleged by the first respondent that such a notice was indeed timeously delivered to the applicant. Two documents have been annexed to the papers, annexure "RK2" which is a so-called *"screen grab"* of the first respondent and "RA3" which is a *"screen grab"* of the applicant. These documents are, as far as the section 179(5) notice is concerned, irreconcilable as they both tell a different story.

[21] The section 179(5) notice on which the first respondent relies is dated 20 May 2020 and is addressed to the applicant. It appears, on the face of it, to be a notice in terms of sub-section (5).

[22] The first respondent gives the following explanation with regard to the delivery of this notice:

> "I am advised that this honourable Court might have a difficulty with the aforesaid annexures because it is my view that for the electronic communication to be complete and regarded as delivered, the complete transaction must be entered into the information system of SARS and correctly submitted by SARS to the electronic page of the registered user as set out in Rule 3(2)(*b*)(i) of the Rules for Electronic Communications issued in terms of the Act."

[23] The manner of delivery is then further explained by the first respondent to be the following:

> "This is so because, in terms of Rule 3(3) if an acknowledgement of receipt for the electronic communication is not received, the communication should be regarded as not delivered, except for an electronic filing transaction. It therefore should follow that if the first respondent did deliver the letter of demand via the applicant's e-filing profile, it would be deemed to have been delivered. This is simply so because, the first respondent only needs to show that the demand was delivered via electronic e-filing profile of the applicant. It is for this reason that I now attach a copy of the screen grab of the applicant efiling profile (SARS Service Manager) and marked same as annexure 'RK2' ".

[24] Annexure "RK2" indicates, *inter alia,* that according to this document a final demand for an overdue debt has been created which appears in a column under the heading *"Item Date of Receipt"* where the date of 20 May 2020 appears. It looks as follows:

> "Case – A final demand letter for overdue debt has ... 316996793 ... 2020105120 (under the heading 'Item Date of Receipt') ... ."

[25] In its replying affidavit the applicant refers to annexure "RA3", being a screen grab of the applicant's e-filing profile which differs materially from the screen grab on which the first respondent relies. This document consists of many pages. At the top left hand corner of each page appears the words *"Secure.SARSefiling.co.za"* and which is, according to the applicant, the e-filing profile of the applicant. Various entries appear on the relevant page thereof (010-39 of Case Lines). The first entry appears at the bottom of the page and is dated 7 May 2020 whereas the last one appears at the top of the page and is dated 10 June 2020. The period covered by this page is therefore between 7 May 2020 and 10 June 2020. There is for instance an entry dated 20 May 2020 which is a final demand with regard to Value-Added Tax (not applicable in this application), but no entry to indicate that a final demand was received by the applicant on 20 May 2020 for outstanding income tax.

[26] During debate counsel for the first respondent conceded that the final demand dated 20 May 2020 should have appeared on this page of "RA3", but it is not there. This leads me to the conclusion that there may be one of two possible explanations: either the applicant did not receive the said notification as a final demand or that it has been fraudulently removed (if possible) from the applicant's e-filing profile ("RA3"). There is no evidence suggesting that the latter possibility is applicable and I also have no reason to suspect such conduct by any person. There may be more than one explanation why the said notification does not appear on the e-filing profile of the applicant, for instance, a technical error or a lack of proper communication in the electronic system. However, what is important is that the applicant's e-filing profile ("RA3") indicates that it was not received.

[27] The first respondent does not rely on an acknowledgement of receipt for the electronic communication. This means that the first respondent, in the words of the deponent to the answering affidavit, needs to show *"that the demand was delivered via electronic e-filing profile of the applicant".* This explanation is, in my view, in accordance with the wording of section 179(5) of the Tax Administration Act which pertinently refers to a *"delivery to the tax debtor of* a *final demand"* (my emphasis). This, according to the evidence, and with specific reference to "RA3", did not take place. I therefore have to conclude that the first respondent failed to comply with the provisions of section 179(5) of the Tax Administration Act and therefore the notice dated 22 June 2020 to appoint a third party should be declared null and void.

SECOND PART

[28] In the second part of the application the applicant applies for an interim interdict, pending the applicant's launching of a review application, interdicting and restraining the first respondent from *"initiating and/or continuing recovery proceedings"* against the applicant.

[29] It is explained in the founding affidavit that the applicant has been engaging the first respondent since at least 22 January 2019 with an offer in terms of section 200 of the Tax Administration Act for a compromise. According to the applicant the application for a compromise had been shifted around between officials and feedback from the first respondent was only obtained during July 2019. Notwithstanding an attempt to reach a compromise, the first respondent ultimately decided not to approve the application. It is for this reason, so it appears, that the applicant seeks an interim interdict pending the applicant's launch of a review application against the first respondent.

[30] The purpose of the interim interdict is to restrain the first respondent from *"initiating and/or continuing recovery proceedings"* against the applicant. This clearly implies that the first respondent should be interdicted to perform its statutory duties regarding recovery proceedings for outstanding tax debt.

[31] By granting an order as requested, such action would, in my view, amount to an intrusion into the exclusive terrain of an organ of state as another branch of government. This would, in my view, violate what may be called the *"separation of powers principle".* In *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (6) SA 223 (CC) par 47 it was pointed out that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted *"only in the clearest of cases and after* a *careful consideration of the separation of powers harm".* In the application before me there is no indication that it should be regarded as one of the *"clearest of cases".* This means that, in my view, the second part of the application cannot succeed. Having come to this conclusion, it is not necessary to also consider the other point *in limine* regarding the applicant's failure to first exhaust the internal remedies.

COSTS *DE BONIS PROPRIIS*

[32] The legal representatives acting for the first respondent have indicated that an order for payment of costs *de bonis propriis* should be granted against the attorneys acting for the applicant. The main reason for this request is that the attorneys for the applicant re-enrolled this application in the Urgent Court after it had been struck off the roll for lack of urgency by Neukircher J and that such conduct amounts to an abuse of the process of Court.

[33] An order of this nature may be granted against a representative to pay costs out of his own pocket by way of a penalty for some improper conduct (Erasmus, Superior Court Practice, 2nd Ed, 05-3). Such an order is not easily granted and good reason for such a cause should be shown, such as want of *bona tides* or unreasonable action or improper conduct. *(Grobbelaar v Grobbelaar* 1959 (4) SA 719 (AD) at 725).

[34] In the matter before me I am unable to find that the attorneys representing the applicant have conducted themselves in such a manner or that there is an abuse of process. On the contrary, I have already concluded that this matter is urgent and that it should be considered by this Court. This is in itself an indication that there is no merit in the application for such an order. In this regard I should also take into account the fact that the attorneys acting for the applicant appointed counsel to represent them in these proceedings and that the costs incurred for such representation should therefore be paid by the first respondent.

ORDER

In the result I make the following order:

1. The first respondent's notice dated 22 June 2020 to appoint the second respondent as a third party in terms of the provisions of section 179 of the Tax Administration Act No 28 of 2011 , is declared unlawful and therefore also null and void;,

2. The first respondent is ordered to repay the amount of R6,284,915.88 to the applicant, within 14 days after service of this order, together with interest a *tempore morae* calculated from the date when this amount of money was received by the first respondent to date of repayment thereof to the applicant;

3. The application regarding the relief sought in paragraphs 4, 5, 6 and 7 of the notice of motion is dismissed;

4. The costs of this application shall be paid by .the first respondent;

5. The costs incurred by the attorneys acting for the applicant to defend themselves against an application for payment of costs *de bonis propriis,* including the costs incurred in the employment of counsel, shall be paid by the first respondent.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA