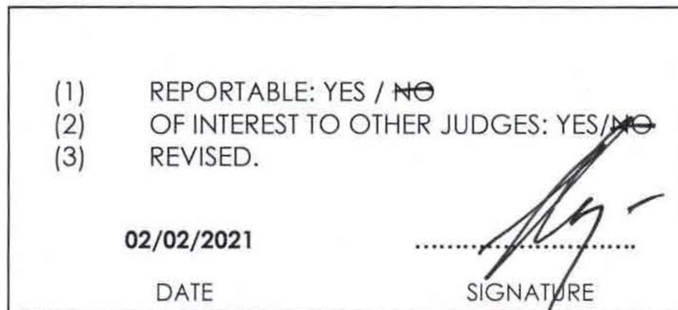
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 25705/2019



(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

02/02/2021 ....

DATE SIGNATURE

IN THE MATTER BETWEEN:-

PRICEWATERHOUSECOOPERS INC	First Applicant
PRICEWATERHOUSECOOPERS SOUTH AFRICAN FIRM	Second Applicant

And

MINISTER OF FINANCE	First Respondent
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Second Respondent

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JUDGMENT

Kollapen J

[1] These are proceedings that relate to a constitutional challenge to the provisions of Section 39(7) of the Value- Added Tax Act No 89 of 1991 (the Vat Act) which provide for the circumstances under which the Commissioner of the South African Revenue Services is empowered and authorised to effect a remittal of interest levied and paid in terms of the Vat Act.

[2] The relief sought in the Notice of Motion reads as follows :-

*" 1. Declaring section 39(7) of the Value- Added Tax Act 89 of 1991 (**VAT Act**) to be unconstitutional and invalid to the extent that it fails to provide for the remittal of interest on late VAT payments where, having regard to the output tax and input tax relating to the supply in respect of which interest is payable, the failure to make payment within the prescribed period did not result in any financial loss (including any loss of interest) to the fiscus and/ or the State;*

2 Severing and reading-in the following words to s 39(7) of the VAT Act, for so long as it remains in operation with regard to interest (insertions underlined, deletions struck through):

"Where the Commissioner is satisfied that the failure on the part of the person concerned or any other person under the control or acting on behalf of that person to make payment of the tax within the period for payment contemplated in subsection (1) (a), (2), (3), (4), (5), (6), (6A), or (8) or on the date referred to in subsection (5), as the case may be-

(a) Was due to circumstances beyond the control of the said person, he or she may remit, in whole or in part, the interest payable in terms of this section;

(b) Was not due to an intent not to make payment or to postpone liability for the payment of tax, he or she may remit, in whole or in part, any penalty payable in terms of this section; or

(c) Did, having regard to the output tax payable and input tax deductible in relation to the supply in respect of which

interest is payable, not result in any financial loss (including any loss of interest) to the State, he may remit, in whole or in part, the interest payable in terms of this section."

3. *Ordering that the declaration of invalidity in paragraph 1 above, and the severance and reading-in in paragraph 2 above, will not apply retrospectively to any payment of interest that has already been made and that has not been disputed or in respect of which remittal has not been claimed, or where the taxpayer's claim for remittal thereof has already been finally determined in accordance with the applicable legislation.*

4. *Declaring that the First Applicant is entitled to a full remittal of the interest in dispute (i.e. R20 008 589.99) in terms of s 39(7)(c) of the VAT Act as set out in paragraph 2 above.*

5. *In the alternative to paragraph 4, directing the Second Respondent to consider and determine, within 30 days of the date of this order, the First Applicant's application for remittal of interest in accordance with s 39(7)(c) of the VAT Act as set out in paragraph 2 above."*

[3] Both respondents oppose the application.

The facts and the history of the dispute between the parties.

[4] The Applicants are related entities and the PWC Partnership (the 2nd Applicant) provides ongoing professional services (all being taxable supplies for VAT purposes) to PWC Inc. (the 1st Applicant) for which it furnishes tax invoices, based on estimates of the services rendered at the end of each month.

[5] At the end of each financial year, PWC Partnership conducts a "true-up" exercise by reference to the services actually supplied, to determine whether it has over- or under-invoiced PWC Inc. through its monthly invoices.

[6] PWC Partnership duly conducted that exercise for the financial years 2009 to 2013, and in each of those five years found that it had in fact over-invoiced PWC Inc. for its services. The result of the true-up exercise (i.e. the reduction

of the amount charged to PWC Inc.) was duly processed for income tax and accounting purposes and the financial statements and income tax returns for both entities for each of the five years in question reflected the correct amounts for the services in question.

[7] The Applicants say however that owing to an 'administrative or system oversight', the true-up results were not processed with regard to the declaration and payment of VAT. Because PWC Partnership had overcharged PWC Inc. in each year, it had also overcharged VAT on its services. PWC Partnership ought, therefore, to have issued VAT credit notes to PWC Inc. at the end of each financial year, thereby reducing its taxable supplies for the year, and reclaimed the overpaid VAT from SARS. Because it did not process the true-up exercise for VAT purposes, it did not do so.

[8] As a result of this failure, PWC Inc. did not pay the VAT that it ought to have at the required time and PWC partnership paid more Vat than it should have and by the same margin as the underpayment of PWC Inc.

[9] SARS imposed penalties and interest on the late VAT payments as the Vat Act obliges it to do. Arising out of this a Voluntary Disclosure Agreement ('VDA') was concluded between PwC Inc. and SARS on the 7 November 2014.

[10] SARS in accordance with the VDA then did the following:-

a) Issued assessments for the relevant tax periods totalling R 97 988 700.18.
b) Levied late payment penalties of R 9 798 870.00
c) Levied interest in the total amount of R 27 390 270.00 .

[11] Following a request by PWC Inc. for the remittal of the penalties imposed as well as interest charged, SARS remitted the full late payment penalty as well as the interest for 2009 (R 7 381 683.71) but did not remit the interest for the period 2010 to 2013. SARS reasoning was that Section 39(7) of the VAT Act (on which SARS had relied on in remitting the interest for 2009) had been amended in 2010 and the effect thereof was to remove the possibility of remitting interest when there was no loss to the *fiscus*.

[12] PwC lodged an objection against the decision of SARS which objection was rejected on the 23 August 2018 resulting in the launch of this application on 11 April 2019.

The legislative scheme

Levying of Interest -Section 39(1)(a)

[13] Section 39(1)(a)(ii) of the VAT Act provides as follows:

> *" If any person who is liable for the payment of tax and is required to make such payment in the manner prescribed in section 28 (1), fails to pay any amount of such tax within the period for the payment of such tax specified in the said provision, he shall, in addition to such amount of tax, pay-*
>
> *...*
>
> *(ii) Where payment of the said amount of tax is made on or after the first day of the month following the month during which the period allowed for payment of the tax ended, interest on the said amount of tax, calculated at the prescribed rate (but subject the provisions of section 45A) for each month or part of a month in the period reckoned from the said first day"*

[14] It is clear from the section that it is mandatory for SARS to charge interest on late payments of VAT and that the peremptory language of the section offers no discretion to SARS on whether or not to levy interest. It is required in all cases where there is a late payment.

The remittal of interest

[15] There was a change in the legal regime with regard to the remittal of interest with effect from the 1 April 2010 and it will be useful to set out the position pre and post April 2010

The position before 1 April 2010

[16] In respect of the position prior to 1 April 2010, section 39(7)(a) provided as follows:

> *"To the extent that the Commissioner is satisfied that the failure on the part of the person concerned or any other person under the control or acting on behalf of that person to make payment of the tax within the period for payment contemplated in subsection (1) (a), (2), (3), (4), (6) or (6A) or on the date referred to in subsection (5), as the case may be-*
>
> *(a) (i) did, having regard to the output tax and in respect of which interest is payable, not result in any financial loss (including any loss of interest) to the State; or*
> *(ii) such person did not benefit financially (taking interest into account) by not making such payment within the said period or on the said date,*
>
> *He may remit, in whole or in part, the interest payable in terms of this section..."*

The position after the 1 April 2010

[17] From the 1 April the amended section 39(7)(a) read as follows:-

> *"Where the Commissioner is satisfied that the failure on the part of the person concerned or any other person under the control or acting on behalf of that person to make payment of the tax within the period for payment contemplated in subsection (1) (a), (2), (3), (4), (6), (6A) or (8) or on the date referred to in subsection (6), as the case may be-*
>
> *(a) Was due to circumstances beyond the control of the said person, he or she may remit, in whole or in part, the interest payable in terms of this section..."*

[18] It is apparent that the position pre and post April 2010 represents a significant shift in focus on the basis upon which a remittal of interest may be granted. In the pre April 2010 period it was focussed exclusively on the question of benefit and loss to the fiscus. A remittal was permissible where the State did not suffer a financial loss or where the taxpayer did not benefit financially.

[19] In the post Aril 2010 period the focus has shifted to the cause of the delay and a remittal may only be granted where the cause of the delay in making a late payment was beyond the control of the taxpayer.

The basis on which the relief is sought

[20] The Applicants challenge the constitutionality of Section 39(7) on two main grounds and contend that the section is:-

a) **Irrational and arbitrary.** They say section 39(7) is irrational and arbitrary in that it permits the charging of interest without any right of remittance in the absence of loss to the fiscus and
b) Section 39(7) permits the **arbitrary deprivation of property** and is in conflict with Section 25 (1) of the Constitution.

[21] I proceed to deal with the two challenges

Section 39(7) is arbitrary and irrational

Is Section 39(1) also under review?

[22] Section 39 of the Act distinguishes between the circumstances under which interest is charged and those that apply to the remittal of interest. As indicated Section 39(1) which regulates the levying of interest is cast in peremptory terms with the result that SARS is obliged to levy interest where payment of the tax due is made late. The Applicants have attempted to argue that even though the relief sought in the Notice of Motion relates to the unconstitutionality of Section 39(7), seen in its proper context the challenge is both in relation to the levying of interest as set out in Section 39(1) as well as the circumstances under which the remittal of interest is allowed.

[23] The Applicants, relying on *South African Transport and Allied Workers Union and Another v Garvas and Others 2012(8) BCLR 840 CC* urged the Court to

look at the section as whole including Section 39(1) as part of the legislative package that governed both the raising of interest as well as its remittal. Even if one accepted the invitation to look at the section as a whole the provisions of Section 39(1) stand on a different policy and legal footing than those of Section 39(7). Section 39(1) deals exclusively with the circumstances under which interest may be charged and lateness is the trigger for the levying of interest. Whatever reason the taxpayer may offer in mitigation of the late payment is not relevant at this stage of the enquiry. Its relevance arises in the Section 39(7) determination of remittal. And so the two relevant parts of the Section that deal with the raising of interest and then its remittal stands separately apart from each other both in structure as well as in the policy and legal basis on which they rest, that render a joint overview of their unconstitutionality problematic and conceptually impossible.

[24] Therefore and even if one had regard to the section in its entirety there is no attack on Section 39(1) and given the considerable difference in what Section 39(1) and Section 39(7) seek to do it could hardly be permissible to allow the Applicants to argue the unconstitutionality of Section 39(1) when the papers do not traverse such a challenge

[25] An attack on Section 39(1) was not the case the Respondents were required to meet and they may have had something to say if that was the case. It would be erroneous to assume that what the Respondents have said in defence of Section 39(7) would be mirrored in their defence of Section 39(1) if they were properly required to launch such a defence.

[26] It is for these reasons that the constitutional challenge must be confined to what the Notice of Motion says – a declaration of invalidity of Section 39(7) that deals with the remittal of interest.

[27] That the Rule 16 A Notice that mirrors the notice of motion but in additions says 'as read with Section 39(1)' does not change the position at all and cannot through a mere reference to Section 39(1) form the basis of an argument that that Section is also under attack and review.

Irrational and arbitrary

The Vat system

[28] South Africa's VAT system has been described as sophisticated with numerous complex provisions that in the main places considerable emphasis on the taxpayer as an involuntary tax collector.

[29] The South African VAT system is an invoice-based system in terms of which the VAT for each supply of the product or service is not calculated individually. The VAT liability for a tax period is calculated having regard to all the output tax and input tax in that particular tax period. The VAT payable by a vendor is levied and calculated by taking into account the specific sale and purchase transactions entered into by each individual vendor during a tax period. It is not relevant, for determining the VAT amount payable by a vendor in terms of section 16(3), whether the VAT levied by the vendor on a sale transaction or VAT payable in relation to an adjustment is deductible as input tax by another vendor.

[30] In *Masango v The Road Accident Fund 2016 (6) SA 508 (GJ) at para 38* the mechanics of the South African VAT system and the liability for VAT has been considered by our courts as being a tax imposed on the supplier of goods or services, and is not a tax on the recipient.

[31] For purposes of administering the VAT Act, the VAT Act looks at the registered vendor in its individual capacity. The VAT Act does not contain grouping rules or any set-off rules across separate entities. Furthermore, the VAT Act does not require a 'look through' principle to determine the tax treatment of transactions.

[32] In *Metcash Trading Limited v Commissioner of South African Revenue Service and Another 2001 (1) SA 1109 (CC) at para 11* the Constitutional Court described the system in the following terms:-

> "*Vendors are entrusted with a number of important duties in relation to VAT. First there is the duty to calculate and levy VAT on each supply of goods; then calculate the output tax and the input tax on*

that transaction correctly; also to keep proper records supported by the prescribed vouchers, periodically to add up the sum of output and input taxes attributable to that period and appropriately deducting the total of the input taxes from those of the output taxes; and, ultimately and crucially, to make due and timeous return and payment of the VAT that is payable in accordance with the vendor's allocated tax period.

"... VAT is a multi-stage tax, it arises continuously. Moreover VAT vendors/taxpayers bear the ongoing obligation to keep requisite record, to make periodic calculations of the balance of output totals over and above deductible input totals (and any other permissible deductibles) and to pay such balances over to the fiscus. It is therefore a multi-stage system with both continuous self-assessment and predetermined periodic reporting/paying.

An even more important feature of VAT, particularly in contradistinction to income tax, is that vendors are in a sense involuntary tax-collectors. In principle vat is payable on each and every sale; the VAT percentage, the details for its calculation and the timetable for periodic payment are statutorily predetermined, and it is left to the vendor to ensure that the correct periodic balance is calculated, appropriated and paid over in respect of each tax period. By like token the regularity of VAT payments on the one hand ensures a steady and generally more accurately predictable stream of revenue via a multi-staged taxation that is perceived as resting less heavily on the taxpayer, but on the other hand it does require a great deal of book-keeping by vendors and policing by the revenue authorities."

[33] Thus the importance of the Vat system in the overall scheme of the fiscus, the obligations on the part of the taxpayer to make due and timeous returns as well as the power vested in SARS to ensure compliance with the Act are all interconnected in the overall success or otherwise of the VAT system.

The rationale for levying interest

[34] The obligation on the part of SARS to raise interest on the late payment of VAT in terms of Section 39(1) is not the subject of any attack in these proceedings but the rationale for levying interest has arisen quite sharply in the context of the attack on Section 39(7).

[35] The Applicants contend that the purpose of interest is to compensate for loss and not to deter. Our Courts have generally accepted that one of the purposes of interest is to compensate the creditor for the lost opportunity of productively using the money if it had been paid timeously.

See *Bellairs v Hodnett and another 1978(1) SA 1109(A) at 1145 D-G*

[36] On the other hand the connection between interest and deterrence and incentivising compliant conduct on the part of taxpayers has also been recognised. In *Metcash* at paragraph 23 the Court referred to the formidable powers of SARS which included the power to levy interest as aimed at ensuring proper compliance on the part of vendors to keep proper records and make timeous payments – a clear recognition that interest was one of the means of establishing a compliant tax system and beyond serving a compensatory function was also part of the package available to SARS to deter errant tax conduct and to incentivise taxpayers to act in accordance with what the law expects of them.

The change in policy and law in relation to remittals

[37] According to SARS the reason for the 2010 amendment was that the pre 2010 position presented practical difficulties in applying regard being had 'to the output tax and input tax relating to the supply in respect of which interest is payable'. It pointed out that vendors who were non-compliant had to obtain access to their counterparts VAT records to prove there was no loss to the State. Such records were ordinarily confidential and would require the counter-party's consent except in the case of related entities. They therefore argued that besides being impractical the system could work for interrelated entities but less so for unrelated entities and was therefore inconsistent, could lead to

disparate outcomes for different taxpayers and by doing so not promote fairness or consistency. It also contended that fairness required that a vendor's liability to pay interest should not be dependant on whether the recipient vendor claimed the input tax on the same transaction.

[38] What is however clear is that the pre April 2010 position and post April 2010 represented a policy and legislation shift in moving away from remittal of interest based on a consideration of loss to the fiscus, to a system that focussed on the conduct of the taxpayer and in particular whether the failure to pay tax timeously was due to circumstances beyond the control of the taxpayer.

[39] It is against that backdrop that one proceeds to consider the argument that this shift in Section 39(7) is irrational and arbitrary.

The irrational and arbitrary argument

[40] Our courts have characterised the rationality enquiry as one that is limited and circumscribed in its scope. In *Law Society of South Africa and Others v Minister of Transport and Another (201) ZACC 25* the court in stating that the enquiry was an objective and not a subjective one said in relation to its limits that:-

> *"[T]he requirement of rationality is not directed at testing whether legislation is fair or unreasonable or appropriate. Nor is it aimed at deciding whether there other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise…"*

[41] It further dealt with the matters of fairness and proportionality in the enquiry as follows:-

> *"The applicants further urged us to incorporate fairness as an element of rationality. Again, the applicants conflate the rationality and proportionality standards of review. I have already remarked that fairness is not a requirement in the rationality enquiry. If the substance of the complaint is about the deprivation of fundamental rights, it would be subject to the proportionality requirements of s 36 and not of mere rationality."*

[42] In explaining the precise nature of the test such an enquiry contemplates, the Constititonal Court in *Ronald Bobroff & Partners inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development 2014 (3) SA 134 (cc) PARAS 6-8* said:-

> *"The Constitution allows judicial review of legislation, but in a circumscribed manner. Underlying the caution is the recognition that courts should not unduly interfere with the formulation and implementation of policy. Courts do not prescribe to the legislative arm of government the subject-matter on which it may make laws. But the principle of legality that underlies the Constitution requires that, in general, the laws made by Legislature must pass a legally defined test of 'rationality'...*
>
> *A rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved. It is A less stringent test than reasonableness, a standard that comes into play when the fundamental rights under the Bill of Rights are limited by legislation.*
>
> *In those cases the courts have a more active role in safeguarding rights. Once a litigant has shown that legislation limits her fundamental rights, the limitation may only be justified under section 36 of the Constitution. Section 36 expressly allows only limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"*

[43] And so ultimately the question that arises in the context of this challenge is whether the means chosen through the vehicle of Section 39(7) to regulate the remittal of interest is connected to the ends of achieving an efficient VAT system

that requires the prompt settlement of tax debts in the overall context of VAT as the Court alluded to in *Metcash at para 60*.

[44] The question therefore is not whether the pre 2010 system was a better system of a fairer one but rather in this part of the enquiry whether the scheme can be said to be rational in the sense of whether the measure introduced by the impugned Section 39(7) is properly related to the public good it seeks to realise.

[45] The Applicant has argued that it is irrational for the fiscus to retain interest it has levied under circumstances where there is no loss to the fiscus. Apart from the practical difficulties associated with implementing the no loss model, this argument is largely located on the view that the only legitimate basis to levy and retain interest is if there was a loss to the fiscus. The argument ignores the other legitimate reason to impose interest – namely as an incentive and as a deterrent to ensure taxpayers comply with their obligations.

[46] On that rationale the question of loss to the fiscus cannot be dispositive of the issue as *Metcash* has affirmed that reasons other than loss to the fiscus justify the levying of interest. On that basis the same justification of incentivising taxpayers is equally applicable to the circumstances under which a remittal of interest is provided for.

[47] In addition the regime of loss is located in an understanding that the defaulting taxpayer is entitled to a remittal because another taxpayer has paid more VAT than what was required. This represents a system that is akin to cross subsidisation between different and possibly unrelated taxpayers and stands in stark contrast to the rationale of incentivising taxpayer conduct. That such a system was in place before April 2010 is not of any great significance. SARS has explained the reasons why that system was problematic and why it elected to introduce a new system which the current Section 39(7) embodies.

[48] Whether the new system is fair or proportional is not part of this leg of the enquiry as the Court in *Law Society* made abundantly clear, except to point out that in the view of SARS which cannot be gainsaid the new system was intended to introduce a fairer regime for the remittal of interest.

[49] Under the circumstances and for the reasons given the test of rationality which has been accepted to be a relatively low threshold has been met and it cannot be contended that a system that triggers a right to remittal of interest based exclusively on the conduct of the taxpayer is irrational. Simply put , if the failure to pay VAT timeously was within the control of the taxpayer the right to seek a remittal is excluded. There can be nothing irrational or arbitrary about such a system – it accords with the objectives of the fiscus to advance an efficient and compliant system of tax collection.

[50] The rationality challenge to Section 39(7) must accordingly fail.

The arbitrary deprivation of property challenge

[51] This part of the challenge to the constitutionality of Section 39(7) of the Act is grounded in the provisions of Section 25(1) of the Constitution which provides that :-

> *"No one may be deprived of property except in terms of law of general application, and no law may permit the arbitrary deprivation of property."*

[52] In summary the Applicants argues that the interest that is levied on late VAT payments constitutes money which in turn is property and that the imposition of penalty interest, therefore constitutes a deprivation of property. To that extent it argues that Section 39(7) which prohibits a remittal where there is no loss to the fiscus constitutes an arbitrary deprivation of property in conflict with the guarantee enshrined in Section 25(1) of the Constitution.

[53] I proceed to examine some of the components of this argument.

Money as property

[54] In *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others [2015] ZACC 15; 2015 (10) BCLR 1158*, the Constitutional Court affirmed the view that while it would be unwise to seek to develop a comprehensive definition of what would constitute property, it went on however to say that 'it cannot be gainsaid that money in hand constitutes a property interest protected by section 25 of the Constitution.'

[55] The issue underpinning the dispute between the parties is the approximately R20 million levied as interest and not remitted. It can hardly be contended that the interest in question is not property for the purpose of Section 25 (1),

Was there a deprivation?

[56] The first question that arises is whether taxation and interest thereon constitutes a deprivation of property and connected to that whether the failure to remit such interest levied constitutes a deprivation. The Applicant has argued that both taxation as well as interest related to that taxation would constitute a deprivation of property.

[57] Very few rights can be regarded as absolute or constitutionally insulated from interference or limitation. The essence of a rights framework is the recognition that rights are indivisible, interconnected and interrelated and the limitation or interference with one right is necessary to advance another right.

[58] Thus in the context of deprivation as contemplated in Section 25(1) of the Constitution our Courts have been clear that not all interference with property rights constitute a deprivation of property. In *Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC) at para 32* the majority held that :-

> *"Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."*

[59] What would constitute 'substantial interference' would of course depend on the particular facts and circumstances but at the very least must be the kind of interference that must extend beyond what the Courts described as ' the normal restrictions on property use in an open and democratic society'. The Applicants argue that the obligations imposed by taxation where an individual is compelled

to pay money (as taxation or interest triggered by the failure to pay) over to the State would constitute such substantial interference and would be a deprivation.

[60] There are a number of difficulties with this proposition:- Taxes are very much part of the normal restrictions on property use. They are indispensable in an open and democratic society to enable the State to discharge its obligations towards its citizens. In *Metcash* the Court emphasized the need for those payments to be made timeously and diligently to ensure a steady and accurately predictable stream of revenue for the fiscus. To suggest that taxation is somehow beyond what may be regarded as the normal restrictions on the use of property is to misconceive the very essence of a democratic system of government and the mutual obligations that rest on State and citizen in such a system.

[61] Therefore and for the reasons given the argument that taxes constitute a deprivation is ill conceived. The Applicants however contend that interest levied by the fiscus is not a tax but a penalty and if taxes do not constitute a deprivation of property then interest must constitute such a deprivation. Again this argument is flawed for the following reasons:-

a) The imposition of interest provided for in Section 39(1) has not been challenged in these proceedings. The challenge is confined to Section 39(7) which governs the remittal of interest. It is thus not open to the Applicants to advance an argument that interest (whatever its rationale) constitutes a deprivation when the legal basis for the raising of such interest has not been challenged.
b) The attempt to distinguish between the obligation to pay tax and the obligation to pay interest upon the failure to pay tax is not appropriate. The tax obligation and the interest obligations, while separate obligations in law and activated under different circumstances, are inextricably intertwined. There can be no interest obligation in the absence of a tax obligation and the rationale for having an interest obligation as part of the broader tax model has been explained – it seeks to contribute to good tax behaviour on the part of taxpayers and to incentivise such behaviour. It too is very much a part of the normal systems of our fiscus and probably most other systems

in the world. It cannot be considered an interference in property rights that extends beyond the normal restrictions on property use in an open and democratic society and can therefore not constitute a deprivation of property.

[62] The High Court in *Pienaar Brothers Pty (Ltd) v Commissioner for the South African Revenue Service and Another 2017 ZAGPPH 231; [2017] 4 All SA 175(GP); 2017 (6) SA 435 GP at par 110* held in the context of taxes as follows:-

> *"In my view it cannot be argued that all taxes involve a "deprivation" of poverty, in the context of Section 25(1). A State cannot exist without taxes. Society receives benefit from them. Taxes are not penalties. Neither can they be, without any qualification, be regarded as unjust deprivation of property use…"*

[63] Mindful that the issue before this Court is squarely the constitutionality of Section 39(7) I must conclude that the creation of an obligation to pay tax coupled with an obligation to pay interest when the primary tax obligation is not fulfilled does not constitute a deprivation of property in terms of Section 25 (1) of the Constitution.

[64] If the payment of interest does not constitute a deprivation of property it is even more onerous to suggest that a provision such as Section 39(7) that allows for a remittal of interest under defined circumstances would result in a deprivation of property when a taxpayer is unable to bring its claim within those defined circumstances. This is precisely the case here.

[65] The framework that allows for a remittal of interest can also be characterized as part of the normal restrictions on the use of property, creating as it does a system that circumscribes the circumstances under which an errant taxpayer may trigger a claim for remittal. Beyond having found that the scheme is rational, it does not constitute a substantial interference that goes beyond restrictions on property use that may be described as normal.

[66] I am accordingly of the view that the provisions of Section 39(7) does not lead to a deprivation of property as contemplated in Section 25(1) of the Constitution.

Arbitrariness

[67] Having concluded that no case has been advanced that the impugned section may lead to a deprivation of property, there is no need to consider the question of arbitrariness as required in terms of Section 25(1).

[68] However and assuming that my conclusion on deprivation is incorrect and that it can be said that Section 39(1) leads to a deprivation of property, I consider briefly the requirement that such deprivation shall not be arbitrary.

[69] In *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another, First National Bank of SA Limited t/a Wesbank v Minister of Finance [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (CC) at par 37* the Constitutional Court said that a deprivation of property will be arbitrary if it takes place '*without sufficient reason*'. Section 39(1) and 39(7) creates a framework that provides that a vendor who fails to pay VAT timeously is liable to have interest levied on the amount concerned and then further provides that such interest may only be remitted where the late payment was due to circumstances beyond the control of the vendor.

[70] It is a scheme that is sufficiently reasoned and the rationale that an errant taxpayer who made a late payment under circumstances that were within his/her control cannot have interest remitted is far from being an arbitrary provision.

[71] The challenge located in Section 25(1) of the Constitution must also fail.

Costs

[72] Even though this is a commercial matter, it does raise a constitutional matter and there is no reason why the principle in *Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC)* should not apply.

I accordingly do not intend to make any order as to costs.

Order :-

I make the following order:-

1. The application is dismissed

2. No order is made as to costs

NJ. KOLLAPEN
JUDGE OF THE HIGH COURT,
PRETORIA

<u>APPEARANCES</u>

COUNSEL FOR THE APPLICANT	:	**Adv M JANISCH SC** **Adv M BOSHOP**
INSTRUCTED BY	:	**GIRARD HAYWARD INC**
COUNSEL FOR THE 1st RESPONDENT	:	**Adv I SEMENYA SC** **Adv N MAYET**
INSTRUCTED BY	:	**STATE ATTORNEY** **PRETORIA**
COUNSEL FOR THE 1st RESPONDENT	:	**Adv S BUDLENDER SC** **Adv A HASSIM** **Adv L SIYO**
INSTRUCTED BY	:	**STATE ATTORNEY** **PRETORIA**
DATE OF HEARING	:	**26 OCTOBER 2020**
DATE OF JUDGMENT	:	**2 FEBRUARY 2021**