IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 52782/21

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

6 February 2024.
....
DATE
SIGNATURE

In the matter between:

DIROSHINI PATHER Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

S. VAN NIEUWENHUIZEN AJ

INTRODUCTION

[1] In her notice of motion, the applicant (Ms Pather) seeks the following relief against the respondent (SARS):

> "*1. That the Respondent be prohibited from undertaking any further tax collection steps pending the outcome of the dispute;*
>
> *2. That the Respondent's decision to impose personal liability for the amount of R21 500 000.00 in terms of the Notice of Personal Liability dated 17 March 2021, be declared unlawful;*
>
> *3. That the Respondent's reliance on the section 102 of the Tax Administration Act 28 of 2011 ("the TAA") be declared unlawful in that it does not apply to decisions made in terms of section 183 read with section 184 of the TAA;*
>
> *4. That the funds taken by way of section 179 Third Party Appointment be declared unlawful and returned to the Applicant together with interest thereon in terms of the TAA from date of the Third-Party Appointment being effected;*
>
> *5. That the Respondent be ordered to pay the costs of this Application on an attorney and client scale, alternatively on a punitive scale against the SARS officials personally that were involved in administering the order, the section 179 TPA [presumably the Third Party Appointment] and the imposition if [presumably of] liability in terms of section 183.*

6. *Any/other alternative relief that this Honourable Court deems appropriate.*"(words in brackets my understanding of what was intended)

[2] The applicant relies on the founding affidavit which it submits falls into three parts:

2.1 Part A: that the Honourable Court grant an order suspending any further collection steps pending the outcome of the disputes in Parts B and C;

2.2 Part B: that the Honourable Court grant an order declaring that the decision to impose Personal Liability in terms of section 183 of the TAA is unlawful and is set aside;

2.3 Part C: that the Honourable Court grant an order declaring that the third party appointment effected on 13 July 2021 (hereinafter referred to as a TPA) is unlawful and is set aside, further directing that all funds taken in terms of the TPA to be refunded together with interest in terms of the TAA from date of effecting the TPA to date of payment.

[3] In addition, SARS applied for the condonation of its late filing of the answering affidavit and Ms Pather applies for condonation of the consequential late filing of the replying affidavit. Given the nature of the matter and the fact that complex issues had to be addressed I believe it is in the interests of justice to condone the late filing of these affidavits.

[4] At the heart of the matter, lies primarily the lawfulness and procedural fairness of SARS' conduct in holding Ms Pather partially liable for the tax debt of a third party, i.e. Impulse International (Pty) Ltd (Impulse).

In the heads of argument filed on behalf of Ms Pather Impulse is referred to as Impulse Trading International (Pty) Ltd but is clear that all SARS's conduct and demands relates to Impulse as defined above. Hence I will assume that for purposes of Ms Pather's heads of Argument that any reference to Impulse Trading refers to Impulse.

[5] Ms Pather contends that SARS' conduct was and is unlawful and procedurally unfair and stands to be reviewed and set aside in terms of the provisions of the Promotion of Administrative Justice Act 2 of 2000 (PAJA).

[6] The underlying facts which gave rise to this application are the fact that, during 2017, Mr Pragasen Pather, (Mr Pather) a director of Impulse, made payments of R21.5 million to Ms Pather's Standard Bank account on the following dates:

6.1 on 28 April 2017, Impulse paid R2 million to Ms Pather;[1]

6.2 on 1 June 2017, Impulse paid R3.5 million to Ms Pather in two payments i.e. R1.5 million and R2 million;[2]

6.3 on 31 August 2017, Impulse paid R8 million to Ms Pather's Standard Bank money market call account account number 10088887497 from its Standard Bank account number 1869426;[3]

6.4 on 1 September 2017, Impulse paid R8 million to Ms Pather's Standard Bank money market call account number

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[1] Answering Affidavit par 119.

[2] See Answering Affidavit par 120.

[3] See Answering Affidavit par 121.

10088887497 from its Standard Bank account number 1869426.[4]

6.5 Ms Pather disputes the correctness of the bank account account numbers but not the receipt of the amounts.

[7] It would appear that altogether R21.5 million of the monies paid by Mr Pather, came from his alleged loan account in Impulse. SARS disputes the existence of the loan account[5]

[8] It is common cause that these funds were used to purchase a property situate at 39 Chesterfield Road, Bryanston, Randburg (the property), which was duly registered to Ms Pather at the deeds office.

[9] From the above, it is clear that the payments made to Ms Pather originated from Impulse. The content of these paragraphs are admitted in Ms Pather's replying affidavit. Ms Pather clearly states that:

> "As indicated above, Mr Pather advised me that he had a substantial loan account in Impulse, that he wished to make good in respect of his failure to attend to payment of maintenance as well as to pay an amount which he felt was due to me. We agreed that I would purchase a property with the monies and that I would bequeath the property to our two children. This I did."

[10] It is common cause that Mr and Ms Pather were married but were divorced on 20 September 2000.[6]

[11] Ms Pather explains these payments made by Impulse as a repayment of a loan account which Mr Pather then held in Impulse. To the extent that Ms Pather seems to state in her Founding Affidavit that Mr Pather personally made the payment of R2 million on 3 May 2017 and also

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4 See Answering Affidavit par 122.
5 See Answering Affidavit par 98-99.
6 See Founding Affidavit par 22.2.

personally made a payment of R3.5 million[7] it is clear if these allegations are read with the replying affidavit that she accepted all such funds as alimony which had been due and payable to her and based on Mr Pather's word. Ms Pather contends that these payments were funded from Mr Pather's loan account in Impulse.

[12] The aforesaid assertion that she received such payments as alimony is not supported by the decree of divorce Mr Pather obtained under case number 2166/98, as granted on 27 September 2000, which states:

> "*That it is ordered that the bonds of marriage subsisting between the Plaintiff and Defendant be and are hereby dissolved.*"

[13] Thereafter, in a different font, on the same document the following appears:

> "*It is ordered that the joint estate be divided.*
>
> *Custody of the two minor children of the marriage is awarded to the Plaintiff.*
>
> *Defendant is ordered to pay maintenance of R1 000.00 a month for each child. The first payment must be made on or before 30 September 2008 and all subsequent payments must be made on or before the 30th day of each succeeding month. All payments must be made to Plaintiff's Standard Bank account number 05315468.*"[8]

[14] In essence, the aforesaid is the full extent of the explanation offered by Ms Pather for the unexpected windfall that she received during

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7 See Founding Affidavit par 22.3-22.4

8 See Annexure DP 8.

2017. Ms Pather has further contended that Mr Pather had failed to make maintenance payments to her in terms of the decree of divorce as well as the subsequent Marital Settlement Agreement (the MSA) concluded between them on 9 October 2000.[9] Despite the aforesaid date the date of separation in the MSA is recorded as 1 August 2020.[10]

[15] I should add that, at the time the payments were made, the children were already majors and were no longer receiving any support from Mr Pather.[11]

[16] Ms Pather has, throughout her founding and replying affidavits, insisted that at all material times she understood that the payments were made from Mr Pather's loan account with Impulse and, although they were received directly from Impulse, she understood it to be made in reduction of his loan account.

[17] Pursuant to the aforesaid payments, Ms Pather sold her house which she owned at the time, for approximately R2 million, and proceeded to purchase the property to which SARS now wants to lay claim.[12]

[18] On Ms Pather's version, she was an innocent recipient of these funds and she acquired the property and her former husband took up residence in the garden cottage and she received an income from him in respect of his living there.

[19] Mr Pather has, in the meantime, passed away.

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9 See Replying Affidavit par 17.
10 See Annexure DP9 clause 1.3.
11 See para 18 of the founding affidavit.
12 See Replying Affidavit par 19.

WHY SARS REGARDS MS PATHER'S EXPLANATION AS DUBIOUS

[20] In order to fully understand why SARS treated the aforesaid with some suspicion, once it made a demand under section 183 from Ms Pather, regard must be had to the following facts:

20.1 a certain Mr Koko was employed by Eskom and it is alleged that he assisted Mr Pather in obtaining several contracts in the name of Impulse;

20.2 initially, Mr Pather was the sole director and shareholder of Impulse;

20.3 Impulse was registered with SARS for corporate income tax, employees' tax, UIF, Skills Development Levy and VAT respectively;[13]

20.4 during the period 14 September 2018 to 30 September 2019, SARS conducted a company income tax audit for Impulse. A VAT audit was also conducted from 14 September 2018 to 8 November 2019;[14]

20.5 a personal income audit for Mr Pather was then conducted from 25 October 2018 to 8 November 2019.[15] These audits related to her 2013 to 2017 years of assessment. Assessment letters were then issued and SARS imposed the following additional taxes in the various categories set out below:

Tax type	**Capital**	**Additional tax**

[13] See answering affidavit par 62.
[14] See answering affidavit par 64.
[15] See answering affidavit par 65.

PIT	R9 562 379.34	R6 864 573.23
VAT	R48 135 033.46	R48 349 426.21
PAYE	R72 084 188.20	Zero
UIF	R3 592 515.98	R68 165.00
SDL	R1 343 208.91	Zero

20.6 SARS also issued an assessment for Mr Pather:

Tax type	**Capital**	**Additional tax**
PIT	R31 827 399.92	R28 291 081.88

20.7 As a consequence of these assessments, Mr Pather and Impulse were now indebted to SARS for tax in excess of R251 461 181.05.[16]

[21] On 8 November 2019, SARS sent a letter of demand to Impulse and Mr Pather demanding payment of the tax debt within 10 days of receipt of the letter.[17]

[22] Both Mr Pather and Impulse failed to pay the tax debt, whereafter SARS entered civil judgments against them on 10 December 2019 and 13 January 2020 respectively.[18]

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16 See answering affidavit par 67.
17 See answering affidavit par 68.
18 See answering affidavit par 69.

[23] In terms of section 174 of the TAA, civil judgment has accordingly been given in favour of SARS for a liquid debt of over R250 million. Impulse and Mr Pather's indebtedness to SARS is accordingly beyond dispute although it would appear that Ms Pather does not accept the correctness of the aforesaid.

[24] SARS is of the view that it is constitutionally obliged to collect these funds for the benefit of the fiscus and it effectively demonstrates this by an analysis of the TAA which it then uses as a backdrop giving rise to the reasons and events as to why section 183 and Ms Pather's liability comes into play.

[25] SARS argues that the TAA imposes a constitutional obligation to obtain payment of taxes due and refers in this regard to *Lifman and Others v Commissioner for South African Revenue Service and Others*,[19] where it was held that:

"It is common cause that first respondent is tasked by legislation to provide for the effective and efficient collection of tax; to make provision in respect of tax assessment; to make provision for the payment of tax; to provide for the recovery of tax; and to recover interest on outstanding tax debts amongst the others."

[26] SARS further postulates that section 1 of the Income Tax Act 58 of 1962 (the ITA) defines "gross income" as the total amount in cash, or otherwise received by, or accrued in favour of, the taxpayer during the year or period of assessment.[20] Section 5, in turn, provides that income tax (normal tax) shall be payable in respect of the taxable

[19] 77 SATC 383 at para 23.

[20] See Answering Affidavit par 14.

income received by, or accrued to, or in favour of any person or any company during every financial year of such company.[21] It also submits that "tax debt" is defined in section 1 of the TAA as an amount referred to in section 169. Section 169 of the TAA is titled "Debt due to SARS" and provides that:

> "*An amount of tax due or payable in terms of a tax Act is a tax due to SARS for the benefit of the National Revenue Fund*."[22]

[27] It further submits that the aforesaid provisions indicate that there are three stages in the imposition of a tax, i.e. the charging provisions (provided for in the ITA), the assessment provisions and the recovery provisions (now mainly provided for in the TAA). From the above, it seeks to draw a distinction between liability to pay tax and assessment of the exact sum to be paid. It relies on this for the explanation given by Lord Dunedin in *Whitney v Inland Revenue Commissioner*[23] as follows:

"Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now there are three stages in the imposition of a tax; there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly come the methods of recovery, if the person taxed does not voluntarily pay."

[28] SARS also takes the view that the aforesaid is in alignment with an earlier decision of the Appellate Division in *Amex (Edms) BPK v Kommisaris van Binelandse Inkomste*:[24]

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[21] See Answering Affidavit par 15.

[22] See Answering Affidavit par 16.

[23] [1926] AC 37 at 52

[24] [1994] (2) All SA 111 (A)

“Appealing against a number of decisions, the appellant'*s advocate argued that income tax liability arises at the latest at the end of a tax year, ie even before an assessment has been issued. This argument is well-founded. ... although the issuance of an assessment may be a requirement for the enforceability of a tax debt, the debt as such already exists before that contingency. It is therefore not subject to a condition the fulfilment of which may result in that debt will not arise or lapse.”*

[29] Accordingly, SARS submits that, to the extent that Ms Pather argues that Impulse’s tax debts only arose after the issuing of the letter of assessment in November 2019 (after the tax audits were concluded in September 2018), the tax debts were already in existence as at the end of the tax years 2013 to 2017. SARS’ submission is thus that Impulse already had a liability in favour of SARS arising from inter alia the ITA and the VAT Act.[25]

[30] SARS further submits that, to the extent that Ms Pather submits that these liabilities only arose later, there is a failure to distinguish between the words “due” or “payable”. it explains that a tax debt is an amount that is due or payable in terms of a tax Act. For this, it relies on a decision of the Supreme Court of Appeal in *Singh v Commissioner South African Revenue Services*.[26] In this case it was held that:

“The word '*payable*' *can have at least two different meanings, viz*
' *. . . (a) that which is due or must be paid, or (b) that which may be paid or may have to be paid. . . . . The sense of (a) is a present liability � due and payable � . . . . (b) . . . . a future or contingent liability... Depending on the context of the statute involved, the word payable may refer to* ' *. . . what is eventually due, or what there is a liability to pay*'*. . . .* "*payable at a future time*"*, or* "*in respect of which there is liability to pay.*"

[31] In the above matter it was also held that:

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25 SARS HOA par 37-38

26 2003 (4) SA 520 (SCA), at para 26

"The Act does not couple the word due and payable, in s 40, with and. They are distinguished by or. It follows that a separate meaning must be given to the two terms. From what has been stated above, 'due' must be given, in s 40 of the Act, the meaning of ' . . . a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor'. 'Payable' in order to distinguish it from 'due' must be given the meaning of a ' . . . future or contingent liability."[27]

[32] It was submitted that this follows the judgment of *Stafford v Registrar of Deeds*,[28] where it was held that:

"It is clear that the word "payable" is sometimes construed as meaning "payable at a future time," or "in respect of which there is liability to pay. [there is liability in casu by virtue of income tax Act]" It is also true that it is sometimes used to mean payable immediately "or" actually due and presently demandable." (See Wharton's Law Lexicon under "Due." "It should be observed that a debt is said to be due the instant it has existence as a debt. It may be payable at a future time"), and Jessel, M.R. said In re Stockton Malleable Iron Co. (2 Ch. D., p. 101) "due" means either "owing" or "payable," and what it means is determined by the context. From this I gather that "payable" does not usually mean "presently owing" according to his view. Here I think the word "payable" refers to all sums which there is a liability to pay under the original advance; that, I think, is its more usual meaning"

[33] From the aforesaid, SARS seeks to conclude that the actual amount of tax payable might not be known prior to the issuing of the assessment and is of no consequence as the determination in the assessment applies retroactively to the date when the debt and the liability arose. This, in turn, is explained in *Commissioner for Inland Revenue v Janke*:[29]

"the "charge" or burden of the tax is not a burden imposed upon the taxpayer by the commissioner, as was contended on behalf of respondent, but is a charge imposed by the Ordinance, and liability for poll tax (as for income tax) is an obligation incurred within the meaning of the section

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27 See *Singh* at par 27.

28 1913 CPD 379 at pp 385 – 386

29 See 1930 AD 474, at p 481.

> *certainly not later than at the close of the year for which the tax is levied (dies cedit),[30] although the tax may not be collectable before it has' een assessed (dies vent). It is true the actual amount of the liability is not known on the former date. For under the income tax laws there are various deductions and abatements to be made before the "taxable amount" of a person's income can be ascertained. But when once these have been made according to law, and the amount determined, the determination operates nunc pro tunc.[31] It follows that the right to the correct amount of the tax had accrued to the Provincial Administration at the close of each year of taxation. The repeal of the Ordinances in 1928 therefore does not affect the obligation of the respondent to pay that amount when ultimately correctly assessed"*

[34] Put somewhat differently, SARS submits that the tax debt of Impulse arose over many years and, if it had submitted its tax returns timeously or correctly, the amounts would have been declared and it would have been expected to have been paid long ago. This accords with the conclusion in the *Lifman* matter referred to above. Accordingly, SARS submits that, in terms of s169 of the TAA, the word "due" simply means "owing" and no more.

[35] SARS concludes thus that, on the facts of this matter, the tax debt was at all material times since the 2013 tax year payable to SARS in the sense that, at the close of each year of assessment, there was a liability on Impulse to pay tax to SARS. This is a present liability, and all the assessment did was simply to particularise the exact sum, which Impulse, at all material times, had to pay.[32]

[36] Consequently, SARS submits that the tax debt was, at all material times since the 2013 year, due as it was, at all material times, in existence as a debt and owing to SARS (albeit only quantified in the final assessments referred to above). I find myself in agreement with

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30 The moment of vesting.

31 "Now for then", thus applying retroactively to the date on which the obligation to pay the tax arose i.e. not later than close of year of assessment.

32 See *Whitney's* case above, at 52.

the above approach of SARS as to the existence of a tax debt on the part of Impulse during specifically 2017.

[37] In the alternative to the above, SARS submits that such amount was at all material times payable to SARS in the sense that, at the close of each year of assessment, there was a liability on Impulse to pay tax to SARS and that this is a present liability on Impulse's part and all that has since happened is that the assessment particularised the exact sum which Impulse has, at all material times, had to pay.

[38] SARS thus takes the stand that Ms Pather cannot contend that there is no tax debt to the extent that same is a jurisdictional pre-requirement for the imposition of liability under section 183. She nevertheless disputes this. I am not persuaded that Ms Pather's dispute as to the existence of the tax debt is bona fide. The massive amount earned by Impulse from the contracts awarded by Eskom are such that even without the subsequent quantification of the debt a tax debt would have arisen. The exact extent of the tax debt at the time of the alleged dissipation is another matter. To the extent that Ms Pather disputed the existence of the tax debt I find that a tax debt existed at the time she received the payments from Impulse. I make no finding as to the quantum due to SARS at the time she received the payments.

[39] In addition to the aforesaid, SARS more specifically alleges that Ms Pather <u>knowingly</u> assisted Impulse in the dissipation of assets. In support hereof, it states that she had no working relationship with Impulse during the period the amount of R21,5 was paid.[33] It also submits that Ms Pather concealed the payments from SARS and never declared same at the time. Hence it is argued that same is

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[33] See applicant's HOA par 20 and respondent's HOA par 52.

indicative of her knowingly assisting Impulse in avoiding of the tax debt although same is denied.[34]

[40] SARS thus takes the stance that enquiries into the timing and circumstances under which these payments were made are important.[35]

[41] As far as the timing is concerned SARS submits that the payments commenced two months after the media reported on the relationship between Mr Koko (a former interim CEO of Eskom) and Impulse.

[42] In its answering affidavit SARS under the rubric "Impulse's Conracts and Earnings" sets out in some detail the career of Mr Koko during the period 2014 to December 2016.[36] With regard to the circumstances under which Impulse was awarded Eskom's contracts, SARS points out that it was reported that Mr Koko's stepdaughter, Ms Choma was a director, shareholder and beneficiary of Impulse and that, during the period May 2016 to April 2017, Impulse was awarded multi-million rand Eskom contracts, this during a period when Koko was the head of generation at Eskom and later its interim CEO.

[43] When she resigned as a director of Impulse, Ms Choma transferred her shareholding to the Mokoni Trust in September 2016. Mr Choma was the sole trustee and beneficiary of the Mokoni Trust. All of the aforesaid took place amidst a lot of publicity.

[44] SARS refers to the earliest articles that were issued between early 2017 and pursuant thereto and, on 23 February 2017, Ms Choma resigned as trustee of the Mokoni Trust but remained its sole beneficiary.

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[34] See answering affidavit par 195.

[35] See answering affidavit par 101.

[36] See answering affidavit par 90-91.

[45] During the period when these contracts were awarded to Impulse, Mr Koko had not declared Ms Choma's directorship in Impulse. It did so for the first time on 24 February 2017 and after the media had started reporting on this issue (I point out that this is before any payments were made to Ms Pather by Mr Pather from his alleged loan account in Impulse).

[46] SARS further relies on the fact that the payments made to Ms Pather coincided with the investigation that was conducted by Eskom through Cliffe Dekker Hofmeyr Attorneys ("CDH") and is part of their investigation and, on 19 April 2017, CDH forwarded questions to Mr Pather enquiring about his relationship with Mr Koko. Mr Pather responded by saying:

46.1 Impulse had been doing business with Eskom since 2014, a long time prior to him becoming acquainted with Mr Koko and prior to Ms Choma securing any shares in Impulse;

46.2 he was aware that Ms Choma was the daughter of Ms Koko and the stepdaughter of Mr Koko;

46.3 he confirmed the appointment of Ms Choma as a non-executive director of Impulse from 9 April 2016 and indicated that she was introduced to him (Mr Pather) by Ms Koko.

[47] In this context, SARS points out that the first payment to Ms Pather was accordingly made 10 days after Mr Pather was provided with a list of questions and whilst CDH's investigation was under way. It was also two months after the media had started reporting on this issue.

[48] The second payment on 1 June 2017 was also made while the CDH investigation was under way and after Mr Pather had interviews on 17 and 23 May 2017.

[49] The payments of August and September 2017 were then made after the CDH report was issued, i.e. 23 June 2017.

[50] This report recorded that:

50.1 during the investigations, three separate sets of questions were forwarded to Mr Pather to which he responded and that they consulted with Mr Pather on 17 May 2017 and 23 May 2017;

50.2 Mr Koko declared on 24 February 2017, that his stepdaughter is a beneficiary in a trust which owned 35% in the entity styled Impulse;

50.3 SARS further submitted that Mr Pather did not declare the directorship or shareholding of Ms Choma to Eskom during 2016 when Impulse was awarded four contracts to the cumulative value of R193 665 807.77 during 2016 as per the SAP system information;

50.4 Mr Pather declared his relationship with Mr Koko on 12 May 2017 after signing a contract (4600062251) with Eskom on 28 February 2017;

50.5 CDH received a letter from the Mr Pather’s attorney on 26 May 2017 indicating that in hindsight disclosure should have been made and was prudent not only to safeguard the interests of Eskom but also to be transparent and accountable

and thereby serve the interests of the respective contracting persons as well as the public interest.

[51] The CDH investigation team found that:

> "*There are sufficient anomalies in the explanation actually given by Koko and further many unanswered questions from the explanations given by Koko, [wife, Mosima Koko], Choma and [Impulse CEO Pragasen] Pather for Eskom simply to be satisfied that the matter can be closed*".
>
> "*There are sufficient issues which arise which would warrant disciplinary proceedings to be instituted against Koko*."

[52] SARS states that this report is public knowledge.

[53] A disciplinary enquiry against Koko then ensued in June 2017, which SARS contends was also public knowledge.

[54] A parliamentary enquiry was held in August 2017 and also looked into the contracts between Eskom and Impulse. The convening of the parliamentary enquiry became public knowledge in June 2017.

[55] SARS alleges that this matter was widely covered by various media platforms during the time when payments were made to Ms Pather. For instance, various newspaper articles were issued in March 2017, April 2017, 10 July 2017 and 11 July 2017, all dealing with the issue.

[56] According to SARS, these are the exact times when payments were then made by Impulse to Ms Pather.

[57] SARS departs from the premise that Ms Pather, notwithstanding her divorce from Mr Pather years earlier was aware of the various enquiries into the conduct of Koko, Mr Pather and Ms Choma. All of the aforesaid is simply met with denials by Ms Pather.

Notwithstanding SARS' suspicions I do not regard these as bare denials and it is quite possible that she was unaware of the above shenanigans.

[58] There are instances where bare denials will suffice where the party raising the dispute can do no better.[37] In the absence of any evidence of the relationship between Ms Pather and Mr Pather in the 17 years since their divorce I cannot on paper accept that she really paid any attention to the various media reports and investigations into Impulse, Eskom and Mr Pather.

[59] SARS's submission is nevertheless that for a period of 17 years after her divorce from Mr Pather she received no payments from him or Impulse. The first time that she received payments is once the irregularities in Impulse's contracts became public and once investigations are instituted into such contracts.

[60] All of the aforesaid are important but not necessarily conclusive of any knowledge by Ms Pather so that it could be said that she assisted in dissipating funds from Impulse "knowingly". The word "knowingly" in the context in section 183 most certainly has to be reflective of her actual knowledge, or supposed knowledge, or circumstances under which she should have had knowledge (in the sense of *dolus eventualis*) that some tax debts existed.

[61] SARS' assertions that she ought to have known about the investigations and information that was in the public domain, and that such investigations would attract investigations from SARS and a possible tax liability, presupposes that she knew that Impulse never paid tax or never dully discharged its tax debts as and when they occurred. SARS submits:

[37] Cf Wightman t/a JW Construction v Headfour (Pty) Ltd and Another - 2008 (3) SA 371 (SCA) paragraph 13.

> “*At the very least, such information indicates that she ought to have known or would have known that Impulse was the subject of investigation if she had taken reasonable steps.*”

[62] I read this as an indication by SARS that all of the aforesaid should have placed Ms Pather on her guard and, hence, some or other suspicion should have arisen regarding Impulse’s potential tax debts or liabilities and that, in that sense, she acted knowingly and assisted in dissipating assets. I am not fully persuaded that I can come to this conclusion on motion despite the mass of evidence SARS has produced and the “fanciful defence” raised.

[63] SARS regards the explanations for the payments which she received from Impulse indicative of the fact that she was aware that Mr Pather was in the process of dissipating Impulse’s assets when he transferred Impulse’s funds to her.

[64] SARS dismisses he explanations offered by Ms Pather on 24 March 2021, in response to SARS’ request for information in terms of section 46 of the TAA, that the R21.5 million that she received was for alimony payments that had accrued to her and that Mr Pather had deemed such payments to be fair and equitable and that the payment was made from the loan account which Mr Pather held with Impulse.

[65] In view of the terms of the decree of divorce, SARS is emboldened in its view above. SARS also points to the fact that there was a meeting on 17 October 2000 between Mr Pather and Kaka Attorneys who presented Ms Pather in her divorce and that, on 24 October 2000 Kaka forwarded a letter to Mr Pather and recorded Mr Pather’s agreement in relation to his debt and his obligations. This record simply states that “*Mr Pather would pay the applicant maintenance as ordered in terms of the court order, i.e. R2 000.00 per month*”. This was a reference to the decree of divorce which provided for maintenance of R1 000.00 per child.

[66] The letter of 24 October 2000 made no reference to Mr Pather's purported agreement to pay alimony in terms of the MSA to Ms Pather, which was purportedly concluded earlier, on 9 October 2000. (The references to the year 2020 in this regard are clearly typographical errors).

[67] SARS' stance that if a maintenance agreement had been concluded as of 9 October 2000 this would be reflected in Kaka Attorneys' letter of 25 October 2020. Hence, it submits that the purported agreement (the MSA) was an afterthought and produced merely to conceal the true purpose of the payment of R21 500 000.00 to Ms Pather.

[68] Over and above this, Ms Pather failed to declare the receipt of R21.5 million from Impulse in her personal tax returns and, in the email of 24 March 2021, it was initially contended there was no tax liability to SARS as at the date of these alimony payments to the taxpayer, and neither are alimony payments taxable.

[69] SARS points out that there is no merit to this as section 10(1)(u) of the ITA only exempts alimony that is made under an order of the initial separation order of divorce and thar the MSA does not satisfy the requirements of this section. Ms Pather concedes in the replying affidavit that the clause 4.1 of the MSA is unenforceable but maintains it is evidence of Mr Pather's intent to make payments to her in respect of maintenance of the children over and above the decree of divorce in an amount that she and Mr Pather would agree to.[38] The funds which the applicant received from Impulse is on SARS' submissions taxable and ought to have been declared as such. The applicant seems to acknowledge in the replying affidavit that the payments made may well not qualify as tax exempt.[39]

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[38] See par 89 of the Replying Affidavit

[39] See par 100 of the Replying Affidavit

[70] I can understand why SARS, in the circumstances, regards the explanation provided as somewhat fanciful.

[71] SARS' view is that we are not concerned with the general question of *mens rea*[40] but with a determination, on a balance of probabilities, that the persons sought to be held liable had knowledge of the facts from which the conclusion is properly to be drawn. In so doing, it states that the object of the act under consideration must be taken into account. It also refers to the meaning of the word "knowledge" as considered in the matter of *Minister of Finance and Others v Gore NO*,[41] where it was held that:

> "*(a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them.*
>
> *(b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.*"

[72] Therefore, it argues that Mrs Pather's mere say so, contending that she did not have knowledge of the dissipation, is unhelpful. It also referred the court to the plea of ignorance in *Crots v Pretorius*,[42]

> "*[8] The respondent claimed that he had no direct knowledge about the theft or direct intent to steal the appellant's heifers. This stance served him well in both the magistrate's and the high court. The magistrate's court and the high court only investigated whether the respondent's version established direct intent to steal and concluded that it did not. Therein lies the misdirection that entitles this court to interfere. The presence of* dolus eventualis *satisfies the requirements of theft. The court below did not assess the probabilities in order to test whether the requirements of* dolus eventualis *were satisfied.*
>
> *[9] The respondent will be liable if, on a balance of probabilities, he recognised the real possibility that Petrus did not have the right to deliver the cattle to him or that it*

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40 *R v Thornton and Another* 1960 (3) SA 600 (A), at pp 611F-612A

41 2007 (1) SA 111 (SCA), at para 19

42 [2011] 3 All SA 10 (SCA), at para 8 – 9

> *was somebody else's cattle and he deliberately shut his eyes and entered into the transaction, thereby taking the risk of the consequences if the cattle were being stolen. Knowledge in the form of* dolus eventualis *is present if all the objective, factual circumstances justify the inference on a balance of probabilities that the respondent actually and subjectively foresaw that someone else had title to the cattle.*"

[73] SARS also submits that, instead of simply accepting a windfall of millions of rands, Ms Pather should have made enquiries.

> "*By ensuring that he knew as little as possible about Petrus and the nine cattle sold to him and by not complying with the Act, the respondent facilitated the theft of the appellant's cattle. His failure to make any of the necessary enquiries overwhelmingly suggests that he was deliberately avoiding information that would reveal that Petrus had no rights to the cattle or that the cattle were owned by someone else…*
>
> *The respondent proceeded with the transaction recklessly and deliberately failed to comply with the provisions of the Act. His professed ignorance of the theft in these circumstances is so unreasonable that it cannot be accepted. The respondent deliberately shut his eyes to the real and clear impossibility that he was facilitating the theft of cattle, reconciled himself to the risk and took it. By so doing he participated in the theft.*"

[74] Hence, SARS argues that the circumstances are such that you can say the Ms Pather must have had a strong suspicion and in addition that she wilfully refrained from making enquiries that would provide her with guilty knowledge.

[75] SARS further submits that it is not for it to prove Ms Pather's state of mind at the time when she received the payments from Impulse. I find myself in disagreement with SARS in this regard. Whilst the burden of proof normally rests upon the taxpayer, section 183 as a stand alone means of recovery, to my mind demands proof by SARS. It cannot rely on section 102 of the TAA. Its further submission is that the attendant circumstances at the time when such payments were made

indicate that it was public knowledge at the time that Impulse and Mr Pather were the subject of multiple investigations on account of impropriety and/or irregularities related to the manner in which Impulse was awarded contracts by Eskom.

[76] SARS is of the view that Ms Pather elected to close her eyes to the obvious facts and failed to make the necessary enquiries to establish why Impulse, whom she had no dealings with, was transferring millions of rands to her. If she maintained a close relationship over the earlier years and specifically during 2017 with Mr Pather this may well be correct. The case as presented by both parties do not suggest this. If anything, Mr, and Ms Pather seem to strike the bargain regarding the living arrangements i.e. that he will live in a rented cottage on the property during the course of 2017. Neither party placed evidence before me suggesting that she maintained some kind of contact with Mr Pather (other than one would expect given that she was awarded custody of the children.)

[77] Not everyone follows the media and given Eskom's ongoing woes most people avoid sensationalist reporting about Eskom and its contractors. The average South African citizen has long ago accepted that it is just another failed state-owned entity mired in a spiral of corruption and a lack of service delivery. Ms Pather may well be an exception, but it does not follow as a matter of logic that she would have known what Mr Pather, Koko and Ms Choma was up to.

[78] Despite the suspicions SARS raise I am not fully persuaded that Ms Pather acted "knowingly".

[79] Returning to the issue of *mens rea* or the correct meaning of "knowingly", a proper reading of section 183 suggests to me that "knowingly" has a bearing on the dissipation of assets in circumstances where there are tax debts. There is not a single fact

before me which suggests that Ms Pather had any knowledge of the tax affairs of Impulse. Only suspicions and inferences. Of course, this does not mean that she had no knowledge.

[80] SARS further submits that, even if Mr Pather had a loan account, which they deny, the question will still remain as to why the funds were only drawn once the numerous investigations into Impulse got underway. It is submitted that, through such conduct, she knowingly assisted in dissipation of assets as contemplated in section 183 of the TAA. I am of the view add that, if indeed there was a loan account the effect of a payment by Mr Pather from his loan account to his own account or that of Ms Pather would not amount to a dissipation of any asset of Impulse. This is so because funds would simply have moved from the bank account to extinguish a debt of the company.

[81] SARS seems not to accept this simple explanation received from Ms Pather's legal advisers. It suggests that, under the heading of dissipation of assets, I must understand same as involving the wasting, using up or secreting of assets with the intention of defeating creditors' claims or to render such claims hollow. I cannot read it as a general statement of creditors' claims. In the context, it can only mean tax claims or tax debts.

[82] SARS also rely in its answering affidavit on the fact that Impulse had a broader strategy of dissipating its assets. In order to give this insight, SARS referred to another contract concluded with Eskom and Impulse valued at R49 145 861.00. I have already been referred to the fact that, on 20 September 2016, Ms Choma resigned as a director of Impulse and transferred her 25% shareholding to Mokoni Trust on 21 September 2016, a trust established on 7 July 2016 when Ms Choma was registered as both a trustee and sole beneficiary.

[83] Thereafter, Mr Pather transferred an additional 10% shareholding in Impulse to Mokoni Trust. This left with Ms Choma with a 35% shareholding with Impulse through the Trust and, consequently, would have diluted Mr Pather's interest in Impulse to 65%.

[84] Thereafter, several additional contracts were concluded:

Start date of contract	**Value of contract**
17 August 2016	R76 734 614.00
23 August 2016	R22 572 000.00
13 October 2016	R35 539 843.13
22 December 2016	R60 293 379.61
23 February 2017	R41 881 288.86
28 February 2017	R24 340 824.00
April 2017	R47 771 920.00

[85] SARS asserts that Impulse received 89% of its income from Eskom in 2016 and 75% in 2017. This translates into R152 631 845.19 and R130 684 453.19 in the respective financial years. This, at best, gives me the gross turnover produced in these years. SARS, however, does not give me any notion of the profit margin in Impulse. These amounts are indeed staggering but of little help unless Ms Pather can be implicated in the broader scheme of dissipation.

[86] Returning then to the theme of the media reports on Koko, Choma and Impulse, SARS alleged that Mr Pather did not declare the directorship or shareholding of Ms Choma to Eskom during 2016

when Impulse was awarded four contracts, with an accumulative value of R193 665 807.77 during 2016, as per the SAP system.

[87] Further, under the heading of dissipation and concealment of funds, SARS states that, during the period 2014 to 2016, Impulse paid over R100 million to BNJ Tax and Financial Consultants (Pty) Ltd ("BNJ") for secretarial services. Save for five payments, SARS alleges all the payments were in round figures, which it found startling as it is highly unlikely that fees for services rendered can consistently be in round figures.

[88] Although all of this is of interest and may well have motivated Impulse to dissipate funds, it does not assist at all in drawing any inference vis-à-vis Ms Pather unless she can be shown to have been privy to the scheme of dissipating funds at the correct time and had some knowledge of the quantum of the tax debt.

[89] During the financial years 2014 to 2017, Impulse had advanced a total amount of R67 million to Indiwize Construction (Pty) Ltd. These loans did not bear any interest and had no fixed date of repayment. In addition thereto, none of these loans were disclosed in the AFS.

[90] Whilst the application for compromises were pending, further facts came to light. SARS deals with this under the heading of discovery of additional assets. As a consequence of engagements between SARS and other state agencies, SARS discovered that Strauss Scher Attorneys held over R16 million in its trust account on behalf of Impulse. Impulse had not disclosed this information to SARS at all and, but for the engagement of these state agencies, SARS would not have been aware of these funds. Consequently, SARS, on 8 September 2020, issued a TPA to Strauss Scher Attorneys in terms of section 179 of the TAA and directed it to immediately pay over the

monies on behalf of Impulse to SARS or to provide reasons for their inability to do so within five days.

[91] Pursuant to engagements between SARS and Strauss Scher Attorneys, on 27 October 2020 Strauss Scher Attorneys paid an amount of R16 304 531.32 to SARS.

[92] The minutiae of Mr Pather unsuccessful attempts to compromise with SARS do assist in solving the issue of Ms Pather's involvement in the dissipation of Impulse's assets. All it demonstrates is that Impulse's AFS in the years 2018 and further were a moving target.

[93] Of some importance is the fact that during the attempts to compromise Bhugwandeen confirmed that Impulse has reconstructed its financial statements, and the exercise indicated a material reduction in liability to SARS. Bhugwandeen also indicated that Eskom owes Impulse in excess of R300 million.

[94] This email exchanges with SARS also reveals that Bhugwandeen admitted to being unable to answer why Impulse keeps on submitting revised and conflicting financial statements without being able to explain the discrepancies to SARS, nor which version is to be read by SARS as the correct version.

[95] Bhugwandeen blamed the previous auditors (BNJ) and current auditors (unidentified) for the confusion without providing any evidence to SARS of formal disciplinary steps being taken against either set of auditors by Impulse. Biljak confirmed that BNJ was removed during October 2020 due to inefficiencies.

[96] Given the discrepancies between the financial statements as described in the answering affidavit one is not surprised that SARS

took the stance it did and it is immediately clear that this case can never be resolved without having a set of financial statements for every year, which both SARS and Impulse accepts as correct.

[97] To put it quite mildly, the continuing changes in the AFS' demonstrate that there is no fixed basis on which to determine the tax liability of Impulse, nor that of Mr Pather, and it is not surprising that SARS would ultimately have to find a way to break this deadlock, given that the taxpayers involved were not being particularly helpful and the AFS' for the various years remained a moving target.

[98] SARS ultimately drew the conclusion that it was apparent that Impulse and Mr Pather had no intention of settling their debts and/or engaging in settlement discussions in good faith. To the contrary, it formed the the view that the intention seems to be to conceal and dispose of funds and assets that ought properly to be used in settlement of the tax debt. Given the massive shift in the net asset value in the AFS's of Impulse SARS' stance is understandable.

[99] SARS states that these concealments and constant adjustments of submissions must be considered against the background of transactions that were undertaken by Impulse and Eskom as recorded above. It wanted the Court to draw an inference that the background indicates that payments were made to Ms Pather as part of the bigger scheme of dissipating and concealing funds and assets that were properly to be used for satisfying Impulse's tax debt. Although suspicions arise, I cannot find this on the papers.

[100] Under the heading "further dissipation through BNJ", SARS made the point that BNJ received payments from Impulse in excess of R100 million for secretarial services. Pursuant to a notice, dated 30 October 2020, issued by SARS in terms of section 179 of the TAA, SARS appointed BNJ as a third party for purposes of withholding and

paying over the amounts that it held on behalf of Impulse. In terms of the notice, BNJ was required to pay over the monies it held on behalf of Impulse. BNJ failed to respond to the section 179 notice of 2 November 2020, thus SARS issued a further notice in terms of section 46 of the TAA and required it to:

100.1 provide an explanation as to why it received an exorbitant amount of R89 million over a period of two years from Impulse, together with proof of supporting documentation for such explanation;

100.2 provide all invoices, contracts and/or documents pertaining to all funds paid by Impulse to BNJ;

100.3 advise whether BNJ received and/or holds monies in respect of Mr Pather and/or any related persons/entities linked to him and Impulse.

[101] Five months after the issuing of the third party notice and on 24 March 2021, Pierre Retief Attorneys forwarded a letter to SARS stating that it was in the process of consulting with BNJ in relation to the TPA. This ultimately resulted in a payment by BNJ, on 9 April 2021, in an amount of R9 243 344.52 to SARS.

[102] SARS found the amount paid concerning and in regard to the fact that BNJ received over R89 million in the period 2016 to 2018 alone. It was also of the view that same is contradicted by the fact that, in the second compromise application, Impulse stated that it overpaid BNJ in the amount of R2 million, as the AFS stated that BNJ owed Impulse an amount of R19.6 million. On every possible interpretation, there is a discrepancy between the amounts which BNJ held on behalf of Impulse and vis-à-vis what it paid over to SARS.

[103] This led to SARS forwarding an email to BNJ on 9 April 2021 requesting it to confirm:

103.1 the total amount that was held by BNJ on behalf of Impulse as at 2 November 2020; and

103.2 whether the R9.2 million that was paid over to SARS is for part payment or payment in full of all the monies which BNJ held on behalf of Impulse.

[104] BNJ responded through Retief Attorneys on 12 April 2021 and accounted for the funds it received from Impulse as follows:

104.1 R1 032 447 paid back to Impulse;

104.2 R42 162 924.30 paid to SARS for VAT, PAYE, company tax and personal tax;

104.3 R11 213 973.41 related to fees charged for services rendered.

[105] As a consequent hereof, on 19 April 2021, SARS forwarded a letter to BNJ and requested supporting information for the purported payments, including the dates when the payments were made, the bank accounts into which those payments were made and invoices issued for services rendered.

[106] Retief Attorneys responded on 5 March 2021 in a letter to SARS and stated that BNJ prepared a reconciliation of all amounts which it had received and expenses on behalf of Impulse based on this reconciliation. It then paid R51 032 447 to Impulse in <u>cash</u>.

[107] Separately from the fact that it is startling that an amount of over R50 million was purportedly paid in cash, BNJ failed to provide an explanation as to why Impulse would have overpaid over R50 million to BNJ. Also, whereas Impulse had paid BNJ electronically, no explanation was given as to why BNJ opted to make cash payments when returning funds to Impulse. SARS lists this as but one of the many payments that were made by Impulse through which funds and assets were dissipated to prevent SARS from collecting the tax due.

[108] SARS draws the conclusion from all of the aforesaid that all of these transactions indicate a deliberate scheme on Impulse's part, aided by parties such as Ms Pather, to frustrate the collection of tax debt that is due and owing. I cannot but agree with SARS that the wild fluctuation in the AFS' and the massive amounts overpaid to BNJ are indeed of a startling nature.

[109] As informative as the aforesaid might be it still does not mean that Ms Pather was part of the broader scheme of the dissipation of asserts.

THE PARTS OF THE MATTER THAT IS PURELY A LEGAL DISPUTE

[110] SARS then tackles the notion that Ms Pather contends for i.e. that section 184 of the TAA grants her the same rights and remedies which the main taxpayer, i e Impulse, has against SARS. On this basis, she contends that she is entitled to lodge a request for suspension of payment in terms of section 164 of the TAA. This contention, SARS submits, is based on a selective reading of the TAA and section 184, in that section 184 provides that:

> "*[The third party] has the same rights and remedies <u>as the taxpayer has against such powers of recovery</u>.*"

[111] Hence, SARS submits that, on a proper interpretation of the TAA, this does not mean that the third party, such as Ms Pather, has all the remedies which the taxpayer has against SARS. The remedies are limited to those confined to the taxpayer's remedies against SARS' powers of recovery. These powers are set out in Chapter 11 of the TAA and, for instance, do not include the remedy of lodging a request for suspension of payment, which is contained in Chapter 10 thereof. Hence, SARS contends that, on a reading of section 184, the request for suspension of payment of tax in terms of section 164 is not a remedy available to a third party taxpayer.

[112] In this regard, it is extremely important to note the specific provisions of section 184 of the TAA, which reads as follows:

*"**184 Recovery of tax debts from other persons***

(1) SARS has the same powers of recovery against the assets of a person who is personally liable under section 155, 157 or this Part as SARS has against the assets of the taxpayer and the person has the same rights and remedies as the taxpayer has against such powers of recovery.
(2) SARS must provide a person referred to in subsection (1) with an opportunity to make representations-
(a) before the person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183, if this will not place the collection of tax in jeopardy; or
(b) as soon as practical after the person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183.
*[S.184 substituted by s. 51 (1) of Act 44 of 2014 (wef 20 January 2015).]**"***

[113] Given the layout of the TAA and the fact that it differentiates in its different chapters between the various steps of taxation, and that recovery is dealt with in a separate chapter and separate parts section 184 seems to regulate the position *in toto*. SARS is thus only obliged to comply with section 155, 157, 179, 180 181, 182 or 184 as the case may be.

[114] It would appear to me that SARS has given Ms Pather various opportunities to make representations and, more specifically, with regard to the section 183 she was informed on 17 March 2021 per annexure DP1 to the founding affidavit to submit a comprehensive written representation[43] why she should not be held liable in terms of section 183 of the TAA for the tax debt of Impulse. This part of the review resulted in a factual dispute which I am unable to resolve on the paper.

[115] Ms Pather specifically submits that SARS should have entertained a request to suspend payment of the tax allegedly due, in terms of its powers under section 164 (2) of the TAA, and that its failure to do so is part of the procedural irregularities I must review.

[116] This section is located in Chapter 9 of the TAA and reads as follows:

> *"(2) A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9."*

[117] SARS simple answer is that the tax is not due under an assessment but under section 183. The remedy Ms Pather seeks here is in my view simply not available to her. Her remedies are set out in section 184 and does not include the remedies available to a taxpayer who owes tax under an assessment. This argument must thus fail.

[118] Ms Pather also attacks the collection of tax from her bank account in terms of section 179 of the TAA. The criticism is that SARS did not comply with section 179(5) in that its demand under this section, dated 15 April 2021, annexure DP3 to the founding affidavit, does not set out the available debt relief mechanisms under the TAA in that same is peremptory. SARS counters this with the answer that the

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43 See par 3.1.

notice of 17 March 2021, Annexure DP1 to the founding affidavit, preceding the section 179(5) notice advised Ms Pather of the recovery steps that may be taken by SARS if she fails to submit material refuting her liability,

[119] This section reads as follows:

"**179 Liability of third party appointed to satisfy tax debts**

(1) 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.
[Sub-s. (1) substituted by s. 66 of Act 39 of 2013 (wef 1 October 2012) and by s. 57 (a) of Act 23 of 2015 (wef 8 January 2016).]
(2) A person that is unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice and the official may withdraw or amend the notice as is appropriate under the circumstances.
(3) A person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, the person is personally liable for the money.
(4) SARS may, on request by a person affected by the notice, amend the notice to extend the period over which the amount must be paid to SARS, to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependants.
(5) 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 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) if the tax debtor is 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 subsection (1), based on the basic living expenses of the tax debtor and his or her dependants; and

(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 subsection (1), based on serious financial hardship.

[Sub-s. (5) added by s. 57 (b) of Act 23 of 2015 (wef 8 January 2016).]

> *(6) SARS need not issue a final demand under subsection (5) if a senior SARS official is satisfied that to do so would prejudice the collection of the tax debt.*
> *[Sub-s. (6) added by s. 57 (b) of Act 23 of 2015 (wef 8 January 2016).]"*

[120] SARS is of the view hat this non-compliance does not render the section 179(1) notice invalid. For this they rely on *SIP Project Managers (Pty) Limited v Commissioner of the South African Revenue Services*.[44]

[121] In this matter, the Court held that:

> "*A finding that a legislative provision is peremptory is not the end of the matter. The Court must further enquire whether it was fatal that it had not been complied with. The Appellate Division as it then was laid down the test as 'In deciding whether there has been compliance with the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance'.*"

[122] Hence, SARS submits that the objectives sought to be achieved through section 179(5) have been achieved given what is stated above I am of the view that SARS' did substantially comply with section 179 (5) of the TAA by setting out the recovery steps in Annexure DP1. To insist on literal compliance with section 179(5) of the TAA in the specific circumstances seems to me overly formalistic.

[123] This concludes the legal issues which I believe can be adjudicated on the papers.

[124] The only effective legal remedy Ms Pather could invoke in this matter is Court proceedings in terms of PAJA. Given that PAJA prescribes an application proceeding, it can hardly be held against her or her legal advisers that, in circumstances where factual disputes must

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[44] [2020] ZAGPPHC 206 (29 April 2020), at para 24

have been foreseen, this matter now has reached a stage where there is at least a factual dispute between Ms Pather and SARS as to the existence of a loan account, an issue which is, to my mind, material as to whether or not any assets have been dissipated as alleged.

[125] As already indicated before, if the loan account was merely settled, no change in the assets and liabilities of the company has effectively taken place and no dissipation could be at stake. If, however, there was no loan account, the particular payments made to Ms Pather could indeed be construed as a dissipation of assets.

[126] Given the existence of all these factual disputes, the question must be asked why the applicant, who is normally obliged to seek a reference to evidence or trial where there is a factual dispute in place, did not apply for same. I can only assume that applicant's counsel was of the view it can be disposed of on paper. I disagree and I am not inclined to dismiss the matter because such application was not made upfront.

[127] The fact that this is a PAJA review does not change that this is a motion application (albeit prescribed by statute) and the question is whether or not the applicant should be penalised for the fact that there was, before argument ensued, no application for a referral to trial or evidence.

[128] I have considered the matter at length. Having regard to the fact that it is in the interests of justice, I take the view that, notwithstanding the lack of such application by Ms Pather's legal representative at the outset before embarking on argument, this matter should be referred to trial.[45] I carefully considered whether or not it is advisable to lift out the detailed issues and limit it to a referral to evidence, but nevertheless concluded that that is inadvisable. .

45 Cf Mamadi and Another v Premier of Limpopo Province and Others [2022] ZACC 26

[129] In the circumstances, I concluded that it would be in the interests of justice to refer this matter to trial in terms of the discretion I have under Rule 6(5)(g) of the Uniform Rules of Court.

[130] I therefore make the following order:

130.1 The review application based on section 164 of the TAA is dismissed;

130.2 The review application based on non-compliance with section 179 of the TAA is dismissed;

130.3 Impulse International (Pty) Ltd had a tax debt of an unknown quantum at the time the applicant received R21,5 million from it;

130.4 This matter is referred to trial with regard to the question whether the applicant knowingly assisted in dissipating the assets of Impulse International (Pty) Ltd, a taxpayer in order to obstruct the collection of a tax debt of the aforesaid taxpayer and is therefore jointly and severally liable with Impulse Internatuonal (Pty) Ltd for its tax debt to the extent that the applicant’s assistance reduced the assets available to pay the taxpayer's tax debt.;

130.5 The applicant’s notice of motion stands as a simple summons excluding the relief claimed in paragraphs 2 and 4 thereof;

130.6 The applicant is ordered to file a declaration within 21 days of being notified of this order, whereafter subsequent pleadings should be filed in terms of the Uniform Rules of Court.

130.7 All the costs in the matter are reserved for trial, including costs associated with the employment of two counsel. It should be brought to the attention of the trial court that, although the applicant had employed two counsel, her senior counsel was unable to argue the application on the hearing date and, as far as that part of the matter is concerned, the applicant was only represented by junior counsel.

S. VAN NIEUWENHUIZEN AJ

ACTING JUDGE OF THE HIGH COURT

Date of judgment: 6 February 2023

Date Heard: 17 July 2023

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