



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case number: 33257/2021

Date:

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

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DATE

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**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE
APPLICANT**

SERVICES

AND

**GRAND
RESPONDENT**

AZANIA

(PTY)

LIMITED

JUDGMENT

TOLMAY, J:

- [1] The Applicant (SARS) launched a liquidation application against the respondent (Grand Azania) during July 2021 based on section 344(f) read with section 345(1)(a)(i) and/or 344(h) of the Companies Act 61 of 1973 (the Companies Act). Section 344 provides *inter alia* that a company may be wound up if it is unable to pay its debts as described in section 345 and/or if it appears to the Court that it is just and equitable that the company should be wound up.
- [2] The issue that needs to be decided here is whether SARS made out a case for the liquidation of Grand Azania. In doing so it must be demonstrated that SARS is a creditor of Grand Azania, that Grand Azania is indebted to SARS in an amount of no less than R100-00, that SARS issued a demand for the payment of the debt and that the company is unable to pay its debts. In terms of section 345(1)(a)(i) a company is deemed to be unable to pay such debt, if the company fails to pay the sum due, after service of the demand by leaving it at the registered address.
- [3] SARS based the application on income tax and VAT assessments relating to a gratuitous payment of R6.4 million from VBS bank. It relied on a forensic report which indicated that Mr Brian Shivambu, who is the sole director and shareholder of Grand Azania, benefited directly or indirectly from gratuitous payments from VBS bank to the

amount of R16 148 569-00. An amount of R6.4 million of the aforementioned amount was paid to Grand Azania.

- [4] SARS issued a notification of audit to Grand Azania on 23 April 2020. In the letter certain information was requested from Grand Azania. SARS was not satisfied with the information and documents provided and addressed a further letter, dated 3 July 2020 to Grand Azania requesting further information, a reminder to respond to the aforesaid letter was sent to Grand Azania on 28 August 2020. Grand Azania did not respond to these letters and on 4 December 2020 SARS issued audit findings. On 25 January 2021 SARS followed up on the aforementioned letter. On 28 January 2021 Grand Azania requested an extension which was granted until 2 February 2021, a further extension was granted until 10 February 2021. On 12 February 2021 Grand Azania provided SARS with invoices. On 25 March 2021 SARS issued original estimated assessments for income tax in respect of the 2017 and 2018 years of assessment.
- [5] On 29 March 2021 a finalization audit letter was sent to Grand Azania. In this letter the history of the matter, the documents requested by SARS and, the documents provided by Grand Azania were set out. SARS indicated that the audit was completed and the tax adjustments calculated were set out.

[6] It should be noted that this letter *inter alia* recorded that an understatement penalty of 200% was levied in terms of section 223 of the Tax Administration Act 28 of 2011 (TAA) and interest in terms of section 89 quat (2) of the Income Tax Act 58 of 1962 (Income Tax Act) was imposed.

[7] SARS recorded the following in the finalisation of audit letter:

“1.3 SARS established from the review of the taxpayer’s bank account and financial statements that the taxpayer generated an income of R828,101 and R7,611,833 for the 2017 and 2018 tax years respectively. The financial statements further reflected the cost of sales and expenses incurred by the taxpayer amounting to R438,717 and R8,901,628 for the respective tax periods resulting in a profit before tax of R389,384 for the 2017 tax period and a loss before tax of R1,289,795 for the 2018 tax period.”

[8] The letter also states:

“1.5 The taxpayer submitted a response to the audit letter of findings on 12 February 2021, together with some of the invoices. It was found that these expenses were not paid from the taxpayers’ bank account, neither is there any loan accounts to indicate that these were paid by a third person, or any shareholders. Hence none of these invoices provided have been taken into account.”

[9] Grand Azania was invited to respond and give reasons, or written explanations on why it did not agree with the adjustments, SARS proposed and was afforded an opportunity to make written representations of why an understatement penalty should not be imposed. Grand Azania did not make use of this opportunity. It had a right to lodge an objection, within 30 days against the assessment in terms of section 104 of the TAA.

[10] The income tax assessments issued by SARS for 2017 and 2018 were estimated assessments, which SARS is entitled to do *inter alia* when no tax return was submitted. In terms of s 95(5) of the TAA, an estimated assessment:

“Is only subject to objection and appeal if SARS decides not to make a reduced or additional assessment after the taxpayer submits the return or relevant material under subsection (6).”

[11] Grand Azania had 40 days after the issuing of the estimated assessment to submit an income tax return, in terms of section 95(6) of the TAA.

[12] Grand Azania, in its answering affidavit alleged that SARS's estimated assessments were unreasonable, contain material procedural defects and were substantially flawed. In essence the correctness and reasonableness of the assessments were attacked. It was also averred

that respondent's tax practitioner was instructed to file an objection as well as tax returns for the years 2017 and 2018. The answering affidavit placed into question Grand Azania's tax and VAT liability as reflected in the assessment.

[13] It was noted in the answering affidavit that the tax returns and grounds of objection were "currently being drafted" and would be made available to the court by way of a supplementary affidavit. It is important to note that this affidavit was signed on 7 December 2021.

[14] Despite these averments, a supplementary affidavit was only uploaded to CaseLines on 24 January 2023, the day that the matter was heard. The deponent to the affidavit identified himself as the newly appointed Tax Practitioner of Grand Azania. In this affidavit he said that on 24 January 2023, when he attempted to lodge objections on behalf of Grand Azania he encountered a systems error, which did not allow him to file objections. He also stated that he submitted tax returns for the financial years of 2017 and 2018. No explanation was given why it took more than a year to file the assessments and objections, in circumstances where the answering affidavit indicated that these documents were already being prepared during December 2021. It must also be noted that the VAT returns have still not been filed.

[15] SARS responded on that same day in a letter and pointed out that Grand Azania did not comply with the statutory time periods, nor had

an extension been granted. The assessments were therefore final and not capable of objection or appeal in light of section 95, read with section 100(1)(a) of the TAA. The letter further indicated that no further objections would be considered.

[16] In **Medox Ltd v Commissioner, South African Revenue Service**¹ the taxpayer sought an order declaring that a series of tax assessments issued to him were null and void, as it did not take into account its assessed loss, and only raised this issue twelve years later. The taxpayer did not at any stage object to the assessments that he alleged were incorrect. The Court adjudicated the matter with reference to section 81(5) of the Income Tax Act. (This provision, has since been repealed and replaced by section 100(1)(b) of the TAA) which stated that:

“Where no objections are made to any assessment or where objections have been allowed in full or withdrawn, such assessment or altered assessment, as the case may be, shall be final and conclusive.”

[17] The Court held that the assessment became final and conclusive in the light of section 81(5) of the Income Tax Act and pointed out that any other interpretation of the section would “grant aggrieved taxpayers carte blanche” to approach the Court in nearly every instance where they disagree with an assessment.²

¹ Medox Ltd v Commissioner, South African Revenue Service 2015 (6) SA 310 (SCA) (Medox).

² Medox Ltd para 12 – 13, 15

[18] It was submitted by SARS that there is no substantial distinction to be drawn between section 81(5) of the Income Tax Act and section 100(1)(b) of the TAA. I agree with this submission and concludes that in the absence of a timeous objection the tax assessment became final. The belated filing of the tax returns and objections did in my view not change the situation.

[19] If a taxpayer is not satisfied with an assessment, the Tax Court is a specialised tribunal which deals with the process of disputing such assessments. The defences raised by the respondent and authorities regarding the correctness and reasonableness of the assessment falls within the purview of the Tax Court and it is not for this Court to pronounce on it. It is not appropriate for this court to entertain the complaints and defences raised by the respondent in his answering affidavit. These should have been raised by way of an objection and thereafter an appeal to the Tax Court. This court must limit itself to the question whether a provisional liquidation should be granted.

[20] Section 170 of the TAA provides that:

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

(b) except in the case of proceedings on appeal instituted under Chapter 9 against the assessment, that all the particulars of the assessment are correct.”

[21] Furthermore SARS obtained judgment on 18 June 2021 in terms of section 172 of the TAA. In terms of section 174 of the TAA *“a certified statement filed under section 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.”* Consequently SARS took judgment, based on the assessments for income tax and VAT, on 18 June 2021 in the amount of R11 526 767.61.

[22] This brings one to the requirements for a liquidation application. Section 344(f) of the Companies Act must be read with section 345 in determining a company’s inability to pay its debts.³ The two sections are *“fastened together by the clasp in section 344(f) that refers to a company being unable to pay its debts as described in section 345”*.⁴

[23] SARS is a creditor of Grand Azania, which is indebted to SARS in an amount of no less than R100-00. SARS has issued a demand for payment and Grand Azania failed to make payment of the due amount and as a result Grand Azania is deemed to be unable to pay its debts.

³ Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd [2014] 1 All SA 507 (SCA) para 26.

⁴ Boschpoort at para 20.

[24] The enquiry into whether a respondent in liquidation proceedings is unable to pay its debts is a factual one. Judgment has been taken against the respondent on 18 June 2021 and the amount in respect of which the judgment was taken is still unpaid. The respondent is therefore deemed to be unable to pay its debts to SARS.

[25] In my view SARS made out a case that a provisional liquidation order should be granted.

[26] The following order is made:

- a) **the respondent is provisionally wound up;**
 - b) **all persons who have a legitimate interest are called upon to put forward their reasons why this Court should not order the final wind-up of the respondent company on 24 April 2023 at 10:00;**
 - c) **a copy of this order be forthwith served on the respondent company at its registered office and be published in the Government Gazette and the Star newspaper; and**
 - d) **a copy of this order be forthwith forwarded to each known creditor by prepaid registered post.**
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R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING: 24 JANUARY 2023

DATE OF JUDGMENT: 13 MARCH 2023

ATTORNEY FOR APPLICANT: GILDENHUYS MALANTJI
ATTORNEYS

ADVOCATE FOR APPLICANTS: ADV C LOUW (SC)
ADV N MUVANGUA

ATTORNEYS FOR RESPONDENT: MABUZA ATTORNEYS

ADVOCATE FOR RESPONDENT: ADV L SIGOGO (SC)
