



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 60/21

In the matter between:

**BARNARD LABUSCHAGNE INCORPORATED**

Applicant

and

**SOUTH AFRICAN REVENUE SERVICE**

First Respondent

**MINISTER OF FINANCE**

Second Respondent

**Neutral citation:** *Barnard Labuschagne Incorporated v South African Revenue Service and Another* [2022] ZACC 8

**Coram:** Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

**Judgments:** Rogers AJ (unanimous)

**Decided on:** 11 March 2022

**Summary:** Tax Administration Act 28 of 2011 — sections 172 and 174 — certified statement filed by South African Revenue Service to be treated as civil judgment — whether susceptible of rescission

Scope of Chapter 9 of Tax Administration Act — whether dispute about alleged payment of self-assessments within scope

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## ORDER

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On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside.
4. The applicant's application for rescission is remitted to the High Court for hearing before a different Judge in order to determine the merits of the application.
5. The costs incurred to date in the High Court stand over for determination in the remitted proceedings.
6. The respondents must pay the applicant's costs in the applications to the High Court and Supreme Court of Appeal for leave to appeal.
7. The respondents must pay the applicant's costs in this Court.

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## JUDGMENT

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ROGERS AJ (Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

### *Introduction*

[1] Judgment in this case, which the Court is deciding without an oral hearing, was initially delivered on 4 March 2022. Shortly after delivery, the judgment was rescinded by the Court of its own accord when it emerged that the first respondent, the South African Revenue Service (SARS), had filed written submissions of which

the Court was unaware. The judgment which follows takes account of all the written submissions.

[2] The applicant, Barnard Labuschagne Incorporated (BLI), is an incorporated firm of attorneys. On 15 December 2017 SARS filed with the Registrar of the High Court of South Africa, Western Cape Division, Cape Town (High Court), a certified statement in terms of section 172(1) of the Tax Administration Act<sup>1</sup> (TAA) recording that BLI owed SARS R804 747. In terms of section 174 of the TAA, a certified statement so filed “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”. For convenience, I call this a “tax judgment”.

[3] BLI brought an application to rescind the tax judgment. SARS’s main ground of opposition was that a tax judgment is not susceptible of rescission. In response, BLI contended that if a tax judgment is not susceptible of rescission, sections 172 and 174 of the TAA are constitutionally invalid (the alternative constitutional challenge). In view of this contention, the Minister of Finance (Minister) was joined as a second respondent.

[4] The certified statement arose from BLI’s self-assessments for value-added tax, employees’ tax, unemployment insurance fund contributions and skills development levies. BLI’s attack on the tax judgment was not that its self-assessments were wrong. Its complaint was that the certified statement was wrong because BLI had made payments which SARS had failed to appropriate to the relevant assessed taxes.

[5] The High Court held that the tax judgment against BLI was not susceptible of rescission and dismissed the alternative constitutional challenge. The applicant was ordered to pay the costs of the application. The High Court refused an application for leave to appeal with costs, as did the Supreme Court of Appeal. BLI now seeks leave

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<sup>1</sup> 28 of 2011.

from this Court. The parties were asked to file written submissions on the issues discussed below.<sup>2</sup>

### *Jurisdiction*

[6] BLI's application, on the question of rescindability, raises an arguable point of law of general public importance. This is because several recent High Court judgments, of which the High Court's judgment in the present matter is the third, appear to have failed to apply binding precedent, a core component of the rule of law, which is a founding value of our Constitution.<sup>3</sup> This is an issue which this Court must redress. We thus have jurisdiction.

### *Rescindability of tax judgments*

#### *The TAA*

[7] Section 172(1) of the TAA provides that if a person has an "outstanding tax debt", SARS may, after giving the person at least 10 business days' notice, "file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct". Section 172(2) provides that such a statement may be filed even though the tax debt is subject to an objection or appeal under Chapter 9 of the TAA. I have already quoted the effect which section 174 gives to a statement so filed.

<sup>2</sup> The directions required written submissions on the following issues:

- (a) Is a certified statement filed with a court in terms of section 172 read with section 174 of the [TAA] in principle susceptible of rescission? *[The parties were referred to various authorities which had to be addressed in the submissions.]*
- (b) If this Court were to hold that a certified statement is in principle susceptible of rescission, was the applicant's attack on the certified statement in its rescission application, i.e. an attack that the certified statement disregarded payments allegedly made in respect of the self-assessments, a grievance within the scope of Chapter 9 of the TAA? If this is said to be so by virtue of section 104(2)(c) of the TAA, the submissions must identify the section in any relevant tax Act providing for objection or appeal in respect of such a grievance.
- (c) Did the High Court dismiss the rescission application on any grounds other than its finding that the certified statement was not in law susceptible of rescission? If so, what were such other grounds and where in the judgment are the High Court's findings in that regard to be found?"

<sup>3</sup> See *Turnbull-Jackson v Hibiscus Court Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 54 and *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 28.

[8] Three other features of the TAA should be mentioned:

- (a) Section 164(1) embodies the “pay now, argue later” rule. Unless a senior SARS official otherwise directs, the obligation to pay tax is not suspended by an objection or appeal in terms of Chapter 9.
- (b) Section 170 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” of two things: “the making of the assessment”; and, except in proceedings on appeal against the assessment, “that all the particulars of the assessment are correct”.
- (c) Sections 175 and 176 empower SARS to amend or withdraw a certified statement filed with the court. If SARS withdraws a certified statement, it is empowered by section 176(2) to file a new certified statement in terms of section 172, recording tax which was included in the withdrawn statement.

#### *The IT Act and VAT Act*

[9] The relevant provisions of the TAA had antecedents in the Income Tax Act<sup>4</sup> (IT Act) and the Value-Added Tax Act<sup>5</sup> (VAT Act). In order to understand the authorities, reference must be made to these provisions.

[10] Section 91(1)(b) of the IT Act entitled the Commissioner for Inland Revenue to file a certified statement with the court setting out the “amount of tax or interest”<sup>6</sup> due or payable by the taxpayer, and it was stipulated that “such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement”. Section 88 contained the “pay now, argue later” rule. Section 92 provided that it was not competent for any person, in

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<sup>4</sup> 58 of 1962.

<sup>5</sup> 89 of 1991.

<sup>6</sup> The reference to “interest” was inserted by section 16(b) of the Income Tax Amendment Act 6 of 1963.

connection with a certified statement filed in terms of section 91, to question “the correctness of any assessment on which such statement is based”, notwithstanding that objection and appeal may have been lodged against the assessment. Section 94 contained a “conclusive evidence” provision practically identical to section 170 of the TAA. By way of section 26(a) of the Income Tax Act 55 of 1966, section 91(1)(bA) was inserted into the IT Act. This provision empowered the Commissioner to withdraw a filed statement, in which event “such statement shall thereupon cease to have any effect”. In terms of a proviso, the Commissioner was entitled to institute proceedings afresh under section 91(1)(b) in respect of any tax or interest referred to in the withdrawn statement.

[11] Sections 40(2)(a), 40(2)(b), 40(5) and 42 of the VAT Act were in the same terms as sections 91(1)(b), 91(1)(bA), 92 and 94 of the IT Act. The “pay now, argue later” rule was contained in section 36 of the VAT Act. These provisions of the IT Act and the VAT Act were repealed when the TAA came into force. Despite modest changes in formulation, the essential features of the repealed provisions were replicated in the TAA.

#### *Authorities from 1965 to 2011*

[12] In 1965 the Cape Provincial Division in *Kruger I*<sup>7</sup> heard an appeal against a decision of a Magistrates’ Court refusing rescission of a section 91 tax judgment on the basis that such a judgment was not rescindable. The Full Court held that a tax judgment was indeed susceptible of rescission in terms of section 36(a) of the Magistrates’ Courts Act,<sup>8</sup> which empowers a Magistrate’s Court to “rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted”. The appeal failed, however, because the taxpayer had not brought his rescission application timeously.

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<sup>7</sup> *Kruger v Commissioner for Inland Revenue* 1966 (1) SA 457 (C) (*Kruger I*).

<sup>8</sup> 32 of 1944. Section 36(a) still exists in this form.

[13] A subsequent round of litigation between the same taxpayer and the revenue authorities reached the Appellate Division in 1972 – *Kruger II*.<sup>9</sup> The taxpayer was seeking to recover, by way of the *condictio indebiti* (unjustified enrichment), money he had paid “under duress” pursuant to the tax judgment discussed in *Kruger I*. If the tax judgment had the quality of an ordinary civil judgment, the “duress” exerted on the taxpayer was not unlawful, and recovery by way of the *condictio* was barred. Counsel for the taxpayer argued that the tax judgment did not preclude recovery, because unlike an ordinary judgment it did not involve a judicial determination of any issue. Jansen JA said that this submission was incompatible with the language of section 91(1)(b).<sup>10</sup>

[14] In the alternative, counsel for the taxpayer argued that a judgment, such as a tax judgment, which did not involve a decision on the merits was not a bar to the *condictio indebiti*. Although, so counsel argued, the taxpayer could apply for rescission, such an application would always be doomed to failure, because section 94 would require the court hearing the rescission application to treat the assessment as conclusive evidence of its correctness. In other words, the taxpayer could never, in rescission proceedings, demonstrate a bona fide defence.

[15] In response to this argument, Jansen JA said that the taxpayer’s counsel had rightly not argued that *Kruger I* was wrong in holding that a tax judgment was rescindable.<sup>11</sup> As to the limits imposed by section 94, Jansen JA said that the “conclusive evidence” only related to the making and correctness of the assessment. “Assessment” was a defined term. Various matters going to the merits of a tax judgment could still be contested, for example the computation of the tax, the question of the date from which interest ran, and the lawfulness of the levying of tax. Notwithstanding section 94, therefore, there was a wide field of defences available to a taxpayer in rescission proceedings.<sup>12</sup>

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<sup>9</sup> *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A) (*Kruger II*).

<sup>10</sup> Id at 411G-412A.

<sup>11</sup> Id at 412D-E.

<sup>12</sup> Id at 412F-H.

[16] In *Traco Marketing*,<sup>13</sup> Melunsky J held, with reference to the *Kruger* judgments, that a tax judgment taken in terms of section 40(2)(a) of the VAT Act was rescindable. When the judgment was taken in a superior court, rules 31(2)(b) and 42 of the Uniform Rules of Court were not applicable, but the judgment was rescindable in terms of the common law. He concluded, however, that the taxpayer had not shown good cause.

[17] In May 2000, a Full Court of the Cape Provincial Division in the unreported judgment of *Barnard*<sup>14</sup> confirmed that a Magistrate had jurisdiction to entertain a rescission application in relation to a tax judgment taken in terms of section 40(2)(a) of the VAT Act. The rescission application was remitted to the Magistrate's Court to be dealt with on its merits.

[18] Later in 2000 came this Court's decision in *Metcash*.<sup>15</sup> This Court had to decide whether to confirm orders of the High Court declaring sections 36(1), 40(2)(a) and 40(5) of the VAT Act invalid. Kriegler J delivered the Court's unanimous judgment. He considered each of the impugned sections individually, and found them to be constitutionally compliant. He finally considered an argument by the applicant in that matter that the cumulative effect of the three impugned provisions, read together with the "conclusive evidence" provision in section 42, effectively ousted the jurisdiction of the courts. Such ouster meant, so it was contended, that section 40(2)(a) did not in truth entail recourse to a court of law but was "a mere administrative step aimed at facilitating the extra-judicial recovery of tax".<sup>16</sup>

[19] Kriegler J said that the decisions in *Kruger I* and *II* provided "clear judicial authority" at odds with the applicant's argument. In these cases the courts found

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<sup>13</sup> *Traco Marketing (Pty) Ltd v Minister of Finance* 1998 (4) SA 74 (SE) (*Traco Marketing*).

<sup>14</sup> *Barnard v Kommissaris van Binnelandse Inkomste*, unreported judgment of the Cape Provincial Division, Case No A127/97 (19 May 2000).

<sup>15</sup> *Metcash Trading Ltd v Commissioner, South African Revenue Service* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) (*Metcash*).

<sup>16</sup> *Id* at para 64.

(a) that a tax judgment was in principle susceptible of rescission; and (b) that despite the “conclusive evidence” section of the IT Act, there was a wide field of defences available in rescission proceedings.<sup>17</sup>

[20] In *Mokoena*,<sup>18</sup> the Court rightly regarded *Kruger II* and *Metcash* as authority for the proposition that rescission of a tax judgment is competent. The Court’s finding that the taxpayer had a bona fide defence was enough to dispose of the case. The Court went on, however, to hold that SARS was not entitled to take a tax judgment when an objection against the assessment had already been lodged, and that for this reason the tax judgment was a nullity.

[21] BLI also relies on the Supreme Court of Appeal’s judgment in *Singh*,<sup>19</sup> where it was held that SARS is obliged to give a taxpayer notice of an assessment before taking a tax judgment in terms of section 40(2)(a) of the VAT Act. One of the grounds on which the High Court in *Singh* had held that SARS was not required to give the taxpayer notice was that, since the taxpayer could only challenge the assessment by objection and appeal, notice of the assessment was a pointless exercise. In reversing the High Court, the Supreme Court of Appeal said, with reference to paragraph 66 of *Metcash*, that a taxpayer subjected to an assessment was possessed of a “wide field of defences” which he could raise against an assessment in order to preempt the taking of a tax judgment.<sup>20</sup> What the Supreme Court of Appeal was saying is that the “wide field of defences” open to a taxpayer when rescinding a tax judgment was equally available to a taxpayer who wished to impeach an assessment before a tax judgment was taken.

#### *Recent cases*

[22] The High Court was referred to the authorities discussed above yet did not deal with them. Instead, so BLI complains, the High Court followed more recent

<sup>17</sup> Id at paras 65-6.

<sup>18</sup> *Mokoena v Commissioner, South African Revenue Service* 2011 (2) SA 556 (GSJ).

<sup>19</sup> *Singh v Commissioner, South African Revenue Service* [2003] ZASCA 31; 2003 (4) SA 520 (SCA).

<sup>20</sup> Id at para 20.

provincial decisions which were adverse to BLI's contentions on rescindability. The respondents in this Court support these cases and the High Court's reasoning in the present matter.

[23] The first is *Capstone*,<sup>21</sup> from which the High Court quoted a passage to the effect that although a tax judgment in terms of section 91(1)(b) of the IT Act has all the effects of a judgment, "it is nevertheless not in itself a judgment in the ordinary sense" and "does not determine any dispute or contest between the taxpayer and the Commissioner".<sup>22</sup> However, the Court in this passage from *Capstone* was not dealing with rescindability, but with the question whether SARS could lawfully take a tax judgment when there was a pending objection and appeal. The Court disagreed with *Mokoena* on that issue. The Court did not question the proposition that a tax judgment was in principle rescindable.<sup>23</sup>

[24] The next judgment on which the High Court relied was *Modibane*,<sup>24</sup> which was also concerned with section 91(1)(b) of the IT Act. The taxpayer appeared in person, which may explain why the Court did not discuss the relevant authorities. The Court quoted the passage in *Capstone* mentioned in the previous paragraph as if it were authority for the proposition that a tax judgment is not rescindable, and did not refer to the *Kruger* cases or *Traco Marketing*. Although the Court cited *Metcash*, it only mentioned the paragraphs dealing with the "pay now, argue later" rule; it did not heed paragraphs 65 and 66, which approved the *Kruger* cases and accepted that tax judgments are in principle rescindable. The Court mentioned *Mokoena*, but only to say that, like *Capstone*, it disagreed with it. As I have said, *Capstone* does not provide

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<sup>21</sup> *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Service* 2011 (6) SA 65 (WCC) (*Capstone*).

<sup>22</sup> *Id* at para 37.

<sup>23</sup> In paragraph 35 of *Capstone*, the Judge raised the question whether *Kruger II* and *Metcash* were authority for the proposition that rescission is still available where SARS has already withdrawn the certified statement. In *Mokoena*, the taxpayer only applied for rescission after SARS had already withdrawn the certified statement.

<sup>24</sup> *Modibane v South African Revenue Service*, unreported judgment of the South Gauteng High Court, Johannesburg, Case No 09/9651(20 October 2011).

authority for the view that a tax judgment is not susceptible of rescission. *Modibane* has, for these reasons, been criticised academically as having been wrongly decided.<sup>25</sup>

[25] The last judgment cited by the High Court was *Van Wyk*,<sup>26</sup> decided with reference to the TAA. SARS appealed a decision by a Magistrate granting rescission of a tax judgment. Towards the end of the High Court’s judgment in *Van Wyk*, there is a terse statement that the Magistrate’s Court was not entitled to entertain the rescission application “as it was not a civil judgment in the ordinary sense” and that the certified statement “could not be regarded as having the character of a judicially delivered judgment”.<sup>27</sup> The judgment contains no reference to the *Kruger* decisions. And again, although *Metcash* was cited, the passages relevant to rescindability were not mentioned.

[26] In its submissions, SARS cites the recent High Court decision, *Hamid*,<sup>28</sup> which dealt with the question whether a certified statement filed with a court in terms of section 114(1)(a)(ii) of the Customs and Excise Act<sup>29</sup> is susceptible of rescission. The High Court said no. Sections 114(1)(a)(ii) and (iii)(aa) of the Customs and Excise Act are practically identical to the repealed sections 91(1)(b) and (bA) of the IT Act and the repealed sections 40(2)(a) and (b) of the VAT Act. It is not apparent from the High Court’s reasoning why it did not regard *Kruger II* and *Metcash* as binding on it. The High Court did not mention and discuss paragraphs 65 and 66 of *Metcash*. If there are distinguishing features of the regime in the Customs and Excise Act, a point which it is unnecessary for us to decide, they are not apparent from the High Court’s judgment. The High Court in *Hamid* referred to several earlier decisions in the same Division where the High Court had assumed, or where it had been

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<sup>25</sup> Moosa “Rescission of a tax ‘judgment’” (April 2012) *De Rebus* 30.

<sup>26</sup> *South African Revenue Service v Van Wyk*, unreported judgment of the Free State High Court, Bloemfontein, Case No A145/2014 (5 June 2015).

<sup>27</sup> *Id* at para 29.

<sup>28</sup> *Hamid v South African Revenue Services*, unreported judgment of the High Court of South Africa, KwaZulu-Natal Local Division, Durban, Case No 3280/2017 (30 November 2021).

<sup>29</sup> 91 of 1964.

conceded by SARS, that a tax judgment in terms of section 114 is indeed rescindable. SARS' reliance on *Hamid* is therefore misconceived.

### *Discussion*

[27] The courts in *Modibane* and *Van Wyk* were bound by the decisions in *Kruger II* and *Metcash*. Since *Kruger II* was not mentioned at all, and since the relevant passages in *Metcash* were overlooked, there was no attempt to distinguish them or to suggest that the pronouncements on rescindability were non-binding observations made in passing (*obiter dicta*). While it might be argued that the discussion of rescission in *Kruger II* was *obiter*,<sup>30</sup> the same cannot be said of *Metcash*. The fact that tax judgments are susceptible of rescission, and that certain defences remain available to a taxpayer in rescission proceedings, was an integral part of this Court's reasoning in finding that the cumulative effect of the statutory provisions was not constitutionally repugnant.

[28] The High Court in the present case was bound not only by *Kruger II* and *Metcash* but also by the Full Court judgments in *Kruger I* and *Barnard*. The High Court was much impressed by the fact that SARS has the power to amend or withdraw a certified statement. This showed, in the High Court's view, that a tax judgment is not a "final" judgment and is unlike an ordinary civil judgment. As I have shown, however, the power to withdraw a certified statement was a feature of the IT Act since 1966, and was from the outset part of the VAT Act. That this feature did not change anything is apparent from *Traco Marketing*, *Barnard* and *Metcash*. It is true that the TAA entitles SARS to amend a certified statement and not only to withdraw it, but this additional power cannot be regarded as materially changing the legal character of a tax judgment. The power of withdrawal is itself at odds with a supposed requirement of finality. Furthermore, the power of withdrawal conferred by the IT Act and VAT Act was coupled with an express entitlement to file a new certified statement, which was a practical means of amending the tax judgment.

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<sup>30</sup> See *Kruger II* above n 9 at 413D-E.

[29] Since all the relevant authorities were drawn to the High Court’s attention, it is unacceptable that it did not discuss them and either follow them or explain why it thought they were distinguishable. In the light of the authorities to which the High Court was referred, it is difficult to fathom the Court’s statement, when refusing leave to appeal, that there were no conflicting judgments on rescindability. BLI again raised *Metcash*, on which the Court said this:

“It appears that the applicant elected to rely on a comment in passing by the learned judge in *Metcash* and concluded that it is good law for their case.

...

It is of importance to acknowledge that context is everything, when it comes to the proper interpretation of the legislation. When the Constitutional Court commented as it did, in *Metcash* it did not make a finding of law on this subject. It merely made an observation.”<sup>31</sup>

[30] The reasoning in *Metcash* on rescindability was not “merely . . . an observation”, it was an integral part of this Court’s reasoning. And *Metcash* in turn endorsed the two judgments in *Kruger*. Observance of the rules of precedent is not a display of politeness to courts of higher authority; it is a component of the rule of law, which is a founding value of the Constitution.<sup>32</sup>

[31] The High Court’s cursory dismissal of the alternative constitutional challenge is also unsatisfactory. Having wrongly found that a tax judgment is not rescindable, the High Court was required to revisit the constitutional challenge assessed in *Metcash*, bearing in mind that the rescindability of tax judgments was an integral part of this Court’s reasons for dismissing the constitutional challenge. However, nothing more need be said about this, since the High Court’s finding on rescindability was wrong.

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<sup>31</sup> *Barnard Labuschagne Incorporated v South African Revenue Services*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 23141/2017 (17 July 2020) at paras 30 and 35.

<sup>32</sup> See the cases cited in n 3 above.

[32] As I have said, in this Court the respondents have persisted in placing reliance on the more recent High Court judgments. Of those judgments, *Capstone* – as I have shown – is not authority for the respondents’ contentions, while *Modibane* and *Van Wyk* failed to address binding authority. The respondents seek to distinguish *Kruger I and II*, *Traco Marketing* and *Metcash* on the basis that they dealt with different legislation. However, since the now repealed provisions of the IT Act and VAT Act were the forerunners of the relevant provisions of the TAA, the earlier cases are only distinguishable if the new provisions brought about substantive changes bearing on the question of rescindability. I shall deal presently with the features of the TAA on which the respondents place reliance, but it may be mentioned in passing that two of the cases on which they rely, *Capstone* and *Modibane*, were decided with reference to the IT Act, not the TAA.

[33] SARS submits that that there are “differences distinguishing the position of self-regulating vendors under the value-added tax system and taxpayers under the entirely revenue authority-regulated income tax dispensation”. On this basis, SARS argues that the considerations which persuaded this Court in *Metcash* to reject the constitutional attack on the relevant provisions of the VAT Act might not apply equally to the constitutionality of the corresponding provisions in the IT Act. SARS has not explained, however, why the virtually identical provisions in the IT Act would have been subject to different considerations. Moreover, the issue now under discussion is not one of constitutional validity, but whether a tax judgment is rescindable. In *Metcash*, which concerned the VAT Act, this Court accepted the correctness of the *Kruger* judgments on this issue, and the *Kruger* judgments were decided with reference to the IT Act.

[34] With reference to *Metcash*, the Minister makes the submission that this Court’s statements in paragraphs 65 and 66 were non-binding observations made in passing. As I have explained, that proposition is incorrect. In the alternative, the Minister submits that this Court is not bound by its previous decision and ought not to follow it. However, this Court will not depart from an earlier binding statement of

the Court unless satisfied that the earlier statement was “clearly wrong”.<sup>33</sup> In applying this rule of precedent to itself as the country’s apex Court, the Court must tread with caution: it “must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so”.<sup>34</sup>

[35] The features of the TAA which, according to SARS, are at odds with rescission, are the following. First, SARS contends that the civil judgment secured by the filing of a certified statement “lacks the rights-determining character of a judicially issued judgment”. That is so, but it was also true of the repealed provisions of the IT and VAT Acts considered in the *Kruger* and *Metcash* cases.

[36] Second, SARS points to the Commissioner’s right to withdraw a certified statement and to institute proceedings afresh for the same tax. I have already dealt with this feature, explaining that the power of withdrawal and reinstatement was a long-standing feature of the regimes established by the IT Act and VAT Act. I should add this on the question of the finality of judgments in the context of the present discussion. A characteristic of an interim order is that it may be revised or discharged by the same court which granted the order.<sup>35</sup> The power to vary and rescind orders is needed in the case of final judgments, because a court does not ordinarily have the power to vary or discharge its final orders. It is always open to a judgment creditor to abandon a final judgment or to waive its rights thereunder in whole or in part. The fact that a judgment creditor may do so does not mean that the judgment is not final. In the context of a tax judgment, it is the judgment creditor, SARS, which has the power under the TAA to amend or withdraw the certified statement. At least in commercial effect, this is not unlike the right of abandonment which a judgment creditor has in respect of a judgment granted in its favour. More importantly, however, the court with which the certified statement is filed has no power to treat the

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<sup>33</sup> This Court is required, by the rules of precedent, to follow a binding statement in an earlier judgment of the Court unless satisfied that the earlier statement was clearly wrong: *Turnbull-Jackson* above n 3 at para 57.

<sup>34</sup> *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 62.

<sup>35</sup> *Meyer v Meyer* 1948 (1) SA 484 (T) at 490 and *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549G-551A.

tax judgment as an interim order which it may vary or discharge. In relation to the court and to the judgment debtor (the taxpayer), the tax judgment is final, not interim. The availability of rescission is thus not out of place.

[37] The features of the TAA, which the Minister contends to be incompatible with rescission, include the argument I have addressed in the preceding paragraph. The Minister's second point is that, in terms of section 172(2) of the TAA, SARS may file a certified statement irrespective of whether or not the tax debt is subject to an objection or appeal under Chapter 9. It is true that the IT Act and VAT Act did not contain express provisions to this effect. However, there was no prohibition against the filing of a certified statement if the tax debt was subject to an objection or appeal, and section 92 of the IT Act and section 40(5) of the VAT Act envisaged that a certified statement might indeed be filed in such circumstances. It was provided in those sections that it was not competent for any person to question the correctness of any assessment on which a tax judgment was based, "notwithstanding that objection and appeal may have been lodged thereto". Of course, where the grounds on which a tax judgment is impeached in rescission proceedings are grounds which are being pursued, or can be pursued, by way of objection and appeal under Chapter 9, an applicant for rescission will be unable to establish a bona fide defence, because the court hearing the rescission application will not be entitled to go behind the certified statement. This was recognised in *Kruger II* and *Metcash*, but it was nevertheless held that tax judgments were susceptible of rescission and that there were a number of grounds on which the taxpayer might still legitimately base an application for rescission.

[38] Third, the Minister emphasises that section 174 of the TAA requires the certified statement to be treated as a civil judgment "lawfully given" in the relevant court. This is said to be inconsistent with the notion that a taxpayer can challenge the tax judgment on the grounds of its unlawfulness or invalidity. The "lawfully given" terminology was, however, also a feature of section 91(1)(b) of the IT Act and

section 40(2)(a) of the VAT Act. A judgment may be lawfully given even though grounds exist for its rescission.

[39] Finally, the Minister refers to the dispute resolution mechanisms in Chapter 9 of the TAA, and to section 105 which states that a taxpayer may only dispute an assessment or “decision” in proceedings under Chapter 9. This was, however, the practical effect of the regimes in the IT Act and VAT Act, because it was only by way of objection and appeal that a taxpayer could go behind an assessment on which a certified statement was based. Rescission is only of practical significance where a tax judgment is impeached on grounds which cannot be pursued by objection and appeal, because it is only in such cases that an applicant for rescission can potentially establish a bona fide defence. Whether the present matter is such a case will be addressed in the next part of this judgment.

[40] The position thus remains that a tax judgment in terms of the TAA is susceptible of rescission, in terms of section 36(1)(a) of the Magistrates’ Courts Act or, in the High Court, in terms of the common law jurisdiction to rescind judgments taken in the absence of the other party.

[41] Our affirmation of *Kruger II* and *Metcash* must not be misunderstood. The judgments in these cases make clear that the “conclusive evidence” provisions in the tax legislation considerably narrow the scope of bona fide defences which the taxpayer can raise. Apart from the “conclusive evidence” provision in section 170 of the TAA,

another limitation on bona fide defences arises from section 105 of the TAA, which forms part of the dispute resolution procedures of Chapter 9. These procedures are initiated by an “objection”. In terms of sections 104(1) and (2), a taxpayer may only object to an “assessment” or “decision” of the kind specified in section 104(2). If the taxpayer’s grievance concerns an “assessment” or “decision”, section 105 stipulates that the taxpayer may only dispute such assessment or decision “in proceedings under this Chapter, unless a High Court otherwise directs”. The “unless” proviso caters for

those relatively rare situations where a High Court regards it appropriate to grant declaratory relief on legal questions relating to assessments.<sup>36</sup> For present purposes, the point to note is that section 105 will generally have the effect that, in rescission proceedings, the taxpayer will struggle to demonstrate a bona fide defence if its grievance relates to an assessment or decision governed by Chapter 9.

### *Rescindability in this case*

[42] The dispute in this case is not covered by the “conclusive evidence” provisions of section 170 nor is it excluded by section 105. As to section 170, BLI is not challenging the correctness of the self-assessments; the question is whether they have been paid. As to section 105, the High Court said that Chapter 9 was available to BLI, but did not explain how. BLI was not complaining about an “assessment”. Nor was it complaining about a “decision” as defined in section 104(2) of the TAA. Paragraphs (a) and (b) of section 104(2) are obviously inapplicable. Paragraph (c) covers “any other decision that may be objected to or appealed against under a tax Act”. There is no provision in any relevant tax legislation stating that a dispute about whether an assessment has been paid is subject to objection or appeal.

[43] SARS highlights the definitions of “assessment” and “self-assessment” in section 1 of the TAA. Such assessments involve a “determination” of a “tax liability” by SARS or a taxpayer respectively. SARS emphasises that in terms of section 100 of the TAA, an assessment is final if no objection to it has been made. BLI, so SARS points out, has not objected against its self-assessments. All of this is so, but the contentions miss the point. A self-assessment may correctly determine the taxpayer’s tax liability, but the liability may thereafter be discharged by payment. SARS has not pointed to any statutory provision which renders payment disputes subject to objection in terms of Chapter 9 of the TAA.

[44] SARS goes on to argue that the jurisdictional requirement for filing a certified statement in terms of section 172 is an “outstanding tax debt”. To put the matter more

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<sup>36</sup> See *Metcash* above n 15 at para 45.

accurately, section 172(1) provides that SARS may file a certified statement “[i]f a taxpayer fails to pay tax when it is payable”, and the certified statement must set out “the amount of tax payable”. The question posed by this Court’s directions focused not on disputes concerning the initial tax liability but on disputes as to whether the tax liability remained outstanding. In this case, SARS evidently considered that the tax liability had not subsequently been paid, hence the filing of the certified statement, but BLI contended otherwise. If the payment dispute is not a matter required to be dealt with by way of objection in terms of Chapter 9, it is one of those “defences” which the Courts in *Kruger II* and *Metcash* had in mind as being available to a taxpayer in rescission proceedings.

[45] In the Minister’s submissions, the issue is said to be whether an objection to a taxpayer’s own self-assessments is a grievance falling within the scope of Chapter 9. Clearly the answer to that question is yes, but it is not the question which this Court asked the parties to address. The question framed by this Court was whether a grievance to the effect that a certified statement disregarded payments allegedly made in respect of self-assessments fell within the scope of Chapter 9.

[46] It follows that the High Court should have found that the tax judgment was susceptible of rescission and should have considered whether BLI had made out a case for rescission at common law. This Court recently repeated the well-known requirements: first, the applicant must give a reasonable and satisfactory explanation for its default; and second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success.<sup>37</sup> Because the procedure for taking a tax judgment does not call for a procedural response from the taxpayer, the focus inevitably falls on the second of these requirements.

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<sup>37</sup> *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 (5) SA 327 (CC); 2021 (11) BCLR 1263 (CC) at para 71.

*Did the High Court decide the merits?*

[47] In their written submissions, all the parties agree that the High Court did not dismiss the rescission application on any ground other than that a certified statement is not in law susceptible of rescission. This accords with my reading of the High Court's judgment. In the circumstances, it is unnecessary to consider whether, as BLI contends, the hearing in the High Court was confined to the question of rescindability and the alternative constitutional challenge, with the merits to stand over for later decision.

[48] The Minister submits that this Court is not precluded from finding that the rescission application should be dismissed on its merits. In my view, it is not appropriate for this Court to embark on that question at first instance. The proper course is to remit the matter to the High Court to decide the merits of the rescission application.

*Conclusion*

[49] In view of some adverse remarks made by the High Court about BLI, including criticism based on the High Court's erroneous view on rescindability, prudence dictates that the merits should be heard by a different Judge.

[50] The costs of proceedings in the High Court thus far should stand over for determination in the remitted proceedings. There is no reason, however, why costs should not follow the result in this Court. Since BLI's applications to the High Court and Supreme Court of Appeal for leave to appeal should have succeeded, the respondents must also pay BLI's costs in those applications.

*Order*

[51] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.

3. The order of the High Court is set aside.
4. The applicant's application for rescission is remitted to the High Court for hearing before a different Judge in order to determine the merits of the application.
5. The costs incurred to date in the High Court stand over for determination in the remitted proceedings.
6. The respondents must pay the applicant's costs in the applications to the High Court and Supreme Court of Appeal for leave to appeal.
7. The respondents must pay the applicant's costs in this Court.

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