THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1307/2022

In the matter between:

CHRISTOFFEL HENDRIK WIESE	**FIRST APPELLANT**
ISAK HENDRIK JOHANNES VISAGIE	**SECOND APPELLANT**
GERT CHRISTIAAN VILJOEN	**THIRD APPELLANT**
FREDERICK RAUTEN HOFMEYR	**FOURTH APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**RESPONDENT**

Neutral citation: *Christoffel Hendrik Wiese and Others v CSARS* (1307/2022) [2024] ZASCA 111 (12 July 2024)

Coram: MOCUMIE ADP, MOTHLE and GOOSEN JJA and TOLMAY and SEEGOBIN AJJA

Heard: 8 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 12 July 2024 at 11h00.

Summary: Taxation – recovery of tax debt from third party in terms of s 183 of Tax Administration Act, 28 of 2011 (the TAA) – whether term 'tax debt' envisages existence of assessed tax indebtedness at the time of dissipation of assets to obstruct the collection of tax debt – admissibility of transcript of evidence at inquiry in subsequent proceedings in terms of s 56 of the TAA.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Le Grange J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Goosen JA and Tolmay AJA (Mocumie ADP, Mothle JA and Seegobin AJA concurring):

Introduction

[1] The Commissioner for the South African Revenue Services (SARS) instituted action against the appellants , in terms of s 183 of the Tax Administration Act 28 of 2011 (the TAA) for payment of R216.6 million. SARS claimed that the appellants caused, or assisted in causing, Energy Africa Propriety Limited, (Energy Africa or the taxpayer) to dissipate its assets in order to obstruct the collection of a tax debt owed by it to SARS. The dissipation was alleged to have occurred by transferring a loan account claim Energy Africa held in Titan Share Dealers Proprietary Limited (TSD) as a dividend *in specie* to Elandspad Investments Proprietary Limited (Elandspad), its holding company.

[2] The trial proceeded in the Western Cape High Court, Cape Town (the high court) upon an agreed separation of issues. The high court was required to decide:
(a) Whether the transcript of evidence presented by the appellants at an inquiry held in terms of s 50 of the TAA during 2015 and 2016, is admissible in the trial proceedings and, if so, for what purpose.
(b) Whether the assessments raised by SARS against Energy Africa for secondary tax on companies (STC) and capital gains tax (CGT) constitute 'tax debts' for purposes of s 183 of the TAA.

[3] The high court found that the transcript was admissible. It held that the purpose for which the evidence could be used should be determined by the trial court. The high court also found that the STC and CGT tax assessments constitute tax debts for purposes of s 183 of the TAA. The appeal, with the leave of the high court, is against these findings.

Factual background

[4] Tullow Oil Pic and its subsidiaries (the Tullow Group) undertook a restructuring of its African operations (the restructure) during January 2007. Prior to the restructure, Energy Africa formed part of the Tullow Group. The taxpayer sold its shares and claims in Energy Africa Holdings (Pty) Ltd (EAH) to Tullow Overseas Holdings BV (TOH) (the EAH disposal) on 25 January 2007. The tax return submitted for that period did not raise any liability for CGT.

[5] SARS conducted an audit on the Tullow transaction and based on this audit, on 16 November 2012, it delivered a notice to Energy Africa in terms of s 80J(1) of the TAA. SARS notified Energy Africa that it intended to make certain adjustments to the 2007 income tax assessment. This would result in the inclusion

of CGT of R453 126 518 on the disposal of a subsidiary in terms the Income Tax Act 58 of 1962 (ITA). SARS would also raise an assessment for STC in the amount of R487 205 316, deemed to have arisen in terms of s 64C(2)*(a)* of the ITA.

[6] On 15 April 2013, the appellants disputed SARS's audit findings. On 19 April 2013, Energy Africa disposed of its sole asset which consisted of a loan account credit held by it in TSD by declaring a dividend *in specie* to the value of the loan account in favour of Elandspad.

[7] On 21 August 2013, SARS communicated its finalisation of the audit. It issued an additional assessment of income tax for CGT and an original assessment of STC in the amounts of R453 126 518, together with understatement penalties of 150% (the CGT assessment) and R488 282 886 together with interest and understatement penalties of 150% (the STC assessment) respectively.

[8] On 11 September 2013, Energy Africa's attorneys disputed its liability for any tax and informed SARS that it would lodge a formal objection to the assessments. SARS was also informed that Energy Africa had no cash or assets and was therefore not able to pay the disputed tax. On 1 November 2013, Energy Africa filed its objections to both the STC and CGT assessments. On 3 February 2014, SARS afforded Energy Africa an opportunity to also object to the understatement penalties levied. These were filed on 20 March 2014.

[9] On 3 April 2014, SARS allowed Energy Africa's objections in part. It accepted an adjustment based on the foreign exchange translation rate used in the assessment of income tax and reduced the understatement penalties to 100% of the

capital of tax due. Apart from this, the objections were dismissed. On 29 May 2014, SARS was informed that Energy Africa would not appeal the disallowance of the objections.

[10] In the absence of an appeal SARS issued a final demand in respect of both the STC and CGT assessments. On 30 July 2014, SARS obtained a certified statement in terms of s 172(1) of the TAA in respect of both the STC and the CGT liability. The third appellant informed SARS on 24 October 2014, that Energy Africa was dormant.

[11] On 10 July 2015, SARS applied for the designation by a judge for purposes of an inquiry in terms of Part C of Chapter 5 of the TAA. An inquiry was conducted during which the appellants testified. On 25 October 2016, notices of personal liability were sent in terms of s 183 of the TAA, by SARS to the appellants. These notices stated that first and second appellants had knowingly assisted the taxpayer in dissipating its only asset of value to obstruct the collection of a tax debt. During April 2016, the taxpayer was liquidated by order of court. On 16 January 2017, written representations were addressed to SARS on behalf of the appellants in terms of s 184 of the TAA. They maintained that, because the dissipation of Energy Africa's assets occurred prior to the raising of the STC and the CGT assessments, there existed no tax debt as defined in the TAA at the time.

Proceedings in the high court

[12] As indicated, the trial before the high court proceeded only upon the agreed separated issues. SARS called one witness Mr Kane (Kane). He was the lead auditor who had been auditing the taxpayer's affairs since 2010. He confirmed the facts set out above. He testified that the EAH disposal to TOH during 2007 was a

disposal to a connected person not at market value. He said that the difference in price between what was paid and the market value was the deemed dividend, if the disposal was at market value a deemed dividend would not have occurred, as it would have been regarded as a distribution. He explained how the CGT and the STC were calculated. He testified that the adjustment assessments were related to the EAH disposal during January 2007.

[13] SARS's view was premised upon the fact that the true consideration for the disposal was USD 1.2 million and to the extent that it is contended to be USD 543.76 million or USD 544.96 million, these amounts are simulated. The substance of the transaction was that Energy Africa disposed of its subsidiary Energy Africa Holdings to a connected person at a value that did not reflect an arms-length transaction.

[14] The high court found that s 56(4) of the TAA entitles SARS to use evidence given at the inquiry in the action brought by SARS against the appellants and that the trial court is best positioned to determine for which purpose the evidence may be used and decided the separated issues in favour of SARS. In relation to the term 'tax debt', the high court found that s 183 of the TAA did not contemplate that the debt be assessed at the time of dissipation. It found that the indebtedness in respect of both CGT and STC existed prior to its subsequent assessment.

The issues on appeal

[15] The same issues as served before the high court now serve before this Court, namely whether the term 'tax debt' as used in s 183 of the TAA envisages that an assessed tax debt should exist at the time that the dissipation of assets occurs, and

whether the transcript of proceedings at an inquiry is admissible upon production in subsequent civil proceedings in terms of s 56 of the TAA.

The meaning of 'tax debt' for the purposes of s 183 of the TAA

[16] It is important to highlight that it was common cause that Energy Africa disposed of its sole asset, being a loan claim against TPI, on 19 April 2013. On 21 August 2013, SARS issued notices of assessment to tax of CGT and STC against Energy Africa for the 2007 tax year.

[17] Section 183 of the TAA provides that:

'If a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt of the taxpayer, the person is jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's debt.'

[18] In its present form, s 1 of the TAA defines a 'tax debt' to mean an amount referred to in s 169(1) of the TAA. The latter section in turn provides that:

'An amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund.'

[19] The present definition of 'tax debt' was substituted by s 30 (d) of the Tax Administration Laws Amendment Act, 39 of 2013. It came into operation on 16 January 2014. The amendment, however, took effect retrospectively from 1 October 2012, which was the date of commencement of the TAA.

[20] On 19 April 2013, when the dissipation at issue in this matter occurred, the term 'tax debt' was defined to mean 'an amount of tax due by a person in terms of a tax Act.' In order to avoid a challenge to the lawfulness of the retrospective amendment of the definition, SARS agreed that for the purposes of this matter the

definition should be read as if no amendment had occurred. Section 169 (1) of the TAA at all times read as it now does.

[21] The argument advanced by counsel for the appellants before this Court, as before the high court, was to the following effect. In order to establish liability under s 183, the person concerned must have knowingly assisted in the dissipation of assets 'in order to obstruct the collection of a tax debt'. A 'tax debt' must necessarily exist at the time of the alleged dissipation and the person concerned must know that the tax debt exists. A tax debt is an amount which is due and payable, as the ordinary meaning of the term suggests. In this instance the tax debt only arose upon notice of assessment. The particular assessments to tax, in this case, do not constitute tax debts as contemplated by s 183 of the TAA.

[22] Counsel for SARS contended that the term 'tax debt', as used in s 183, must be read in the light of s 169(1) which provides a specified definition of the term for the purposes of the recovery of tax as contemplated by chapter 11, of which s 183 forms part. The opening passage of s 1 of the TAA provides that the terms there defined have the assigned meaning 'unless the context otherwise provides'. The starting point is therefore that chapter 11, and therefore s 183, envisages a debt that is either due, in the ordinary sense, or payable. The use of the alternatives coincides with the meaning ascribed to the terms by this Court in *Singh v Commissioner, South African Revenue Service* (*Singh*).[1] In that matter it was accepted that a tax debt may be payable even if the obligation to pay is under legal challenge and, therefore, that the tax is not 'due'. On this basis it was submitted that s 183 contemplates that which may become due. Since the purpose of s 183 is to permit SARS to recover tax due and payable by a taxpayer from a third party who assists

[1] *Singh v Commissioner, South African Revenue Service* [2003] ZASCA 31; 2003 (4) SA 520 (SCA).

or facilitates the dissipation of a taxpayer's assets in order obstruct the collection of a tax debt, it is sufficient if, at the time of the dissipation a tax debt is anticipated.

[23] It is important to bear in mind the ambit of the issue that required separate determination. Section 183 establishes a set of requirements to render a third party jointly and severally liable for the recovery of a tax debt which is due by a taxpayer. There are three obvious requirements. They are:

(a) that the third person should 'knowingly assist in the dissipation of a taxpayer's assets';

(b) that the dissipation should be undertaken 'in order to obstruct the collection of a tax debt'; and

(c) that the assistance should have rendered the taxpayer unable to discharge the tax debt. We are not required to interpret these requirements or to provide an exposition of what test(s) should be applied in determining whether they are met. The separated question was confined to an interpretation of the term 'tax debt' and whether it contemplates an existing liability for tax though not yet assessed at the time that the dissipation occurs.

[24] To answer that question requires an analysis of the purpose of s 183, the language employed in its formulation and the context within which the language is employed.[2] We begin with the debate about the definition as provided in s 1 of the TAA. It is true that the introductory portion of s 1 refers to context of the use of the defined terms. However, what it states is that unless the context otherwise indicates, the defined terms have the meaning assigned to them in other tax Acts. In other words the defined terms, if defined in other tax Acts carry the meaning

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18; *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28; *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

ascribed in those tax Acts unless the context indicates to the contrary. In that event, they have the meaning ascribed by the TAA. This formulation of the definitions therefore seeks to ensure consistency of meaning between tax Acts. In the light of the overall object and purpose of the TAA, this is understandable.

[25] The introductory portion of s 1 does not mean that the term tax debt has the meaning ascribed unless the context of its use in the TAA differs. What then is the meaning of the definition prior to its amendment? Counsel for the appellants suggested the ordinary meaning of the term 'due', when used to describe a debt, is that the amount is liquidated and is immediately claimable as being due and payable by the creditor.[3] But that ignores the nature of the debt which is said to be due. It also ignores multiple meanings for both a 'debt' and what is 'due'.

[26] A taxpayer is a person or entity which is chargeable to tax.[4] Tax, which is broadly defined to include several different forms of impost, is levied or imposed by operation of law.[5] A taxpayer is chargeable to tax upon the occurrence of a taxable event, a term defined to refer to the occurrence of an event that may affect the *liability* of a taxpayer for tax.[6] Thus, a taxpayer who earns income in excess of a certain threshold incurs liability for the payment of tax upon such earnings at a stipulated percentage. The occurrence of the event gives rise to a liability for the

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[3] *Singh* para 25:
'The ordinary meaning of "due" is that ". . . there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately." (*Per* D Galgut AJA in *The Master v I L Back and Co Ltd and Others* 1983 (1) SA 986 (A) at 1004G; see also *Western Bank Ltd v S J van Vuuren Transport (Pty) Ltd and Others* 1980 (2) SA 348 (T) at 351; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909; *Whatmore v Murray* 1908 TS 969 *per* Innes CJ at 970; *Banque Paribas v The Fund Comprising the Proceeds of Sale of the MV* Emerald Transporter 1985 (2) SA 452 (D) at 463C E; *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A) at 366G *per* Hefer JA).'

[4] Section 151 of the TAA.

[5] Section 152 of the TAA provides that: 'A person chargeable to tax is a person upon whom the liability for tax due under a tax Act is imposed and who is personally liable for the tax.'

[6] Section 1 of the TAA defines a **"taxable event"** to mean an occurrence which affects or may affect the liability of a person to tax.

payment of tax. The amount of tax payable to SARS, ie the extent of the tax indebtedness of the taxpayer, is subject to calculation in which allowable deductions are deducted from the gross earnings to arrive at an amount of income upon which tax is payable. This accounting and calculation process occurs within defined tax periods. The determination of the amount of tax which is due to SARS occurs by way of assessment. In the case of tax payable by an 'ordinary' taxpayer liable for the payment of income tax, the assessment by SARS is in the form of an original assessment based upon the information submitted by the taxpayer in their return.

[27] CGT is a tax impost which arises upon the occurrence of the sale or disposal of a capital asset subject to tax. The taxable event, being the sale or disposal of the capital asset, gives rise to the liability for the payment of an amount of tax due to SARS. Since the capital gain is deemed to be income accrued within a tax period, the determination of the amount occurs by way of assessment based upon the taxpayer's return.

[28] Other forms of tax are subject to self-assessment. In that event, the determination of the amount of tax due, in the sense of being owed to SARS is made by the taxpayer. Value added tax (VAT) involves such self-assessment which is in the form of the submission of mandatory bi-monthly returns together with payment. Secondary Tax on Companies (STC) is another. In the case of the latter, where a taxpayer company declares a dividend payable to its shareholders the declaration of the dividend is a taxable event. The company is liable for the payment of the tax on the dividend and, upon submission of the return to SARS, the company is self-assessed to payment of the amount due, by law, to SARS.

[29] In this sense, a 'tax debt' is that amount of tax for which the taxpayer is chargeable to tax which is payable by a taxpayer to SARS. The determination of the amount of tax due to SARS occurs by way of assessment. An assessment, however, does not establish or impose liability. The liability exists, by operation of law, whether or not there has been an assessment. The definition of the terms 'tax debt' and 'assessment' bear this out. An 'assessment' means 'a determination of the amount of tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS.' If the definition of 'tax debt' is substituted, then an 'assessment' means 'a determination of a tax debt' which a taxpayer is obliged to pay to SARS. The tax debt exists, with or without an assessment. An assessment merely determines it and renders it recoverable in accordance with the recovery mechanisms provided by the TAA.

[30] In *Singh*, this Court dealt with s 40 of the Value Added Tax Act, 89 of 1984. It held that the section is a recovery provision and that it did not determine when a tax was due or payable.[7] The Court held that:

'An amount may be due but not yet payable, for example additional tax (see the judgment of the Court *a quo* at 100G 101C). Conversely, an amount which is payable may not be due. This may be the case with an assessed amount prior to the final determination of a dispute: to the extent that the assessment is finally found to be correct, that amount was due (and payable) when the return was rendered; to the extent that the assessment was not correct, that assessment was not due at any time, but it was payable in terms of s 31(1), which provides that, where, in the circumstances contemplated in the section, the Commissioner has made an assessment of the tax payable by the person liable for the payment of such amount of tax, "the amount of tax so assessed shall be paid by the person concerned to the Commissioner".'[8]

[7] *Singh* para 9.
[8] *Singh* para 11.

[31] This formulation of the underlying or pre-existing indebtedness versus the assessment of the amount of indebtedness was also set out in a judgment of this Court, namely *Namex (Edms) Bpk v Kommisaris van Binnelandse Inkomste* (*Namex*).[9] One of the questions in that case was whether SARS was to be characterised as a contingent creditor in relation to an additional assessment raised in the context of a compromise entered into in terms of s 311 of the Companies Act 61 of 1973. This Court held (per our translation):

'Was the respondent in fact a contingent creditor? Relying on precedent, the appellant's counsel argued that a tax liability arises at the latest at the end of a tax year, that is, prior to an assessment being issued. This argument has merit. From the case law referred to it transpires that the issuance of an assessment may be a requirement for the enforcement of a tax debt, *but the debt as such exists prior to that event.*'[10] (Emphasis added)

[32] In *Commissioner for the South African Revenue Service v Medtronic International Trading S.A.R.L (Medtronic International)*,[11] the minority judgment dealt with the interplay between the existence of a tax liability and the process of assessment, as follows:

'The contextual starting point is at the source of the liability for the payment of a tax debt. "Tax", is defined by the TAA to include a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act. A "tax debt", as provided in s 169(1) of the TAA, is "an amount of tax due or payable in terms of a tax Act". The determination of a "tax debt" occurs by way of an assessment. This is a fundamental feature of the tax administration system. An "assessment" means "the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS".

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[9] *Namex (Edms) Bpk v Kommisaris van Binnelandse Inkomste* [1993] ZASCA 181; [1994] 2 All SA 111 (A); 1994 (2) SA 265 (A).

[10] Ibid at 289F. The original test reads as follows:

'Was die respondent wel 'n voorwaardelike skuldeiser? Met 'n beroep op 'n aantal beslissings het die appellant se advokaat betoog dat inkomstebelastingpligtigheid laasstens aan die einde van 'n belastingjaar ontstaan, dws nog voordat 'n aanslag uitgereik is. Dié betoog is gegrond. Uit bedoelde beslissings blyk dit dat hoewel die uitreiking van 'n aanslag 'n vereiste vir die afdwingbaarheid van 'n belastingskuld mag wees, *die skuld as sulks reeds voor daardie gebeurlikheid bestaan.*' (Emphasis added).

[11] *Commissioner for the South African Revenue Service v Medtronic International Trading S.A.R.L (Medtronic International)* [2023] ZASCA 20; [2023] 2 All SA 297 (SCA); 2023 (3) SA 423 (SCA) para 67 and 69.

. . .

The liability to pay a tax debt does not arise except by assessment of the liability by SARS or by the taxpayer, in the form of self-assessment. In the absence of such an assessment, liability, and the concomitant duty to pay, do not arise, even though at law the underlying tax obligation subsists. This applies also in respect of interest which may be levied upon overdue amounts, or penalties for non-compliance with statutory obligations.'

[33] In the context of that case, the minority judgment pointed out that the determination of the amount of tax (which includes interest deemed or assessed to be due and payable) permits enforcement of the obligation to pay. Since, in that case, the taxpayer had agreed to the amount of tax due, it was not open to the taxpayer to seek a reduction of the interest payable. The minority judgment in *Medtronic International*, did not differ in any respects with the established authority of this Court as set out in *Namex.* An indebtedness to SARS for the payment of tax is not dependent upon an assessment to tax.

[34] The architecture of the tax administration system is based upon this distinction. SARS may raise an original assessment based upon the information disclosed by a taxpayer in a mandatory return. Such assessment is subject to an objection and appeal process and may be subjected to judicial review or appeal.[12] It is also open to re-assessment within specified time periods, which may result in an additional assessment being issued. SARS enjoys extensive powers of investigation by which it is entitled to make determinations of the tax indebtedness of a taxpayer retrospectively. In such cases the assessment to additional tax does not originate the liability. It determines that which was, by virtue of the tax impost, due by the taxpayer.

[12] This is dealt with in ss 104 -107 of the TAA located in Part B of chapter 9 which deals with 'Dispute Resolution'.

[35] As we have already stated, s 183 imposes liability upon a third party whose conduct has, deliberately, resulted in obstructing SARS from collecting a tax debt from a taxpayer. The section occurs within chapter 11 which deals with the recovery of tax. The chapter is divided into six parts. The first part concerns general provisions which are applicable in relation to recovery proceedings. It commences with s 169. As indicated earlier, subsection (1) refers to the amount of tax due or payable to SARS being a tax debt due to the fiscus. The section goes further to state that a tax debt may be recovered from a representative taxpayer who is personally liable for the payment of taxpayer's debts or the taxpayer.

[36] Section 170 deals with the probative value of an assessment. Section 172 provides for recovery by way of judgment. When s 172 is read with s 164 of the TAA, the distinction between a debt due or payable, as elucidated in *Singh*, is apparent. SARS is entitled to obtain judgment even if the underlying indebtedness is subject to objection. This is so because a taxpayer is obliged to pay the amount assessed to tax, notwithstanding an objection against the assessment. Section 172 envisages a process of amending the judgment or withdrawing it in the light of the outcome of the objection process.

[37] SARS is also entitled to recover tax due to it by process of sequestration or the liquidation of corporate entities. It is worth noting that, as this Court held in *Namex*, SARS recovers in insolvency not as a contingent creditor but as a creditor accorded its usual statutory preference.[13]

[38] The further sections of chapter 11 cater for specified instances of recovery of tax debts due by a taxpayer from third parties. Section 179 envisages the appointment of a so-called agent. The section allows SARS to recover payment

[13] *Namex* fn 9 above.

from a person who holds or will hold money due to the taxpayer. In effect, the 'agent' is notified to pay that money to SARS to satisfy a taxpayer's 'outstanding tax debt'.[14] This form of recovery plainly does not require that the 'tax debt' be anything other than 'payable', in the sense that a date for payment of an amount owed to SARS has been set. Recovery from an appointed agent can occur even if the underlying indebtedness is subject to challenge.

[39] In s 180, personal liability is imposed upon a financial administrator in charge of the financial affairs of a taxpayer who, by virtue of negligence or fraud, causes payment of tax not to be made. In both s 179 and s 180 the term tax debt is qualified by the word 'outstanding'. An 'outstanding tax debt' is defined in s 1 of the TAA to mean a tax debt in respect of which a final demand for payment has been made. A final demand for payment can be made only in circumstances where the date for payment of the amount of tax due to SARS has been stipulated and it remains unpaid.[15] Recovery for the payment of tax (whether or not it is legally due) can only occur if the taxpayer is in default of the obligation to pay a determined amount. Since the date for payment is ordinarily stipulated in the notice of assessment, these recovery processes require the existence of an assessment of the amount of tax due to SARS.

[40] Sections 181 and 182 stand upon a slightly different footing. The former envisages recovery of a tax debt from shareholders of a company in liquidation. They must have received assets of the company within a specified period in

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[14] Section 179 (1) provides that:
'A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, 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.'
An outstanding tax debt is defined to mean a tax debt not paid by the date set in s 162. Such date is set either by proclamation or in the notice of assessment.

[15] See s 164 of the TAA.

circumstances where the company had an 'existing tax debt' or 'would have had an existing tax debt' if the taxpayer had complied with its obligations.[16]

[41] The latter section applies where a transferee receives assets of a taxpayer in relation to which it is a connected person for no consideration or consideration less than the fair market value of the assets.[17] It also draws the distinction between 'existing tax debt' or one that would have existed. Neither s 181 nor s 182 appears, at face value, to require that the shareholders have any knowledge of the circumstances in which they acquired the assets or that they knew of the taxpayer's default.

[42] The phrase 'existing tax debt' and reference to a tax debt 'would have existed', suggests that the term 'tax debt' in this instance means 'a determined amount of tax due'. In other words, that there was an existing *assessment* to tax or that there would have been such *assessment* but for the failure to comply with the taxpayer's obligations. Sections 181 and 182 therefore contemplate recovery of a tax debt even if, at the time that the third party received the assets of a taxpayer, the amount of tax due (the tax debt) by the taxpayer had not yet been determined by assessment. In this context therefore, the term tax debt is used to connote its general description of the taxpayer's liability to pay tax as is imposed by operation of law.

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[16] Section 181(2) reads as follows:
'The persons who are shareholders of the company within one year prior to its winding up are jointly and severally liable to pay the tax debt to the extent that –
(*a*) they receive assets of the company in their capacity as shareholders within one year prior to its winding up; and
(*b*) the tax debt existed at the time of the receipt of the assets or would have existed had the company complied with its obligations under a tax Act.'

[17] Section 182(1) reads as follows:
'A person (referred to as a transferee) who receives an asset from a taxpayer who is a connected person in relation to the transferee without consideration or for consideration below the fair market value of the asset is liable for the outstanding tax debt of the taxpayer.'

[43] The purpose of s 183 is to establish the liability of a third party to pay a tax debt of a taxpayer when the culpable conduct of the third-party results in the obstruction of the collection of tax from the taxpayer. It strikes at the evasion of the payment of tax. Since the section is intended to enable recovery of a tax debt, it follows that the tax debt must be recoverable. The tax debt that SARS seeks to recover must be one that is determined, by assessment, and is therefore due or payable at the time that the recovery process as envisaged by s 183 occurs.

[44] The term ‘tax debt’ in s 183 undoubtedly refers to a recoverable tax debt, in the sense of a determined tax debt, insofar as it permits recovery from the third party. But that is not its exclusive meaning. The term also encompasses the amount of tax a taxpayer is liable to pay to SARS. If a taxpayer is chargeable to tax the taxpayer is indebted notwithstanding that the amount of the indebtedness has not yet been determined. A tax debt exists, irrespective of the absence of an assessment of the tax debt.

[45] It must be emphasised that we are not concerned with what the third party knew or with what constitutes knowing assistance in the dissipation of assets in order to obstruct the collection of a tax debt. That was not the subject of the separated issue. The separated issue was whether ‘tax debt’ was envisaged to refer to an assessed indebtedness at the time of the dissipation. Section 169 (1) refers to a debt due to SARS as being and amount due or payable. Section 169 (3) describes SARS as a creditor for the purposes of recovery as envisaged by chapter 11. In our view, the language of s 183, construed within its context, does not require that the taxpayer’s liability to pay tax due to SARS should have been determined by assessment at the time that the dissipation of assets occurs.

[46] To hold that the section requires that, at the time of the dissipation, the taxpayer's obligation to pay tax due to SARS should be liquidated and immediately claimable by action, would defeat the purpose of the section. It would also give rise to absurdity, in that a culpable third party who intentionally assists a taxpayer to dissipate assets so that payment of a yet to be assessed tax debt cannot be made, would escape liability despite culpable conduct to evade tax, simply on the basis that an anticipated assessment had not yet been issued.

[47] Upon the separated issue as framed, therefore, the high court order was correct. A final word needs be said in relation to the nature of the assessed tax and the circumstances in which the assessment to tax occurred. There was considerable argument both before the high court and this Court about the fact that the taxpayer's assessment to tax flowed from an investigation and audit process in which SARS relied upon deeming provisions and upon its treatment of the substance over form of transactions which constituted taxable events. It was argued that this treatment of the tax position of the taxpayer could not, because of the inherent uncertainty, prejudice the third party by imposing liability in the absence of a determined tax debt. To do so, it was suggested, would expose a third party to significant uncertainty and almost indeterminate risk.

[48] The argument was misplaced for two reasons. First, it loses sight of the onerous requirements which s 183 sets for third party liability. The third party must knowingly have assisted in a dissipation for the purpose of obstructing the collection of a tax debt. Whether that requirement and the requisite intention is established will be a matter dependent upon the facts in each case. So too, what the relevant parties knew or ought to have known at the time that the dissipation

occurred. These aspects are not before us. No doubt they will feature in the continuation of the trial of the matter in due course.

[49] Secondly, the argument ignores the fact that the assessment to tax for CGT and STC in respect of the 2007 tax period related to a legal liability for the payment of tax which arose in consequence of taxable events in that tax period. Following the issue of the assessments, the taxpayer pursued an objection. The objection was partially allowed, in relation to the obligation to pay certain interest charged and in relation to the quantification of the amount payable. The liability to pay the tax was confirmed. No appeal was noted and the assessments became final. The consequence is that the tax indebtedness of the taxpayer, as it existed in the 2007 tax period, was finally established. Contentions regarding the basis of assessment are therefore irrelevant for present purposes. In the circumstances the appeal against the high court order on this question must fail.

Admissibility of the transcript

[50] The appellants testified at an inquiry during 2015 and 2016 as envisaged in s 50 of the TAA.[18] SARS wishes to rely upon the evidence obtained during this inquiry at the trial. The appellants contended that the evidence is inadmissible. Their stance is in essence that the evidence is inadmissible, because relying on it will conflict with s 69 of the TAA. And that s 56 (4) does not allow for the admissibility of evidence procured in a s 50 inquiry in subsequent civil proceedings.

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[18] Section 50 of the TAA reads as follows:
'(1) A judge may, on application made *ex parte* and authorised by a senior SARS official grant an order in terms of which a person described in s 51(3) is designated to act as presiding officer at the inquiry referred to in this section.
(2) An application under subsection (1) must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.
(3) A senior SARS official may authorise a person to conduct an inquiry for the purposes of the administration of a tax Act.'

[51] To sustain the argument appellants relied, inter alia, on s 56 (1) of the TAA which provides that an inquiry under s 50 is private and confidential. Section 56 (4) however provides as follows:

'Subject to s 57 (2), SARS may use evidence given by a person under oath or solemn declaration at an inquiry in a subsequent proceeding involving the person or another person.'

[52] Section 57 (2) reads as follows:

'(2) Incriminating evidence obtained under this section is not admissible in criminal proceedings against the person giving the evidence, unless the proceedings relate to –

(a) the administering or taking of an oath or the administering or making of a solemn declaration;

(b) the giving of false evidence or the making of a false statement; or

(c) the failure to answer questions lawfully put to the person, fully and satisfactorily.'

[53] Section 56 (3) provides that s 69 applies with the necessary changes to persons present at the questioning of a person, including persons being questioned during the inquiry. Section 69 (2) *(a)* authorises the disclosure of a taxpayer's information in certain circumstances, including by a SARS official as a witness in civil proceedings.

[54] The appellants relied upon *Commissioner for South African Revenue Services v Sassin and Others* (*Sassin*) [19] where the court stated that the transcript of an inquiry under s 50 of the TAA was inadmissible in subsequent civil proceedings. The high court, however, did not follow *Sassin* and pointed out that the view expressed was obiter. In the *Sassin* matter SARS had brought an application against Mr Sassin and Mr Badenhorst in relation to an alleged fraudulent VAT scheme. Mr Badenhorst was insolvent and SARS alleged that Mr Sassin received ill-gotten gains from Mr Badenhorst. A variety of declaratory

[19] *Commissioner for South African Revenue Services v Sassin and Others* [2015] ZAKZDHC 82; [2015] 4 All SA 756 (KZD).

orders were sought against Mr Sassin for payment of damages that SARS allegedly suffered as a result of the scheme. The court referred the matter to trial, based on the finding that there was a bona fide dispute of fact and made no finding on the merits.

[55] In *Commissioner for the South African Revenue Service v Badenhorst t/a SA Global Trading and/or Global Trading and Others, Commissioner of the South African Revenue Service v Vermaak and Others* (*Vermaak*),[20] the same transcript featured as in *Sassin*. In that matter SARS obtained a provisional preservation order against Mr Badenhorst and Mr Sassin. The court considered the affidavits and transcript of the inquiry.[21] In *Vermaak*, the court also considered whether *Sassin* was authority for the proposition that a s 50 transcript is inadmissible in subsequent proceedings and found, correctly in our view, that it was not. The remark about the admissibility of the transcript in *Sassin* was indeed obiter as the court was not called upon to determine the issue.

[56] Section 56 is to be found in chapter 5 of the TAA, which concerns 'Information Gathering'. The purpose of the chapter is to facilitate the execution of SARS' statutory mandate to collect tax.[22] The TAA recognises the fact that SARS stands as a stranger to transactions between taxpayers. For this reason there is a need to enable SARS to obtain information it would otherwise not be able to acquire, in order to perform its statutory function.[23]

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[20] *Commissioner for the South African Revenue Service v Badenhorst t/a SA Global Trading and/or Global Trading and Others, Commissioner of the South African Revenue Service v Vermaak and Others* [2015] ZAGPPHC 1085.
[21] Ibid para 50.
[22] Section 2 of the TAA.
[23] *Commissioner South African Revenue Services v* A (Pty) Ltd and Others (unreported judgment of Keightley J Gauteng Local Division Case no 17418/20160) para 88.

[57] The high court expressed itself as follows in relation to the interpretation of the words 'proceedings' in *Sassin* :

'The Court's approach by attributing a meaning to the word "*proceeding*" that excludes judicial proceedings in court, whether civil or criminal, cannot be supported. Section 56 (4) clearly empower the use of the evidence in a subsequent proceeding, subject to the qualification in s 57 (2), which excludes the use of incriminating evidence in criminal proceedings. It will also be at odds with the context and plain wording of the provision itself to exclude judicial proceedings, whether civil or criminal, from the word "*proceeding*." There is also no textual reason to interpret "*proceeding*" where it appears in s 56 (4) as meaning something different from where the plural of the same word appears in the introductory part of s 56 and in s 57 (2).'

[58] The appellants' construction of the section would require a reading in of the words 'tax proceeding'. In *National Director of Public Prosecutions v Mohamed NO and Others*,[24] the Constitutional Court says the following in relation to the reading in of words into a statute:

'Furthermore, the issue is not whether the *audi* principle is to be implied in s 38 but, on the contrary, whether –

"it is clear that Parliament has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify the Court's not giving effect to it."

We have adopted the view, consistently enunciated over the years by the courts, that –

"words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands"

and that such implication must be necessary in order "to realise the ostensible legislative intention or to make the Act workable".' (Footnotes omitted)

[59] In this instance reading in of the words 'tax proceedings' is not necessary to realise the legislative intention, nor to make the TAA workable. On the contrary, if SARS is constrained to only use information obtained during an inquiry in

[24] *National Director of Public Prosecutions v Mohamed NO and Others* [2003] ZACC 4; 2003 (1) SACR 561; 2003 (5) BCLR 476; 2003 (4) SA 1 (CC) para 48.

subsequent proceedings under the TAA, the purpose of an inquiry would be frustrated. Such an interpretation would render these sections nugatory.

[60] The appellants argued that, if subsequent proceedings were to include civil proceedings, it would imply a contradiction between s 56 (1) and (3) read with s 69 and s 56 (4). The argument was that it is not possible for an inquiry to be both private and confidential on the one hand, and for the evidence obtained during the inquiry to be used in a subsequent court action. The argument went further to say that it is not possible to ensure the secrecy of a taxpayer's information and not to disclose such information to a person who is not a SARS official.

[61] The wording of s 56 (4) points to the fallacy of the argument. The section provides specifically that the evidence may be used against another person. In any event, s 69 (1) is qualified by s 69 (2) which makes provision for the disclosure of a taxpayer's information under specified circumstances.[25] The confidentiality of such information is therefore not without restriction. Section 69 (2) *(a)* specifically authorises the disclosure of a taxpayer's information in a variety of circumstances, including by a SARS official as a witness in civil proceedings. Additionally, s 56 (3) provides for restrictions on the application of s 69 to the extent necessary,

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[25] Section 69 (1) and s (2) of the TAA reads as follows:
'(1) A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official.
(2) Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official –
(a) in the course of performance of duties under a tax Act or customs and excise legislation, such as –
(i) to the South African Police Service or the National Prosecuting Authority, if the information relates to, and constitutes material information for the proving of, a tax offence;
(ii) as a witness in civil or criminal proceedings under a tax Act; or
(iii) the taxpayer information necessary to enable a person to provide such information as may be required by SARS from that person;
(b) under any other Act which expressly provides for the disclosure of the information despite the provisions in this Chapter;
(c) by order of a High Court; or
(d) if the information is public information.'

depending upon the circumstances of the case. There is accordingly no contradiction between these sections.

[62] Counsel for the appellants relied, in argument, on what was said to be analogous provisions in s 417 and s 418 of the Companies Act.[26] These sections of the Companies Act permit the holding of inquiries into the affairs of a company in liquidation. The sections provide that the person testifying at an inquiry is obliged to answer any question put, even if it may be incriminating. The Companies Act, however, provides that the evidence given is admissible only against the person giving the evidence in civil proceedings and in certain criminal proceedings relating to the offences as set out in s 417 (2) *(c)* of the Companies Act. The text of s 57 of the TAA, however, differs. It provides that the evidence obtained may also be used against another person. The Companies Act provisions are, therefore, of no assistance.

[63] In *Bernstein and Others v Bester NO and Others* (*Bernstein*),[27] it was held with reference to the Companies Act that the use of compelled testimony in civil proceedings is not prohibited or unconstitutional in other open and democratic societies. This applies equally to inquiries provided for in s 64 and s 65 of the Insolvency Act.[28] In *Pitsiladi v Van Rensburg and Others NNO* (*Pitsiladi*),[29] the applicants sought to set aside a subpoena *duces tecum* on the basis that it was an abuse of process. The court held that the purpose of the inquiry was for the trustees to gather information and held that its use in future civil litigation is a legitimate purpose of the provision.[30]

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[26] Companies Act 61 of 1973.

[27] *Bernstein and Others v Bester NO and Others* [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 para 120. See also *Benson, In re: Tait NO and Others v Jason and Others* [2012] ZAWCHC 377 para 13.

[28] Insolvency Act 24 of 1936.

[29] *Pitsiladi v Van Rensburg NO and Others* [2001] JOL 8442 (SE); 2002 (2) SA 160 (SECLD) at 161 F-G.

[30] Ibid at 161 G-J.

[64] In light of the text of the relevant sections of the TAA and the approach to comparable provisions in the Companies Act and the Insolvency Act, the transcript of the evidence given at the s 50 inquiry, is admissible in the litigation between the parties. The evidence obtained pursuant to s 50 of the TAA serves a legitimate purpose, which is to enable SARS to execute its statutory duty, inter alia, to recover tax debts due to the fiscus.

[65] The appellants' reliance upon their right to a fair hearing, as envisaged in s 34 of the Constitution, does not avail them. The argument was that the high court erred in relying on Constitutional Court cases that were decided under the 1993 Constitution which did not expressly provide for a fair trial. However, *Ferreira v Levin No and Others; Vryenhoek and Others v Powell NO and Others* (*Ferreira*),[31] and *Bernstein*, which were decided under the 1993 Constitution, enunciated principles which have been consistently applied under the 1996 Constitution.[32]

[66] The high court was alive to these considerations. It referred to *Benson: In re Tait N.O. and Others v Jason and Others*,[33] where it was held that the provisions of s 417 and 418 do not cause an unjustifiable infringement of constitutional rights. It was also pointed out that whether any constitutional rights were infringed will depend on the manner in which the inquiry is conducted. It is the primary responsibility of a trial court to ensure the fairness of a trial. It does so by careful consideration of the circumstances in which evidence sought to be admitted was obtained and the purpose for which it is to be admitted. The high court was therefore correct to find that the trial court is best placed to determine the latter

[31] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1.
[32] In *Ferreira*, the Constitutional Court dealt with the constitutionality of s 417(2)(*b*) of the Companies Act. It invalidated only the part of the section permitted the use of incriminating evidence in subsequent criminal proceedings. In *Bernstein*, the Constitutional Court rejected an application to invalidate ss 417 and 418 of the Companies Act. It held that the use of compelled testimony in civil proceedings is constitutional.
[33] *Benson: In re Tait N.O. and Others v Jason and Others* [2012] ZAWCHC 377 para 13.

question and the probative value and weight that should be given to the evidence, if any.

[67] In the result we make the following order:

The appeal is dismissed with costs, including the costs of two counsel.

G GOOSEN
JUDGE OF APPEAL

R G TOLMAY
ACTING JUDGE OF APPEAL

Appearances

For the first and second appellants:	L S Kuschke SC and M O'Sullivan
Instructed by:	Edward Nathan Sonnenbergs Inc., Cape Town Webbers Attorneys, Bloemfontein
For the third and fourth appellants:	E W Fagan SC and G M Quixley
Instructed by:	Edward Nathan Sonnenbergs Inc., Cape Town Webbers Attorneys, Bloemfontein
For the respondent:	A Sholto-Douglas SC and P Myburgh and S Mahommed
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