Commissioner For The South African Revenue Services v Miles Plant Hire (PTY) Ltd Case 23533/2013

The North Gauteng Division of The High Court heard the matter between the Commissioner For The South African Revenue Services (appellant) and Miles Plant Hire (PTY) (respondent) Ltd on 13 September 2013 and delivered its judgement on 3 October 2013.

Background to the case

These proceedings have their origin in an urgent application filed in April 2013 in which the appellant inter alia sought an order to set aside a resolution adopted by the respondent to file for voluntary business rescue and for the final winding-up of the respondent. On 10 May 2013, the application was postponed on the basis that it would be dealt with on a semi-urgent basis, with the respondent's agreement to interim anti-dissipation relief.

Subsequent to the postponement, the business rescue practitioner whose appointment was in part the subject of the application has filed a notice in terms of s 132(2)(b) of the Companies Act, with the result that the only remaining issue for adjudication is the winding-up. In addition, the respondent has filed a notice of its intention to argue a question of law concerning the interpretation of s 177(3) of the Tax Administration Act, 28 of 2011. The respondent contends that the section required the supplicant to seek leave to institute the present application for winding up, since there is a disputed tax debt in respect of which an appeal is pending.

After the filing of the notice of intention to argue a point of law, the applicant filed a notice to amend its notice of motion by adding a prayer in terms of which it seeks leave to institute the winding up proceedings. The respondent did not oppose the amendment. Shortly before the hearing of the application, the parties agreed that if the question of law is decided in favour of the applicant, then the respondent will concede the merits of the application; if the respondent succeeds, the application stands to be dismissed. The application was argued on that basis.

Contentions by both parties

It is common cause that the respondent has submitted objections against certain assessments raised by the South African Revenue Services (SARS), that the objections were disallowed and that an appeal is pending. The appeal is to be heard in the Tax Court during November 2013. The respondent submits that the provisions of s 177(3), properly construed, required the applicant to seek the court's leave to institute the winding-up proceedings being instituted by way of notice of motion. Since the applicant omitted to do so, the respondent contends that the winding-up application is premature and that it stands to be discussed on that basis.

The primary basis for this submission is that the intention of the legislature is to be defined by reference to the ordinary grammatical meaning of the words used. These envisage that an application for winding-up may 'only be instituted' with the leave of the court before which the proceedings are to be brought, i.e. that an application for winding up may be instituted if and only if prior leave has been granted by the court before which any winding-up proceedings are ultimately brought.

The applicant argues for an interpretation of s 177(3) that accounts more clearly for context and purpose.

Extracts from the judgement

"…the context in which the section occurs, its purpose, and the potential consequences that might flow from each of the interpretations preferred, it should be recalled that s 177(3) is located in chapter 11 of the Act, headed 'Recovery of tax'. More specifically, part C of the chapter empowers SARS, as one of the means available to it to recover a tax debt, to institute sequestration, liquidation or winding-up proceedings. "

In short the court found that the words 'the proceedings may only be instituted with the leave of the Court before which the proceedings are brought' mean that the disputed tax debt is not recoverable under the 'pay now, argue later' rule during winding –up proceedings, unless the court before which those proceedings serve, permits it. Such an interpretation affirms the court's inherent discretion in winding-up proceedings, and empowers the court to evaluate all of the appropriate facts and circumstances (including the merits of any objection and pending appeal), and to make an appropriate order.

"Even if one were to grant the applicant the burden of showing only that the grounds for disputing the assessment are unreasonable, there is nothing in the papers that persuades me that there are any grounds in terms of which the court should be inclined to refuse leave to institute winding-up proceedings on account of the pending appeal."

"On the contrary, the grounds for appeal are clearly intended only to further delay the inevitable. It is just and equitable that the respondent's affairs be wound up and that an independent liquidator be appointed to conduct an investigation into the respondent's financial affairs."

As the parties already agreed on the future course of these proceedings in the event that the question of law is decided

in the applicant’s favour, and given further that all of the other formal requirements relevant to the application have been met, the court found that the applicant has made out a case for a final winding-up order.

The following order was made Judge Andre van Niekerk (Acting Judge of the High Court):

1. The applicant is granted leave to institute these winding-up proceedings.
2. The respondent is placed under a final order of winding-up.
3. The costs of the application are to be costs in the winding-up.