

SARS says pay up, but the court says no: An important case on taxpayers rights



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In *Nondabula v Commissioner: SARS and Another* (4062/2016) [2017] ZAECMHC 21 (27 June 2017), heard by the Mthatha High Court, Nondabula (Taxpayer), brought an application to interdict the South African Revenue Service (SARS) from invoking the provisions of s179 of the Tax Administration Act, No 28 of 2011 (TAA) pending the final determination of the Taxpayers objection to an additional assessment of his income tax. Furthermore, the Taxpayer sought an order that SARS withdraw its third party notice, in terms of which SARS instructed Absa to withhold and pay over monies held in the Taxpayers bank account. **Facts**The Taxpayer is a businessman and sole proprietor of a fuel service station called Umzimkhulu Shell Garage and it is in respect of this business that he is liable to pay taxes to SARS in these proceedings. The matter at hand arose after SARS issued an additional assessment in terms of which the Taxpayer was ordered to pay an amount of R1,422,637.83 within 10 days, in a letter dated 29 September 2016. The letter was preceded by a statement of account issued by SARS which reflected a balance brought forward in the sum of R1,404,517.97. Apart from the information in the statement of account, SARS did not explain how it arrived at these figures. The Taxpayer objected to the additional assessment on 4 April 2016, but SARS rejected the objection on 5 May 2016. The Taxpayer then wrote another letter to SARS on 3 June 2016 in which the Taxpayer requested that SARS reconsider the objection. The Taxpayer also submitted further documentation

with this letter and submitted a further objection, but SARS did not respond to the letter or the objection. It simply raised technical objections against the Taxpayers objections.

Legal framework

The court considered the provisions of s92, s95, s96 and s179 of the TAA and the interaction between those provisions. These provisions deal with, among other things, the rules pertaining to the issuing of additional assessments based on estimates and the issuing of a third party notice in terms of which an institution is ordered to pay monies that would have been due to a person, to SARS, to satisfy a persons tax debt.

Judgment

The court explained that in terms of s92 of the TAA, SARS must issue an additional assessment if at any time it is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, so as to correct the prejudice. However, before SARS can act in terms of s92, it must comply with the provisions of s95, which provides, among other things, that SARS may raise an additional assessment based on an estimate, based on information readily available to it. The court found that SARS had complied with s95, as SARS explained in its answering affidavit that the additional assessment was raised due to the Taxpayer declaring interest income of R0, which did not match the interest income amount of R32,734 for the Taxpayers account held at Absa.

The court continued, stating that once SARS had decided to act in terms of s92 and had complied with s95, it was then required to comply with s96 of the TAA. Section 96 contains the formal requirements regarding the information that must be contained in a notice of assessment, but importantly it also states that in addition to these formal requirements SARS must give the person assessed in the case of an assessment described in section 95 of an assessment that is not fully

based on a return by the taxpayer, a statement of the grounds for the assessment. In other words, SARS had to explain the grounds on which the additional assessment was raised, by providing a statement of the grounds of the assessment. SARS failed to do this under the circumstances as the statement of account issued to the Taxpayer did not provide such grounds.

The court explained that although SARS was correct in arguing that the application of s92 and s95 does not require SARS to interact with the Taxpayer, once the stage provided for in section 92 is reached the first respondent is required to comply with section 96 by issuing a notice of assessment with all the information required and provided for in section 96. Importantly, the court also found that s96 is a peremptory provision, meaning that SARS does not have a discretion to apply the provision or not. Having failed to comply with s96, SARS then jumped to the provisions of s179 of the TAA and issued the impugned third party notice, which effectively would have had the effect of closing down the Taxpayers business. The court viewed SARSs conduct in a very negative light and held that SARSs conduct was not only unlawful but a complete disregard of the doctrine of legality which is a requirement of the rule of law in a constitutional democracy.

The court held that SARS dealt with the Taxpayer in an arbitrary manner contrary to the TAA and to the values enshrined in the Constitution. It added that the Applicant is a businessman who employs quite a number of people in our country where our unemployment rate is extremely high and SARSs conduct had the potential to close down the Taxpayers business. This would have had catastrophic consequences for the Taxpayer, his family and all his employees. The court held that at the very least, SARS should comply with its own legislation and must promote the values in the Constitution in the exercise of its public power, which it failed to do in the circumstances by not complying with its obligations under s96 of the TAA.

The court found in favour of the Taxpayer and ordered SARS to pay the Taxpayers costs.

Comment

This case reiterates the fact that inasmuch as taxpayers have a duty to pay tax, SARS has duties that it has to comply with in order to be entitled to collect such tax. A taxpayer that is faced with a situation where an assessment is raised by SARS, which does not meet the formal requirements of s96 of the TAA and which does not provide the grounds for raising the assessment, should be aware that SARS is not entitled to enforce payment based on such an assessment as such an assessment is unlawful.