



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

CASE NO: B2495/2023

DELETE WHICHEVER IS NOT APPLICABLE

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

12 February 2025

.....
DATE SIGNATURE

In the matter between:

ANDRIES GREYVENSTEYN

APPLICANT

and

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

FIRST RESPONDENT

THE MINISTER OF FINANCE

SECOND RESPONDENT

THE SOUTH AFRICAN REVENUE SERVICE

THIRD RESPONDENT

GOLD KID TRADING (PTY) LTD

FOURTH RESPONDENT

JUDGMENT

AMIEN AJ

Introduction

- [1] The applicant in this matter is Mr Andries Greyvensteyn. There are four respondents, namely the Commissioner for SARS (first respondent), the Minister of Finance (second respondent), SARS (third respondent), and Gold Kid Trading Pty (Ltd) (fourth respondent). Any reference to SARS includes both the first and third respondents, unless otherwise indicated.
- [2] The applicant challenges the constitutionality of three provisions of the Tax Administration Act 28 of 2011 (the Act). They are sections 180, 184(2), and 186(3).
- [3] By virtue of sections 169 and 172(2)(a) of the Constitution, this court has the power to strike down national legislation as unconstitutional if it finds it to be so.
- [4] The wording of the impugned provisions read as follows:
- “180. A person is personally liable for any tax debt of the taxpayer to the extent that the person’s negligence or fraud resulted in the failure to pay the tax debt if-
- (a) the person controls or is regularly involved in the management of the overall financial affairs of a taxpayer; and

- (b) a senior SARS official is satisfied that the person is or was negligent or fraudulent in respect of the payment of the tax debts of the taxpayer.
184. (1) SARS has the same powers of recovery against the assets of a person who is personally liable under section 155, 157¹ or this Part as SARS has against the assets of the taxpayer and the person has the same rights and remedies as the taxpayer has against such powers of recovery.
- (2) SARS must provide a person referred to in subsection (1) with an opportunity to make representations-
- (a) before the person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183,² if this will not place the collection of tax in jeopardy; or

¹ Sections 155 and 157 of the Tax Administration Act read:

- "155. A representative taxpayer is personally liable for tax payable in the representative taxpayer's representative capacity, if, while it remains unpaid-
- (a) the representative taxpayer alienates, charges or disposes of amounts in respect of which the tax is chargeable; or
 - (b) the representative taxpayer disposes of or parts with funds or money, which are in the representative taxpayer's possession or come to the representative taxpayer after the tax is payable, if the tax could legally have been paid from or out of the funds or moneys.
- ... 157. (1) A withholding agent is personally liable for an amount of tax-
- (a) withheld and not paid to SARS; or
 - (b) which should have been withheld under a tax Act but was not so withheld.
- (2) An amount paid or recovered from a withholding agent in terms of subsection (1) is an amount of tax which is paid on behalf of the relevant taxpayer in respect of his or her liability under the relevant tax Act."

² Sections 179, 181-183 of the Tax Administration Act read:

- "179. (1) A senior SARS official may by 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, require the person to pay the money to SARS in satisfaction of the taxpayer's tax debt.
- (2) A person that is unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice and the official may withdraw or amend the notice as is appropriate under the circumstances.
 - (3) A person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, the person is personally liable for the money.
 - (4) SARS may, on request by a person affected by the notice, amend the notice to extend the period over which the amount must be paid to SARS, to allow the

(b) as soon as practical after the person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183.

186. (1) To collect an outstanding debt, a senior SARS official may apply for an order referred to in subsection (2), if-

(a) the taxpayer concerned does not have sufficient assets located in the Republic to satisfy the tax debt in full; and

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- taxpayer to pay the basic living expenses of the taxpayer and his or her dependants.
181. (1) This section applies where a company is wound up other than by means of an involuntary liquidation without having satisfied its tax debt, including its liability as a responsible third-party, withholding agent, or a representative taxpayer, employer or vendor.
- (2) The persons who are shareholders of the company within one year prior to its winding up are jointly and severally liable to pay the unpaid tax 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.
- (3) The liability of the shareholders is secondary to the liability of the company.
- (4) Persons who are liable for tax of a company under this section may avail themselves of any rights against SARS as would have been available to the company.
- (5) This section does not apply—
- (a) in respect of a “listed company” within the meaning of the Income Tax Act; or
- (b) in respect of a shareholder of a company referred to in paragraph (a).
182. (1) 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 tax debt of the taxpayer.
- (2) The liability is limited to the lesser of—
- (a) the tax debt that existed at the time of the receipt of the asset or would have existed had the transferor complied with the transferor’s obligations under a tax Act; and
- (b) the fair market value of the asset at the time of the transfer, reduced by the fair market value of any consideration paid, at the time of payment.
- (3) Subsection (1) applies only to an asset received by the transferee within one year before SARS notifies the transferee of liability under this section.
183. 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 tax debt.”

(b) the senior SARS official believes that the taxpayer-

- (i) has assets outside the Republic; or
- (ii) has transferred assets outside the Republic for no consideration or for consideration less than the fair market value,

which may fully or partly satisfy the tax debt.

(2) A senior SARS official may apply to the High Court for an order compelling the taxpayer to repatriate assets located outside the Republic within a period prescribed by the court in order to satisfy the tax debt.

(3) In addition to issuing the order described in subsection (2), the court may-

(a) limit the taxpayer's right to travel outside the Republic and require the taxpayer to surrender his or her passport to SARS;

(b) withdraw a taxpayer's authorization to conduct business in the Republic, if applicable;

(c) require the taxpayer to cease trading; or

(d) issue any other order it deems fit.

(4) An order made under subsection (2) applies until the tax debt has been satisfied or the assets have been repatriated and utilised in satisfaction of the tax debt."

[5] SARS refers to sections 180 and 184(2) of the Act as the 'personal liability provisions' and to section 186 of the Act as the 'repatriation provision'.

- [6] Under section 180 of the Act, SARS can hold a third-party personally liable for the tax debts of a taxpayer if: the taxpayer has an outstanding debt; the third-party controls or manages the financial affairs of the taxpayer; the third-party's negligence or fraud resulted in the taxpayer's failure to pay its tax debt; and a senior SARS official is of the view that the third-party was negligent or fraudulent regarding payment of the tax debts of the taxpayer.
- [7] Under section 184(2) of the Act, SARS must allow the third-party an opportunity to make representations regarding their liability for the tax debts of the taxpayer.
- [8] As the applicant controls or is regularly involved in the management of the overall financial affairs of the fourth respondent, SARS holds the applicant liable under section 180 read with section 184(2) of the Act for the tax debts of the fourth respondent.
- [9] The applicant avers that section 180 read with section 184(2) of the Act violates his right to access to court under section 34 of the Constitution, on the basis that the sections allow SARS to resort to self-help thus undermining his access to court.
- [10] When SARS determines that a third-party is liable for the tax debts of a taxpayer, it may apply for an order under section 186(1) and (2) of the Act to repatriate their foreign assets if they do not have sufficient local assets to satisfy the tax debts. Section 186(3) of the Act enables a court to order the third-party to surrender their passport and limits their ability to travel outside the country. It also enables the court to withdraw the third-party's authorization to conduct business in the country or to cease trading.
- [11] On 28 February 2023, SARS obtained an interim *ex parte* order in chambers against the applicant and the fourth respondent under section 186(3) of the Act. The applicant refers to this order as the "February order".

- [12] The February order allows for the compulsory repatriation of the applicant's foreign assets and to limit his ability to travel outside South Africa.
- [13] The applicant contends that section 186(3) of the Act violates his sections 21 and 22 rights of the Constitution because his rights to travel outside South Africa and to earn a living are limited.
- [14] Payment of taxes from those whom the fiscus deems able to afford to do so, is important for the development of a country. Thus, its collection is compulsory and used for the socio-developmental benefit of the country. Recovery of taxes is crucial to ensure that the public benefit and public interest are served.
- [15] The Act requires that the recovery of taxes must be done in an effective and efficient manner. As enunciated in section 2, the purpose of the Act is:
- “to ensure the effective and efficient collection of tax by-
- (a) aligning the administration of the tax Acts to the extent practically possible;
- (b) prescribing the rights and obligations of taxpayers and other persons to who this Act applies;
- (c) prescribing the powers and duties of persons engaged in the administration of a tax Act; and
- (d) generally giving effect to the objects and purposes of tax administration.”
- [16] Effective and efficient recovery of taxes is especially necessary given the decline over the years of taxpayers to adhere to their tax obligations as well as increasing fraudulent conduct and tax evasion by vendors.
- [17] SARS has the legislative obligation and powers of recovering taxes for the benefit of the fiscus. The South African Revenue Service Act 34 of 1997, under

which SARS is established, describes SARS' primary responsibility as the collection of revenue in an efficient and effective manner.³

- [18] However, SARS' powers and duties of recovery of taxes are not absolute. SARS may not carry out its powers and duties of recovery in a way that violates constitutional rights. The purpose of this judgment is to ascertain whether this has happened through the application of sections 180, 184(2) and 186(3) of the Act.

Background Information

- [19] The fourth respondent conducts business as a duly authorised refinery specialising in refining precious metals, including gold.
- [20] The fourth respondent claims to purchase unwrought gold bars and jewelry containing gold from suppliers who were registered vendors under the Value-Added Tax Act 89 of 1991 (VAT Act) and to have paid the purchase prices including VAT to its suppliers. It then refines the gold and sells it to South African clients who pay the purchase prices plus VAT. The fourth respondent also sells the refined gold to external clients, in which case the transactions are zero-rated in terms of section 1 of the VAT Act. From time to time, the fourth respondent had VAT refund claims against SARS.
- [21] After auditing the fourth respondent and conducting investigations and inquiries into its tax affairs, SARS claims that the fourth respondent was fraudulent. SARS avers that the fourth respondent did not receive gold from stipulated vendors. Instead, SARS contends that the fourth respondent obtained gold Kruger Rands, on which VAT is not levied, which it smelted and sold as highly refined unwrought gold. SARS alleges that the fourth respondent claimed VAT refunds for which it had not paid.

³ Sections 2 and 3 of the South African Revenue Service Act 34 of 1997.

- [22] In addition to the above claims by SARS against the fourth respondent, SARS holds the applicant liable for the fourth respondent's tax debts on various grounds including sections 180 and 184 of the Act.
- [23] Although the applicant disputes SARS' claims against him, the purpose of this application is to challenge the constitutionality of the impugned provisions and not to litigate the dispute between the applicant and SARS.
- [24] The *ex parte* February order that SARS obtained against the applicant and fourth respondent comprises a preservation order under section 163 of the Act⁴ and a repatriation order under section 186(3) of the Act.

⁴ Section 163 of the Tax Administration Act reads:

- "163. (1) A senior SARS official may authorise an *ex parte* application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates.
- (2) (a) SARS may, in anticipation of the application and in order to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full amount of tax due, seize the assets pending the outcome of an application for a preservation order, which application must commence within 24 hours from the time of seizure of the assets or the further period that SARS and the taxpayer or other person may agree on.
- (b) Until a preservation order is made in respect of the seized assets, SARS must take reasonable steps to preserve and safeguard the assets.
- (3) A preservation order may be made if required to secure the collection of tax and in respect of—
- (a) realisable assets seized by SARS under subsection (2);
- (b) the realisable assets as may be specified in the order and which are held by the person against whom the preservation order is being made;
- (c) all realisable assets held by the person, whether it is specified in the order or not; or
- (d) all assets which, if transferred to the person after the making of the preservation order, would be realisable assets.
- (4) The court to which an application for a preservation order is made may—
- (a) make a provisional preservation order having immediate effect;
- (b) simultaneously grant a rule nisi calling upon the taxpayer or other person upon a business day mentioned in the rule to appear and to show cause why the preservation order should not be made final; and
- (c) upon application by the taxpayer or other person, anticipate the return day for the purpose of discharging the provisional preservation order if 24 hours' notice of the application has been given to SARS.
- (5) A preservation order must provide for notice to be given to the taxpayer and a person from whom the assets are seized.
- (6) For purposes of the notice or rule required under subsection (4)(b) or (5), if the taxpayer or other person has been absent for a period of 21 business days from his or her usual place of residence or business within the Republic, the court may direct that it will be sufficient service of that notice or rule if a copy

[25] In terms of the February order, this court granted a provisional preservation order relating to the assets of the applicant and the fourth respondent. The order prevents the applicant and fourth respondent from disposing of their assets and calls for the appointment of a *curator bonis* in whom the assets will vest. When the tax debt becomes due and payable, the *curator bonis* is authorised to dispose of the assets by means of auctions or out of hand sales and to pay the proceeds of the sales to SARS in reduction of any tax liability of the applicant and fourth respondent.

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- thereof is affixed to or near the outer door of the building where the court sits and published in the Gazette, unless the court directs some other mode of service.
- (7) The court, in granting a preservation order, may make any ancillary orders regarding how the assets must be dealt with, including—
- (a) authorising the seizure of all movable assets;
 - (b) appointing a curator bonis in whom the assets of that taxpayer or another person liable for tax vest;
 - (c) realising the assets in satisfaction of the tax debt;
 - (d) making provision as the court may think fit for the reasonable living expenses of a person against whom the preservation order is being made and his or her legal dependants, if the court is satisfied that the person has disclosed under oath all direct or indirect interests in assets subject to the order and that the person cannot meet the expenses concerned out of his or her unrestrained assets; or
 - (e) any other order that the court considers appropriate for the proper, fair and effective execution of the order.
- (8) The court making a preservation order may also make such further order in respect of the discovery of any facts including facts relating to any asset over which the taxpayer or other person may have effective control and the location of the assets as the court may consider necessary or expedient with a view to achieving the objects of the preservation order.
- (9) The court which made a preservation order may on application by a person affected by that order vary or rescind the order or an order authorising the seizure of the assets concerned or other ancillary order if it is satisfied that—
- (a) the operation of the order concerned will cause the applicant undue hardship; and
 - (b) the hardship that the applicant will suffer as a result of the order outweighs the risk that the assets concerned may be destroyed, lost, damaged, concealed or transferred.
- (10) A preservation order remains in force—
- (a) pending the setting aside thereof on appeal, if any, against the preservation order; or
 - (b) until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt.
- (11) In order to prevent any realisable assets that were not seized under subsection (2) from being disposed of or removed contrary to a preservation order under this section, a senior SARS official may seize the assets if the official has reasonable grounds to believe that the assets will be so disposed of or removed.
- (12) Assets seized under this section must be dealt with in accordance with the directions of the High Court which made the relevant preservation order.”

- [26] The February order also contains a repatriation order as envisaged under section 186 of the Act. The repatriation order requires the applicant to repatriate all his assets located outside South Africa within three months of the order. The applicant is also required to surrender his passport to the *curator bonis* who may not unreasonably withhold consent should the applicant wish to travel outside South Africa.
- [27] SARS obtained the February order on the basis that a tax debt of about R3 billion may be due or payable by the fourth respondent for which SARS intends to hold the applicant personally liable in terms of section 180 of the Act.
- [28] The return date for the February order was set down for hearing on 14 June 2023. Prior to the return date, the applicant launched an interlocutory application to postpone the main application until this present application is determined. This application was launched on 18 May 2023 and served on SARS' legal representatives on 24 May 2023.
- [29] The applicant brings the application in his own interest as contemplated in section 38 of the Constitution, as well as in the public interest and in the interest of the class of persons facing unilateral determination by SARS of disputes between them and SARS under section 180 of the Act.⁵
- [30] The applicant advises that no assessments have been issued against the fourth respondent by SARS and the claims against the applicant under sections 180 and 184(2) do not entail the issuing of assessments. This is confirmed by

⁵ Section 38 of the Constitution reads:

"38. Enforcement of rights.-Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members."

SARS. There is also no case pending in the Tax Court against the applicant and SARS' claims against the applicant will not be litigated in the Tax Court. Sections 105 and 107 of the Act are accordingly not impediments to this court determining the issues brought before it.⁶

Constitutionality of sections 180 and 184(2) of the Tax Administration Act

- [31] For a third-party to be held liable under section 180 for the outstanding tax debts of a taxpayer, a senior SARS official must find that the third-party acted negligently or fraudulently in steering the taxpayer to act negligently or fraudulently. Section 180 read with section 184(2) of the Act thus empowers SARS to determine third-party liability.
- [32] The above investigation requires SARS to prove the elements of fraud. For this reason, the applicant argues that SARS performs a judicial function, and not an administrative function. The applicant suggests that the court's jurisdiction is ousted and SARS resorts to self-help. The applicant contends that the liability of the third-party should be adjudicated by a court of law and not by SARS.

⁶ Sections 105 and 107 of the Tax Administration Act read:

105. A taxpayer may not dispute an assessment or 'decision' as described in section 104 in any court or other proceedings, except in proceedings under this Chapter or by application to the High Court for review.

...

107. (1) After delivery of the notice of the decision referred to in section 106(4), a taxpayer objecting to an assessment or 'decision' may appeal against the assessment or 'decision' to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the 'rules'.

(2) A senior SARS official may extend the period within which an appeal must be lodged for—

(a) 21 business days, if satisfied that reasonable grounds exist for the delay; or

(b) up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.

(3) A notice of appeal that does not satisfy the requirements of subsection (1) is not valid.

(4) If an assessment or 'decision' has been altered under section 106(3), the assessment or 'decision' as altered is the assessment or 'decision' against which the appeal is noted.

(5) By mutual agreement, SARS and the taxpayer making the appeal may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the 'rules'.

(6) Proceedings on the appeal are suspended while the alternative dispute resolution procedure is ongoing."

[33] It is true that the dispute between the applicant and SARS cannot be adjudicated in the Tax Court since the latter deals with issues arising from assessments, and liability under section 180 does not arise from assessments. Thus, the applicant contends that neither the Tax Administration Act nor its regulations make provision for an independent and impartial tribunal or forum to determine the disputes between SARS and himself regarding his liability under sections 180 and 184(2) of the Act.

[34] Should SARS find that a third-party is liable for the outstanding tax debts of the taxpayer, the applicant argues that there is no possibility of appealing the decision except for a review of the process.

[35] In this way, the applicant contends that sections 180 and 184(2) of the Act infringe against his section 34 constitutional right

“to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

In short, the applicant suggests that sections 180 and 184(2) of the Act require an application of law, but do not allow him to have his dispute about his liability for the tax debts of the fourth respondent be determined in a fair public hearing before a court or another independent and impartial tribunal or forum.

[36] Instead, according to the applicant, an application of sections 180 and 184(2) of the Act requires the same entity, namely SARS to investigate a claim and ascertain liability emanating from that claim – in a manner of speaking, SARS is simultaneously litigator and judge in its own cause. The applicant suggests that even the process of determining liability is devoid of procedural guarantees that enable a fair judicial process, for example, there is no provision for the leading and testing of witnesses.

[37] In *Lesapo v North West Agricultural Bank*,⁷ Mokgoro J treated self-help as ill-disposed to the rule of law:

⁷ 2000 (1) SA 409 (CC) at paras 11.

“A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the state can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalizing the resolution of disputes, and preventing remedies being sought through self-help. No one is entitled to take the law into her or his own hands. Self-help, in this sense, is inimical to a society in which the rule of law prevails, as envisioned by section 1(c) of our Constitution ... Taking the law into one’s own hands is thus inconsistent with the fundamental principles of our law.

...

The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.”

- [38] SARS argues that the process envisaged through the application of section 180 read with section 184(2) of the Act involves administrative action and therefore does not constitute self-help.
- [39] SARS disputes the applicant’s constitutional challenge and argues that there is no infringement of sections 180 and 184(2) of the Act.
- [40] SARS describes the process under section 180 read with section 184(2) of the Act as follows: Before SARS can hold a third-party personally liable under section 180 of the Act for the tax debts of a taxpayer, a specific relationship must exist between the taxpayer and the third-party, and SARS must identify the grounds on which it alleges that the third-party acted negligently or fraudulently. If the evidence demonstrates that such grounds exist, a letter in terms of section 184(2) of the Act is prepared, which is subjected to internal

governance procedures within SARS. If approved, the letter is dispatched to the person whom SARS intends to hold liable and they are afforded a reasonable period to respond to the letter, explaining why they should not be held personally liable for the tax debts of the taxpayer. Should the taxpayer respond, the response will be considered, and a final decision is made by the senior SARS official.

- [41] When a senior SARS official implements the provisions of section 180 of the Act, SARS correctly describes it as an exercise of public powers or the performance of a public function in terms of section 1(a)(ii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).⁸
- [42] The administrative nature of the power is particularly evident from the requirement that SARS must afford a third-party the opportunity to make representations before it can hold the third-party liable for the tax debts of the taxpayer. The applicant's *audi alteram partem* right is protected by enabling him to present his case through an administrative process. Should the third-party dispute liability, their rights to fair administrative action under section 33 of the Constitution are activated.⁹ PAJA then becomes applicable, and section 6 of PAJA provides for a wide range of review grounds, which enables a substantive challenge to its decision.¹⁰ The grounds include *inter alia*: substantive

⁸ Section 1(a)(ii) of PAJA reads:

1 Definitions

In this Act, unless the context indicates otherwise-

'administrative action' means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

...

(ii) exercising a public power or performing a public function in terms of any legislation ..."

⁹ Section 33 of the Constitution reads:

"Just administrative action.-(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

¹⁰ Section 6 of PAJA reads:

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

reasonableness, error of law, and error of fact. Thus, the review is not only procedural, but also substantive in nature. The fact that the third-party (applicant in this instance) may take the decision on judicial review to challenge SARS' decision means that a court of law is the ultimate arbiter of the fairness of its decision.

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- (2) A court or tribunal has the power to judicially review an administrative action if-
- (a) The administrator who took it-
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;
 - (d) the action was materially influenced by an error of law;
 - (e) the action was taken-
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;
 - (f) the action itself-
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
 - (g) the action concerned consists of a failure to take a decision;
 - (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
 - (i) the action is otherwise unconstitutional or unlawful.
- (3) If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where-
- (a) (i) an administrator has a duty to take a decision;
 - (ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
 - (iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or
 - (b) (i) an administrator has a duty to take a decision;
 - (ii) a law prescribes a period within which the administrator is required to take that decision; and
 - (iii) the administrator has failed to take that decision before the expiration of that period;
- institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period."

[43] SARS advises that enforcement of tax debts against taxpayers and third parties can also be done through a judgment procedure under sections 172 to 176 of the Act.¹¹ In terms of these sections, SARS may, after giving the taxpayer or third-party 10 business days' notice, file with the clerk or registrar of the competent court, a statement setting out the amount of tax payable by the taxpayer and certified by SARS as correct. Such a statement is treated as a civil judgment lawfully given in favour of SARS for payment of the specified amount. In *Barnard Labuschagne Inc v Commissioner, SARS*,¹² Rogers AJ confirmed that a tax judgment obtained under sections 172 to 176 of the Act is susceptible to rescission.

[44] Yet, SARS suggests that it cannot be expected to first obtain a court judgment to hold the applicant personally liable. Doing so would have adverse consequences for the country's fiscus because it could take years for a matter to be finally determined. The administrative nature of section 180, read with section 184(2) of the Act, provides for a speedier and more efficient remedy.

¹¹ Sections 172 to 176 of the Tax Administration Act reads:

- "172. (1) If a person fails to pay tax when it is payable, 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.
- (2) SARS may file the statement irrespective of whether or not the amount of tax is subject to an objection or appeal under Chapter 9, unless the obligation to pay the amount has been suspended under section 164.
- (3) SARS is not required to give the taxpayer prior notice under subsection (1) if SARS is satisfied that giving notice would prejudice the collection of the tax.
173. Despite anything to the contrary in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), the certified statement referred to in section 172 may be filed with the clerk of the Magistrate's Court that has jurisdiction over the taxpayer named in the statement.
174. A certified statement filed under section 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.
175. (1) SARS may amend the amount of the tax due specified in the statement led under section 172 if, in the opinion of SARS, the amount in the statement is incorrect.
- (2) The amendment of the statement is not effective until it is initialled by the clerk or the registrar of the court concerned.
176. (1) SARS may withdraw a certified statement led under section 172 by sending a notice of withdrawal to the relevant clerk or registrar upon which the statement ceases to have effect.
- (2) SARS may file a new statement under section 172 setting out tax included in a withdrawn statement."

¹² 2022 (5) SA 1 (CC) at para 40.

SARS takes the view that by virtue of its composition, experience and expertise, it is best equipped to make the administrative decision contemplated in sections 180 and 184 of the Act, the outcome of which can be challenged by the third-party in a court of law.

[45] At the same time, the parties inform this court that the activating element of section 180 is that SARS must be satisfied that the third-party is negligent or fraudulent regarding payment of the tax debts of the taxpayer. It appears from SARS' heads of argument that no such finding has been made yet and the applicant does not dispute this.

[46] SARS thus argues that until the activating element is triggered, the applicant's right of access to court is neither activated nor infringed, and his constitutional challenge to sections 180 and 184(2) of the Act is premature.

[47] Notwithstanding the submission made by SARS in para [46] above, I am of the view that it is in the interests of justice that this matter be considered by this court. In saying that, I agree that SARS' actions amount to administrative action, which is reviewable under PAJA. As such, SARS' actions do not amount to self-help. Moreover, the review does not merely involve a review of process but also considers substantive reasonableness and errors of law and/or fact. In essence, as noted previously, the review is substantive in nature and not simply procedural.

[48] In *Zondi v MEC for Traditional and Local Government Affairs*,¹³ Ngcobo J held:

"PAJA was enacted pursuant to the provisions of section 33 [of the Constitution], which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with

¹³ 2005 (3) SA 589 (CC) at para 101.

PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA.”

[49] But “[e]ven if the determinations sought to be impugned ... are not administrative action”, the Supreme Court of Appeal per Ponnan ADP found that “they would [nevertheless] fall under the exercise of public power that is subject to the rule of law and are reviewable under the principle of legality.”¹⁴ So, either way, the third-party’s right to access to court is protected.

[50] In *Metcash Trading Limited v Commissioner for the South African Revenue Service*,¹⁵ Kriegler J reasoned that unless the jurisdiction of a court is ousted, administrative action by a state organ is deemed to be constitutional.¹⁶ Although *Metcash* dealt with the constitutionality of various provisions of the VAT Act,¹⁷ the principles espoused therein relating to administrative action are apposite here.

[51] Furthermore, in *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd*,¹⁸ Ponnan ADP noted that a person may enjoy both a right of appeal and a right of review. These rights afford an affected party recourse to a court of law.

[52] In this case, even though section 180 read with section 184(2) of the Act enables SARS to make a unilateral finding about the tax liability of a third-party, if the third-party is unhappy with the decision, they may apply to court for a review of SARS’ decision. Consequently, the jurisdiction of a court is not ousted by an application of section 180 read with section 184(2) of the Act. As a result, I find that there is no infringement of section 34 of the Constitution.

¹⁴ *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* (Case no 1299/2021) [2023] ZASCA 39 (31 March 2023) at para 22.

¹⁵ 2001 (1) SA 1109 (CC).

¹⁶ At paras 45-47, 72.

¹⁷ The impugned provisions in the *Metcash* case included sections 36(1), 40(2)(a) and 40(5).

¹⁸ *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* (Case no 1299/2021) [2023] ZASCA 39 (31 March 2023) at para 25.

Constitutionality of section 186(3) of the Tax Administration Act

- [53] The *ex parte* provisional preservation and repatriation orders obtained by SARS against the applicant interdicted him from dealing with, encumbering, or disposing of any of his assets and limited his ability to travel outside South Africa, pending the finalization of the *ex parte* application and pending SARS holding the applicant personally liable for the tax debts of the fourth respondent.
- [54] The applicant argues that section 186(2) and (3) of the Act infringes against sections 21, 22, and 25 of the Constitution in that his rights respectively to freedom of movement, freedom of trade, occupation or profession and his right to not be arbitrarily deprived of property are limited.
- [55] Section 21 provides:
- “Freedom of movement and residence
- (1) Everyone has the right to freedom of movement.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter, remain in and to reside anywhere in, the Republic.
- (4) Every citizen has the right to a passport.”
- [56] Section 22 reads:
- “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”
- [57] Section 25 provides that “no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property”.
- [58] The applicant argues that the limitation on his section 21, 22, and 25 constitutional rights can also not be justified under section 36 of the Constitution.
- [59] Although the applicant refers throughout his affidavit to sections 186 and 186(3) of the Act, and sections 21, 22 and 25 of the Constitution, in his notice of motion,

he challenges only section 186(3) of the Act as infringing only sections 21 and 22 of the Constitution.

- [60] In this judgment, I am therefore guided by the applicant's notice of motion and will focus my attention on his constitutional challenge to section 186(3) of the Act as purportedly infringing sections 21 and 22 of the Constitution.
- [61] SARS contests the applicant's constitutional challenge to section 186(3) of the Act on the grounds that judicial oversight is exercised in the granting of an order and the court applies its mind to the specific circumstances of each case and the seriousness of the alleged tax-related offences. Should this court find that section 186(3) of the Act limits sections 21 and 22 of the Constitution, SARS avers that the limitation is nevertheless justifiable under section 36(1) of the Constitution.
- [62] The purpose of section 186(3) of the Act is to prevent taxpayers and third-parties from moving their assets offshore to avoid paying taxes or to reduce their tax liabilities in South Africa. SARS claims that it does not have the power to recover taxes in all foreign countries like the UAE or USA, which is where most of the applicant's foreign assets are believed to be located. This part of the order is therefore important to enable SARS to recover the applicant's assets located abroad.
- [63] The impugned provision also enables the court to order that a taxpayer and third-party cease trading if the circumstances require it, for example, where trading could assist the taxpayer and third-party to evade their tax obligations. In all instances, the court retains discretion to grant the order/s set out in section 186(3) of the Act if the facts and circumstances of a particular case justify it. If it is found that the fourth respondent has been trading fraudulently and the third-party enabled the criminal activities, the order for the parties to cease trading becomes all the more imperative.
- [64] SARS avers that there is no less restrictive means to achieve the purpose of section 186(3) of the Act. And the applicant did not offer a less restrictive means.

- [65] Since the effect of the February order is to prevent the applicant from dealing with, encumbering, or disposing of any of his assets pending the finalization of the *ex parte* application and it limits the applicant's ability to travel outside the Republic of South Africa, I find that there is an infringement of both the applicant's section 21 constitutional right to move freely and his section 22 constitutional right to practice his trade freely.
- [66] Having regard to the factors listed in section 36 of the Constitution,¹⁹ the Minister correctly points out that the Act aims to strike a balance between the rights and obligations of taxpayers on the one hand, and the powers and duties of SARS on the other hand, and that one way of doing so is to collect taxes as efficiently as possible. But at what expense is this efficiency achieved?
- [67] In light of the history of apartheid in our country, which prevented masses of people from practicing a trade, occupation or profession of their choice, and which prevented large numbers of people from moving about freely, sections 21 and 22 hold an important place in our constitutional order to remedy the historic ills relating to trade and movement. Equally so is the restriction that section 186(3) of the Act places on the applicant's ability to deal with his assets and move beyond the borders of this country to ensure that he does not escape the tax liabilities of the taxpayer. This is because procuring taxes is vitally important for the maintenance of the fiscus in our country to ultimately serve the public interest. Nevertheless, an absolute impediment to the applicant's ability to trade and move outside the country would not be justifiable since it would directly impact on his ability to make a living. That's why, in this case, a *curator bonis* was appointed to maintain oversight of the applicant's assets and his ability to travel, and consent for the applicant to deal with his assets or to

¹⁹ Section 36 of the Constitution reads:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

travel outside South Africa cannot be unreasonably withheld by the *curator bonis*. Was there nevertheless a less restrictive means for SARS to achieve its purpose of securing payment for the taxpayer's tax debts? Assuming SARS had asked that the applicant put up a sum of money as security pending the outcome of the *ex parte* application and finalization of the tax liability of the taxpayer, this would have enabled the applicant to continue trading and traveling without needing the consent of a *curator bonis*. On the face of it, this appears to be a less restrictive measure. Yet, given the allegations of fraudulent trade on the part of the fourth respondent, seizure of the applicant's foreign assets and a limit on his trade and ability to travel seems appropriate. As noted previously, the limitation was subject to oversight by a *curator bonis* who was ordered to not withhold permission unreasonably. Under the circumstances, it seems that a less restrictive means could not be imposed to achieve the purpose of the limitation.

- [68] Even if a less restrictive measure could have been imposed, I would suggest that that is not a failing of section 186(3) of the Act because subsection (d) gives the court discretion to issue any other order it deems fit.
- [69] In light of the above, the limitation that section 186(3) of the Act places on sections 21 and 22 of the Constitution is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- [70] I accordingly find that section 186(3) of the Act does not violate sections 21 and 22 of the Constitution.

Miscellaneous

- [71] For the sake of completeness, I mention that during oral argument, the applicant contended that section 180 read with section 184(2) of the Act also violates the equality provision contained in section 9 of the Constitution, particularly section 9(3). The contention is that SARS proceeds against taxpayers in Tax Court for the tax liabilities of taxpayers. Yet, section 180, read with section 184(2) of the Act, allows SARS to bring internal proceedings against third parties instead of instituting action against them in Tax Court. In other words, the applicant suggests that third parties are unfairly discriminated against vis-à-vis taxpayers. Yet, this allegation was not raised in the applicant's

heads of arguments. Furthermore, the applicant neither indicates the basis for the unfair discrimination nor whether and how it is justifiable under section 36 of the Constitution.

[72] In *Prince v President of the Law Society of the Cape of Good Hope and Others*,²⁰ Ngcobo J. wrote:

“Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance.^[24] The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.”

[73] Ngcobo J’s observations are even more pertinent when a party alleges unconstitutionality of a provision during oral argument without laying a proper basis for it in their papers, as the applicant has done in this case. In fact, the applicant failed to lay a proper basis for his argument of unfair discrimination during the oral hearing as well.

[74] I cannot therefore entertain the allegation of unconstitutionality of the impugned provisions based on section 9(3) of the Constitution.

²⁰ 2001 (2) SA 388 (CC) at para 22.

Order

[75] Having read the papers filed of record and heard counsel for the parties and after considering the matter, the following order is hereby granted:

[75.1] Sections 180, 184(2), and 186(3) of the Tax Administration Act 28 of 2011 are constitutionally valid.

[75.2] The application is dismissed with costs, including the costs of four counsel on scale C.

W AMIEN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

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State Attorney Pretoria

CASE NO: B2495/2023

Date heard: 22 August 2024

Date of judgment: 12 February 2025

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is **12 February 2025**.