

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CCT No.:

Case No. *a quo*:23141/2017  
(Western Cape High Court)

IN THE MATTER BETWEEN:

**BARNARD LABUSCHAGNE INC**

**APPLICANT**

and

**SOUTH AFRICAN REVENUE SERVICE  
MINISTER OF FINANCE**

**FIRST RESPONDENT  
SECOND RESPONDENT**

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**NOTICE OF MOTION**

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**TAKE NOTICE** that the abovenamed Applicant applies, in terms of rule 19 of the Constitutional Court Rules, for an order in the following terms:

1. That the Applicant be granted leave to appeal to the Constitutional Court against that the of the judgment, and against all of the orders made by the Honourable Ms Justice Mantame, delivered in the Western Cape Division of the High Court on 15 May 2020 under WCHC case number 23141/2017, in which:

1.1. The application for rescission of judgment was dismissed;

Sonja Labuschagne  
Tel: 021 852 7780  
Email: [ebaitorneys@bamards.co.za](mailto:ebaitorneys@bamards.co.za)  
Please cc to [etienne@bamards.co.za](mailto:etienne@bamards.co.za)

1.2. It was declared that the “Impugned Provisions” (i.e. sections 172 and 174 of the Tax Administration Act 28 of 2011) are not unconstitutional; and

1.3. The applicant was ordered to pay the costs of this application.

2. That the appeal will entail an order in following terms:

2.1. Declaring that the judgment taken by the First Respondent in terms of the Impugned Provisions may be rescinded by the Court out of which such judgment was issued;

In the alternative to prayer 2.1, and in the event that this Court declines to grant an order in terms thereof:

2.1.1. Declaring that the Impugned Provisions are inconsistent with section 34 read with sections 165 and 169 of the Constitution of the Republic of South Africa and invalid to the extent that they do not permit applications for rescission of judgments taken by the First Respondent in terms of the Impugned Provisions;

2.2. The judgment obtained by the First Respondent in the Western Cape High Court, in terms of the Impugned Provisions, on 15 December 2017 is rescinded;

In the alternative to prayer 2.2:

2.2.1. The judgment obtained by the First Respondent in the Western Cape High Court, in terms of the Impugned Provisions, on 15 December 2017 is rescinded and the matter is referred in terms of Sec 105 of the TAA to the Tax Court for determination of the amount (if any) due;

Alternatively,

2.2.2. an order referring the application for rescission back to the Western Cape High Court, differently constituted, for consideration and determination thereof.

3. That the costs of this application be costs in the appeal; and/or.
4. Further and/or alternative relief as the Honourable Court deems fit and proper.

**PLEASE TAKE NOTICE FURTHER THAT** the accompanying affidavit of **SONJA LABUSCHAGNE** is annexed in support of the application.

**PLEASE TAKE NOTICE FURTHER THAT** the applicant has appointed the following address as the address at which the applicant will accept notice and service of all process in these proceedings: Christodoulou and Mavrikis Inc, Suite 3A, 5 Ficker Road, Illovo Boulevard, Johannesburg.

**PLEASE TAKE NOTICE FURTHER THAT** within ten (10) days from the date upon which this application is lodged, the Respondents may respond thereto in writing, indicating whether or not the application for leave to appeal is being opposed, and if so the grounds for such opposition.

DATED and SIGNED at **SOMERSET WEST** on 24 February 2021

  
**(signed) S LABUSCHAGNE**  
**ATTORNEY FOR APPLICANT**  
**BARNARD LABUSCHAGNE INC T/A**  
**ETTIENNE BARNARD ATTORNEYS**  
**EBROSE CHAMBERS, AUDAS ESTATE**  
5 Audas Street  
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C/O Christodoulou and Mavrikis Inc,  
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5 Ficker Road,  
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Email: [robvn@cm-attorneys.com](mailto:robvn@cm-attorneys.com)

TO: **THE REGISTRAR  
CONSTITUTIONAL COURT  
BRAAMFONTEIN**

AND TO: **SOUTH AFRICAN REVENUE SERVICES  
FIRST RESPONDENT  
C/O THE STATE ATTORNEY  
4<sup>th</sup> Floor  
Liberty Life Centre  
22 Long Street  
Cape Town  
E-mail: [SChothia@justice.gov.za](mailto:SChothia@justice.gov.za)  
Tel: 021 441 9209  
Ref: 90/19/P5**

AND TO: **THE MINISTER OF THE DEPARTMENT OF FINANCE  
SECOND RESPONDENT  
C/O THE STATE ATTORNEY  
Salu Building  
255 Francis Baard Street  
Pretoria  
E-mail: [TNhlanzi@justice.gov.za](mailto:TNhlanzi@justice.gov.za)  
Tel: 0123091575**

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case No.:

WCHC Case No: 23141/2017

IN THE MATTER BETWEEN:

**BARNARD LABUSCHAGNE INC**

**APPLICANT**

and

**SOUTH AFRICAN REVENUE SERVICE**

**FIRST RESPONDENT**

**MINISTER OF FINANCE**

**SECOND RESPONDENT**

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**-FOUNDING AFFIDAVIT**

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I, the undersigned

**SONJA LABUSCHAGNE**

declare under oath:


1. I am an attorney duly admitted with right of appearance in the High Court of South Africa, employed as a director of the applicant.
2. The facts contained herein are, save where otherwise indicated or so appears from the context, within my personal knowledge. They are to the best of my knowledge and belief true and correct. Where I make legal submissions, I do so based on my own knowledge and experience of the law as well as on the advice of counsel. As will become apparent, it

is necessary to make legal submissions in this affidavit because this application involves issues of law.

3. I am duly authorised to depose to this affidavit and institute this application on behalf of the applicant.

#### **INTRODUCTION AND HIGH COURT JUDGEMENT**

4. This is an application for leave to appeal to this Court against the judgment of the Western Cape Division of the High Court, Cape Town ("the High Court"), per Mantame J, dismissing the applicant's application for rescission of a judgment taken by the first respondent in terms of section 172, read with section 174, of the Tax Administration Act 28 of 2011 ("TAA") on the basis that such judgments cannot be rescinded. A Copy of the High Court's order, SL1 and judgment SL2 is annexed.
5. The Applicant applied for leave to Appeal from the court a quo. The court a quo denied the application, the order, SL3 and judgment SL4 is attached hereto.
6. The Applicant then applied for leave to appeal to the Supreme Court of Appeal, which was denied, the order is attached as SL5. The Applicant thereafter applied for reconsideration by the President of the Supreme Court of Appeal in terms of Section 17(2)(f) of the Superior Courts Act, Act 10 of 2013. That, application was dismissed on 3 February 2021. Order is attached as SL6.
7. Essentially, the basis for the applicant's application for rescission was (and still is) that many of the payments it has made to the First Respondent, over a number of years, were incorrectly allocated, or not allocated at all, with the result that the amount reflected in the First Respondent's judgment is materially inflated.

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## GROUNDS OF APPEAL

8. The Applicant is seeking leave to appeal against the whole of the judgment and order of the High Court, including the costs award (save for the granted condonation). The findings outlined above are wrong in fact or law and such errors in the judgment and order are further dealt with herein.
9. It will be immediately apparent that the *ratio* of the High Court judgment on the point in limine is diametrically inconsistent with the *ratio* of this Honourable Court's judgment in *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) (24 November 2000) ("*Metcash*") at paragraphs 64 to 66.
10. There is a long line of judicial authorities which have not been overturned (which judgments had recognized that judgments obtained via certified statements filed by the tax authority could in fact be rescinded or set aside on various grounds). The court *a quo* misdirected itself in not following the strong legal precedent which clearly indicates that tax judgments obtained by certified statements are capable of rescission by the court in which they were obtained by certified statement. The manner in which the court *a quo* just dismissed these cases with no discussion or justification on why they are not applicable all indicates that the court did not properly considered them. These authorities include:
  - 10.1. Constitutional Court:
    - 10.1.1. Metcash Trading Ltd at paragraphs [65] and [66].
  - 10.2. Supreme Court of Appeal and the former Appellate Division:
    - 10.2.1. Singh v Commissioner<sup>1</sup>, at paragraphs [18], [19] and [20], the judgment was set aside by court.

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<sup>1</sup> SARS 2003 (4) SA 520 (SCA)

10.2.2. Kruger v Sekretaris van Binnelandse Inkomste<sup>2</sup> at 412D-F (Which was quoted with approval by the Constitutional Court – see Metcash above)

10.3. High Court and the former Supreme Court:

10.3.1. Mokoena v Commissioner, South African Revenue Service<sup>3</sup> at para 16;

10.3.2. Capstone 556 (Pty) Ltd<sup>4</sup> at footnote 13 where the Court does not criticize, but rather acknowledges, with reference to the Kruger judgments that “the effects of the filed statement might, in subsequent proceedings, be addressed as if there had been a judgment...” In other words, Capstone acknowledged and referred to legal precedent where it was held that rescission in such matters is possible;

10.3.3. Barnard v Kommissaris van Binnelandse Inkomste<sup>5</sup> page 4 lines 9 to 12 page 5 lines 7 to 11;

10.3.4. Traco Marketing (Pty) Ltd<sup>6</sup> at 84 A-I; and

10.3.5. Kruger v Commissioner for Inland Revenue<sup>7</sup> 462 A-B.

11. In the circumstances, this application for leave to appeal is brought in terms of both section 167(3)(b)(i) and (ii) of the Constitution of the Republic of South Africa 1996 (“**the Constitution**”) and on the following grounds:

11.1. The question whether a judgment taken by First Respondent in terms of section 172, read with section 174, TAA can be rescinded raises an arguable point of law of great and general public importance which ought to be considered by this Honourable Court.

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<sup>2</sup> 1973 (1) SA 394 (A)

<sup>3</sup> 2011 (2) SA 556 (GSJ)

<sup>4</sup> Capstone 556 (Pty) Ltd and Ano v Commissioner, South African Revenue Service and Anot 2011 (6) SA 65 (WCC)

<sup>5</sup> A127/97 19 May 2000 (CPD)

<sup>6</sup> Traco Marketing (Pty) Ltd & Another v The Minister of Finance & Another 1998 (4) SA 74 (SE)

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

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- 11.2. The application before the High Court and this application raises constitutional matters, *inter alia*, that the respondents' and the High Court's interpretation of sections 172 and 174 of the TAA render those section inconsistent with the rights enshrined in section 34 as read with sections 165 and 169 of the Constitution.
12. As I shall show in this affidavit, the legal question is of considerable legal importance and there are very good prospects that this Court will reach a different conclusion – in fact, as pointed out above, I would argue that this Court has already decided the question in the manner proposed by the applicant.
13. At this point it also bears mentioning that, although the High Court makes some reference in its judgment to the conduct of the applicant and First Respondent, it is apparent that the High Court dismissed the applicant's application on the basis of the its conclusion that, as a matter of law, such certified statements are not capable of being rescinded. In the circumstances, and in the event that (a) leave to appeal is granted to this Honourable Court and (b) the appeal is upheld, the applicant requests that the merits of the applicant's application for rescission be:
- 13.1. Referred back to the High Court (differently constituted, as the honourable Judge Mantame appears to have already taken a prima facie view in respect of the facts);  
or
- 13.2. Determined by this Honourable Court based on the papers before it and applying the ordinary principles applicable to the resolution of disputes in motion proceedings  
and /or
- 13.3. Rescinded by this Honourable Court with a direction that the issue of the Applicant's tax liability be referred to the Tax Court for adjudication.

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- 13.4. If the judgment is rescinded and the dispute is referred to the Tax Court in terms of section 105 of the TAA (either by the above Honourable Court or by the High Court after remittal), then the Applicant's actual tax liability can be properly ventilated and determined. There is simply no other path for the Applicant's dispute to be ventilated by a Tax Court.
14. Against that brief introduction, the remainder of this affidavit will be divided as follows:
- 14.1. First, I briefly explain the procedural background to this application.
- 14.2. Second, I explain why judgments taken by First Respondent in terms of sections 172, read with section 174 of the TAA, properly construed, do permit applications for rescission of judgment in appropriate cases.
- 14.3. Third, and to cater for the possibility that this Court finds that section 172, read with section 174, of the TAA do not permit rescissions of judgment, then I discuss why those sections are unconstitutional and invalid;
- 14.4. Fourth, and relying on the arguments set out in paragraph 14.2 above, I also discuss why the proper interpretation of those sections raises an arguable point of law of general public importance which ought to be considered by this Court.
- 14.5. Fifth, I deal briefly with the merits of the applicant's application for rescission in order to establish that the relief sought is not academic or moot as far as the applicant is concerned. Further, I intend to illustrate to this Court why, in the alternative to referring the dispute back to the High Court, this Court is in a position to determine the merits of the rescission application based on the appeal record which will serve before it if leave to appeal is granted.

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14.6. Sixth and finally, I conclude by asking for leave to appeal, setting out the remedies should leave to appeal be granted and I address costs. Such a leave to appeal and the appeal if successful will bring about an appropriate order, one in which the applicant as a taxpayer is afforded an opportunity that the true tax liability, if any, be accurately determined and paid, while the First Respondent is prevented from relying on self-help in enforcing payment of amounts already paid. Most importantly, the purpose of this application and the preceding court process is not to delay payment but to insist on the rights of a taxpayer to approach the court in appropriate circumstances.

#### **PROCEDURAL BACKGROUND**

15. On 15 December 2017, First Respondent filed a certified statement with the registrar of the High Court, in terms of section 172 of the TAA, setting out the outstanding tax debt it claims was owed to it by the applicant.
16. On 2 February 2018, First Respondent caused a document, headed *Notice of Judgment*, to be delivered to the applicant. For ease of reference, I reproduce the salient parts of the *Notice of Judgment* below:

*According to the records of [SARS] you have failed to comply with the final demand dated 2017-09-26 for the amount of R 819 077.51.*

*As a result of your failure to comply, a certified statement setting out the amount of tax payable was filed with the **HIGH COURT OF SOUTH AFRICA WESTERN CAPE DIVISION CAPE TOWN** and a civil judgement was entered against you on 2017-12-15.*

*A copy of the judgment is enclosed.*

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*Unless your total debt specified in the judgment is paid within 10 business days from the date of this notice, a warrant of execution will be issued for the Sheriff of the Court to attach and sell your assets. [my underlining]*

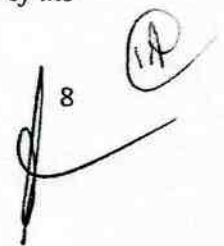
17. For ease of reference, the certified statement and *Notice of Judgment* will, hereinafter, be referred to as “**the judgment**”.
18. On 19 February 2018, the applicant applied to the High Court for an order that the judgment be rescinded and the applicant be given permission to defend the matter. In other words, the applicant sought an order rescinding a judgment taken by First Respondent in its absence.
19. Essentially, the basis for the applicant’s application for rescission was (and still is) that many of the payments it has made to First Respondent, over a number of years, were incorrectly allocated, or not allocated at all, with the ultimate result that the amount reflected in the judgment is materially inflated.
20. In its answering affidavit in the High Court, First Respondent summarized the three principal grounds of its opposition as follows:

*“11.1 First, a civil judgment in terms of section 172(1) read with section 174 of the TAA is not a judgment by default and is not subject to the usual rescission procedures as contemplated in the Uniform Rules of Court. Accordingly, the application stands to be dismissed on this score alone.*

*11.2 Second, even if this Honourable Court is minded to entertain the application, the applicant is not entitled to the relief sought on the merits; and*

*11.3 Third, the Respondent contends that the tax debt arose from a self-assessment where the taxpayer is required to report the basis of assessment, to submit a calculation of the*

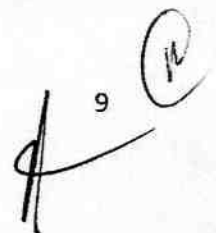
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*tax due, and to pay any outstanding tax due as calculated by the taxpayer. Accordingly, the applicant has the obligation immediately to pay its outstanding tax debt which is due and payable notwithstanding any other process that it may wish to follow.*

21. First Respondent then set out the basis for the first ground of opposition under the heading **JUDGMENT NOT OPEN TO RESCISSION** before it addressed the merits of the applicant's application for rescission. For ease of reference, first Respondent's first ground of opposition will be referred to, hereinafter, as "*the point in limine*".
22. In response to the *point in limine*, the applicant delivered a Notice in terms of Rule 16A raising, *inter alia* the following issues:
  - 22.1. The Court in which a judgment in terms of section 172, read with section 174, of the TAA was noted, has jurisdiction to rescind such judgment when the grounds for rescinding it are not based on an objection against an assessment or an objection against a decision as referred to in section 105 of the TAA;
  - 22.2. The relevant sections should be interpreted in line with the Constitution so that it does not oust the jurisdiction of the High Court to consider an application for rescission of judgment;
  - 22.3. Alternatively, the section 172, read with section 174, of the TAA should be declared unconstitutional to the extent that it violates the Rule of Law as set out in sections 1(c), 34, 165 and 169 of the Constitution.
23. Subsequent to the delivery of the applicant's Rule 16A Notice, the Minister of Finance was joined as the second respondent ("the Minister") to the proceedings. The Minister did not engage with the merits of the application (and deferred to First Respondent in that regard) but, as summarized in its Practice Note in the High Court, *the role of the second respondent*

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*arises only in the event that the applicant's constitutional challenge is considered. In that event, the second respondent will contend that a certified statement issued pursuant to the provisions of section 172 of the TAA:*

*23.1. although a civil judgment in terms of section 174 of the TAA, is however not in itself a judgment in the ordinary sense;*

*23.2. does not determine any dispute or contest between the tax payer and First Respondent;*

*23.3. is not susceptible to rescission.*

24. At the commencement of the hearing on 17 March 2020, and in line with the Minister's limited involvement in the dispute and the respondents' practice notes in the High Court, the High Court indicated that it will hear the parties' submissions on the point *in limine* – the implication being that the merits would only be heard if necessary, after the point *in limine* had been determined. As there is a dispute on the ambit of the hearing, more will be said on this when I deal with the merits below from paragraphs 89 onwards.

#### **SECTIONS 172 AND 174 OF THE TAA PERMIT RESCISSION**

25. In relation to the question '*Does the High Court have jurisdiction to rescind a civil judgment granted in terms of section 172 read with section 174 of the TAA?*'<sup>8</sup>, the court *a quo* held that it did not for the following (incorrect) reasons:

25.1. There must be a civil judgment of the Court in existence for the rescission of a civil judgment to take place;<sup>9</sup>

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<sup>8</sup> P 26 of the High Court judgment

<sup>9</sup> Para 60 of the High Court judgment

25.2. While section 174 states that “*a certified statement filed under section 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS...* ’ [i]t does not state that a certified statement filed under section 172 constitute a civil judgment or are a civil judgment (sic)”;<sup>10</sup>

25.3. The judgments in *Capstone*<sup>11</sup>, *Singh*<sup>12</sup>, *Modibane*<sup>13</sup> and *Van Wyk*<sup>14</sup>, all held that certified statements do not result in actual judgments in the ordinary sense;<sup>15</sup>

25.4. Section 172 and 174 constitute a lawful enforcement mechanism;<sup>16</sup>

25.5. Because “*SARS may file the statement irrespective of whether or not the amount of tax is subject to an objection or appeal under Chapter 9...* ’ *the dispute resolution will still be in motion... there is no finality to this judgment and it cannot be accorded a status of a judgment.*’ (Judgment para 62);<sup>17</sup>

26. “*The fact that the certified statements can be amended, and / or withdrawn after they have been treated as a civil judgment unilaterally by SARS bears credence to the fact that the judgment obtained from the Registrar has no final effect and therefore not capable of rescission.*”<sup>18</sup>

26.1. Although the court *a quo* appears to accept that an objection to an assessment would not be appropriate in the circumstances, the Court found that the issue of unallocated

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<sup>10</sup> Para 63 of the High Court judgment

<sup>11</sup> *Capstone 556 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another* 2011 (6) SA 65 (WCC)

<sup>12</sup> *Singh v Commissioner for South African Revenue Services* 2003 (4) SA 394 520 (SCA)

<sup>13</sup> *Modibane v South African Revenue Services* (09/9651) [2011] ZAGPJHC 152 (20 October 2011)

<sup>14</sup> *South African Revenue Service v Van Wyk* R D Case A145/2014 FSHC

<sup>15</sup> Paras 66 and 67 of the High Court judgment

<sup>16</sup> Para 61 of the High Court judgment

<sup>17</sup> Para 62 of the High Court judgment; see also para 64

<sup>18</sup> Para 65 of the High Court judgment

payments constitutes a dispute that could be resolved in terms of Chapter 9 of the TAA.<sup>19</sup>

27. I deal with each category of the Court's findings, in turn.

#### **The nature of the judgment**

28. In considering the meaning of section 174 of the TAA, the court *a quo* relied on the *dicta* in *Commissioner of the South African Revenue Service v Bosch and Another* 2015 (2) SA 174 (SCA) para 9 to the effect that '*the words of the section provide the starting point and are considered in light of their context, the apparent purpose and any relevant background material...*'
29. The historical background of section 172 and 174 must, therefore, be relevant to its interpretation, which background the court *a quo* failed to take into consideration. The relevant background is the similarly worded predecessors in, for example, the VAT Act and the meanings ascribed thereto by the Constitutional Court in *Metcash*. It is trite that the legislature is presumed to know the law<sup>20</sup>. Yet, despite the meanings attributed to the similarly worded section 40 of the VAT Act in *Metcash*, the legislature enacted substantially similar provisions in the TAA without any indication that those sections should be treated differently.
30. It is useful for purposes of this argument to set out the relevant parts of sections 172 and 174:

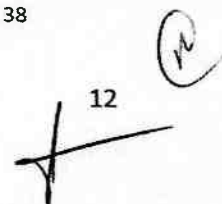
*"172. Application for civil judgment for recovery of tax*

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<sup>19</sup> Paras 68 and 70 of the High Court judgment

<sup>20</sup> *Kaknis v Absa Bank Limited & another* (08/16) [2016] ZASCA 206 (15 December 2016) paras 26 and 38

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*(1) If a person has an outstanding tax debt, SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct.*

*(2) SARS may file the statement irrespective of whether or not the tax debt is subject to an objection or appeal under Chapter 9, unless the period referred to in section 164(6) has not expired or the obligation to pay the tax debt has been suspended under section 164...*

*"174. Effect of statement filed with clerk or registrar*

*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." (my underlining)*

31. The court a quo in deciding that the judgment could not be rescinded undermines the clear wording and intention of this section.
32. In relation to applicable case law, section 172 is a relatively new provision. It is, therefore, important to also bear in mind the wording of the now repealed S 40(2)(a) of the Vat Act:

*"40. Recovery of tax. —*

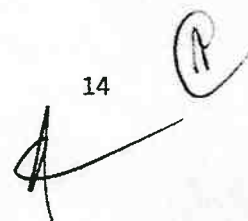
*(1) . . . .*

*(2)(a) If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were,*

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*a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement."*

33. The respondents contended, and the court *a quo* agreed, that section 172, read with section 174 of the TAA, is nothing more than an enforcement mechanism for First Respondent to collect outstanding debt.
34. There must however be a purpose to the legislature elevating a certified statement to the status of a civil judgment. I submit that purpose is to prevent self-help by the revenue services. The submission is consistent with the fact that, in the past courts have allowed aggrieved tax payers the right of rescission in the court where the judgment was noted.
35. Moreover, what would be the purpose of describing the judgment as having been taken '*for a liquid debt*'? Surely the nature of the underlying debt would be irrelevant if the purpose of the section was simply to create an enforcement mechanism.
  - 35.1. The TAA states that 'the certified statement may be enforced as if it were a civil judgment'. The TAA was enacted AFTER the Constitutional Court in *Metcash* interpreted section 40 of the VAT Act as permitting applications for rescission (paragraphs 65-66);
  - 35.2. It is to be noted that the legislature does not simply authorise the sheriff to execute on a certified statement. It requires a civil court order. This is something more than a mere enforcement mechanism which instructs the sheriff. The court is involved for good reason.
  - 35.3. To leave no scope for a Court to intervene in a judgment taken by First Respondent is reducing the relevant Court to a mere conduit or rubber stamp for First Respondent;

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35.4. This can never be so and I submit the wording of S 174 makes it clear that it is not so.

36. Moreover, The High Court's and the respondents' reasoning is *anathema* to the principles recently espoused by the majority judgment of this Court in *Smit v Minister of Justice and Correctional Services and Others* (CCT 235/19; 243/19) [2020] ZACC 29 (18 December 2020) ("the *Smit* judgment"). Although that judgment deals with a person's right, in terms of section 12(1)(a) of the Constitution, not to be arbitrarily deprived of their freedom, I submit the principles are equally applicable here where the right not to be arbitrarily deprived of property is concerned (section 25(1) of the Constitution). After all, the Respondents' version is that the impugned provisions of the TAA are aimed purely at execution against tax payers' property.

37. In the *Smit* judgment, the majority confirmed that the relevant constitutional right entrenches both substantive and procedural aspects (paras 101-105).

37.1. The substantive aspect ensures that a deprivation cannot take place without satisfactory or adequate reasons for doing so (in this case, we do not dispute the substantive rationale behind the efficient and effective collection of revenue for the State.)

37.2. The procedural aspect, however, requires that the deprivation must follow a fair and lawful process.

38. A fair and lawful process requires the judicial arm of the State to play the role afforded to it by the Constitution. "*That is, in the sense of being able to act as an independent arbiter and to exercise the kind of oversight that guarantees procedural safeguards. Requiring a Judicial Officer to rubberstamp what a member of the Executive branch of the State presents to her or him is inconsonant with this requirement*" (*Smit* para 106).



39. That reasoning applies all the more in the present instance where the power to issue a judgment is given to the clerk or registrar of a court on the mere say so of First Respondent.

40. The following quote from the *Smit* judgment illustrates precisely why the respondent's reliance on the courts in order to enforce its own tax mechanisms is misguided and problematic:

*"[151] ... the issuing of a warrant of arrest under section 5(1)(a) makes it impossible for a Magistrate to act as an independent arbiter and to exercise the kind of oversight that guarantees procedural safeguards. Section 5(1)(a) strait-jackets a Magistrate to act within its restrictive confines, which do not admit of the exercise of an independent mind. Put bluntly, in a situation where a Magistrate ought to do something that pre-eminently falls within the domain of judicial function, section 5(1)(a) co-opts the Magistrate effectively to act on the mere say-so of a member of the Executive arm of State, the Minister. The unintended consequence of the section's involvement of a Magistrate under those circumstances is that a Judicial Officer is required to lend judicial legitimacy to what, in essence, is an executive act. Not only is the performance of the section 5(1)(a) function outside of the purview of functions of the judicial office, it is "harmful to the institution of the Judiciary" and thus breaches the principle laid down in *Heath*. That constitutes a breach of the separation of powers principle, thus rendering section 5(1)(a) unconstitutional on this basis as well."* [my emphasis]

41. Unlike section 5(1)(a) of the Extradition Act, the Applicant's case is that the impugned sections of the TAA can be read in a constitutionally compliant manner – i.e. if it is interpreted in a manner consistent with *Metcash*, to permit, *inter alia*, applications for rescission of judgment.

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42. However, as will be discussed more fully below, if the sections cannot be read in such a constitutionally compliant manner, then they fall to be set aside on the basis of the principles laid down in, for example, *Chief Lesapo*<sup>21</sup> and *Smit*.

43. This Court's position on self-help and provisions which purport to oust judicial oversight has been consistent throughout. Another example is the approach adopted in respect of the *University of Stellenbosch Legal Aid Clinic* cases<sup>22</sup>.

44. In *University of Stellenbosch CC*, the CC confirmed that

*[34] While there is a connection between the judicial process and execution, these are separate processes which occur consecutively. There can be no execution without a judicial process prelude... Execution may only commence after the judicial process has ended. For execution is a process of enforcing a court order. Depending on the nature of the order granted, execution may be against the person or the property of the judgment debtor.*

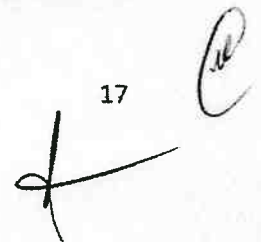
45. While the facts in the *University of Stellenbosch* cases are different to the present, I respectfully submit that the principles apply with equal force to the instant case because:

45.1. The issuing of a judgment in order to facilitate execution is not preceded by any judicial process;

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<sup>21</sup> *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC)

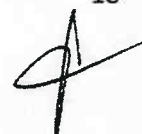
<sup>22</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015) ("*University of Stellenbosch WCHC*"); and *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016) ("*University of Stellenbosch CC*")



- 45.2. The clerk of a Magistrate's Court or registrar of a High Court merely rubberstamps that which is presented to it by or on behalf of the First Respondent;
- 45.3. As will be explained, the *fora* established in Chapter 9 of the TAA are not available to the Applicant or taxpayers in its particular position and a judgment of the High Court can only be set aside by that same court (or by a higher court on appeal);
- 45.4. On the respondents' versions, the Applicant cannot apply to set aside the order – this would render judgments taken in terms of sections 172 and 174 of the TAA even more onerous than those considered in the University of Stellenbosch and Lesapo cases.
46. The Applicant accepts the rationale behind giving the revenue services the kind of remedy provided for by section 172 and 174 of the TAA. However, for it to pass constitutional muster it must be given an interpretation which provides an affected taxpayer with the same remedies that are available in respect of ordinary civil judgments. Such an interpretation will not place undue strain on the language of the provisions and is in accordance with the interpretation already given by this Court in *Metcash* to the erstwhile but similar provisions of the VAT Act and the Income Tax Act 58 of 1962 ("ITA").

### *Metcash*

47. Turning then to the High Court's treatment of *Metcash*, despite its references to the judgments of other High Courts (referred to in paragraph 25.3 above) the High Court simply failed to engage with the *ratio* of this Court's judgment in *Metcash*. In particular, the court ignored the reasoning of the Constitutional Court in *Metcash* as set out in paragraphs 64 to 66 of that judgment. Indeed, in the judgment on leave to appeal, the court *a quo* asserts that '[w]hen the Constitutional Court commented as it did, in *Metcash* (supra)



*it did not make a finding of law on this subject. It merely made an observation.*<sup>23</sup> With respect, this finding is patently wrong.

48. In *Metcash*, the CC was faced with confirmation proceedings relating to a challenge to the constitutionality of *inter alia* section 40(2) and (5) of the Vat Act. As stated, section 40(2) was a similarly worded predecessor to sections 172 and 174 of the TAA.
49. At paras 25 and 26 of *Metcash*, Kriegler J quotes the Court *a quo*'s reasoning (with which the majority in *Metcash* ultimately disagreed) for finding that the impugned provisions were unconstitutional:

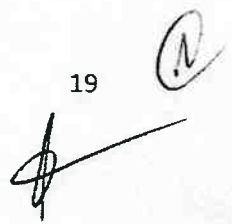
*'the meaning of the act is that the obligation to pay remains intact: it cannot be suspended by a court of law but only by the first respondent. Thus the power of any court of law to provide an aggrieved vendor with interlocutory relief is clearly excluded irrespective of the merits or demerits of his case. The constitutional challenge by the applicant would then remain valid whether the first respondent made a decision and whether that decision was taken on review or not.*

...

*[the impugned sections] explicitly exclude the need for recourse to a court of law and exclude the powers of the courts of law in interfering with that process regardless of the demands of justice. The only option available to a vendor would be to pay prior to having any dispute settled by a court of law or suffer the course of execution outside the auspices of the judicial process.*

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<sup>23</sup> Para 35 of the judgment on leave to appeal

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*There is no doubt that the relevant provisions are inconsistent with the provisions of s 34 of the Constitution in that:*

*(a) it substitutes the first respondent for the court in determining every facet of the vendor's liability and the enforcement thereof;*

*(b) it precludes any interlocutory relief by a court of law for the aggrieved vendor whilst the statutory remedy of appeal is pursued.*

*The prospect that an eventual successful appeal might reverse the situation is no answer to the actual infringement which endures until then.'*

50. Then in paragraph 49 of *Metcash*, the majority contextualised the complaint in respect of section 40(2) of the VAT Act - and the High Court's finding - as one that did not focus on the notion that the section short-circuits the judicial process but rather that procedure permitted by the subsection '*permits [SARS] to employ, like that condemned in the Lesapo case, constitutes a form of self-help which by-passes the courts of the land.*'
51. The majority then went on to explain that, although section 40(5) of the VAT Act proscribed certain kinds of judicial challenges (requiring those kinds of challenges to be raised in terms of the special machinery established under the Act), challenges which did not fall into those proscribed categories were still available to aggrieved tax payers to raise in a court of law (paras 53 to 56). That explanation is concluded with the following statement which, I submit, is instructive in this instance:

*"The dividing line between challenges that are permissible under section 40(5) and those that are not may at times be faint; but the distinguishing principle is clear and will have to be applied on a case-by-case basis."*

52. As I will show at paragraphs 71 to 77 below, the dispute raised by the applicant in the High Court falls outside of the kinds of disputes that can be referred to the special machinery established by the TAA.

53. Further, this Court refused to confirm the High Court's declaration of constitutional invalidity by considering the combined effect of all the impugned sections of the VAT Act. Importantly for present purposes, the Constitutional Court found:

*'[66] ... [relying on an excerpt from Kruger v Sekretaris van Binnelandse Inkomste<sup>24</sup>]*

*The observation not only signifies that section 42 is no bar to an application for rescission once a judgment has been entered under s 40(2), but necessarily implies that a 'wide field of defences' would be available to the taxpayer who wishes to pre-empt the entry of such judgment'*

54. The Court further emphasized its reasoning by clarifying that:

*'[68] ... The three provisions in question ... are found to pass constitutional muster because they do not bear the meaning ascribed to them in terms of the common belief [of the parties]. Not one of the sections means, nor do any of them read together mean, that a vendor aggrieved by an assessment or other decision of the Commissioner is precluded from seeking appropriate judicial relief, notwithstanding that an appeal under the Act may be pending, whether to a special court or against its judgment.'*

55. That '*common belief*' about which this Court found the parties in *Metcash* to be mistaken is precisely the arguments put forward by the respondents in this matter and which the High Court incorrectly applied.

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<sup>24</sup> 1973 (1) SA 394 (A)

56. Even prior to *Metcash*, the High Court in *Traco*<sup>25</sup>, accepted that judgments obtained in terms of s 40(2) were susceptible to rescission – although the court dismissed the application for rescission based on the facts.
57. Similarly, in *Barnard v Commissioner for Inland Revenue*<sup>26</sup>, a full bench of the Cape Provincial Division (as it then was) confirmed that the nature of a judgment taken in terms of s 40(2) of the VAT Act is that of a default judgment and is capable of rescission.
- 57.1. That Court found support for its conclusions in the judgments of *Traco and Kruger*.
58. In addition to its failure to properly apply the *ratio* in *Metcash*, the High Court's reliance on judgments which appear to be unfavourable to the applicant was also misplaced. In what follows I explain why the High Court was wrong to rely on the cases referred to in paragraph 25.3 above when it dismissed the applicant's application.<sup>27</sup>
59. In *Modibane*, that Court *held* that rescissions were not permitted in respect of judgments obtained under the section 91(1)(b) of the Income Tax Act. I submit the judgment in *Modibane* is wrong for the following reasons:
- 59.1. Section 91(1)(b) was, for all intents and purposes, identical to S 40(2) of the VAT Act;
- 59.2. However, the judge in *Modibane* limited his analysis of *Metcash* to the issue of the 'pay now argue later' principal and the evaluation of section 42 of the VAT Act;
- 59.3. No mention at all is made of the express finding in *Metcash* that section 42 does not preclude rescission of a judgment obtained under s 40(2) of the VAT Act.

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<sup>25</sup> *Traco Marketing (Pty) Ltd & Another v The Minister of Finance & Another* 1998 (4) SA 74 (SE)

<sup>26</sup> A127/97 19 May 2000 (CPD)

<sup>27</sup> Moosa F in Rescission of a tax 'judgment', De Rebus 2012 April.

60. On the other hand, the judgment of Binns-Ward J in *Capstone* is distinguishable from the applicant's case because the court there was concerned with applications for interim interdicts and not rescissions of judgments obtained pursuant to the filing of a certified statement by First Respondent.

60.1. Interestingly, despite criticizing the grant of a rescission in an earlier judgment<sup>28</sup>, Binns-Ward J noted at footnote 13 of *Capstone* that “*the effects of the filed statement might, in subsequent proceedings, be addressed as if there had been a judgment...*”

60.2. For that observation, the learned judge, like this Court in *Metcash*, relied on *Kruger v Sekretaris van Binnelandse Inkomste*.

60.3. Binns-Ward J, therefore, did not find that judgments taken under s 40(2) of the VAT Act were not susceptible to rescission.

61. Similarly, the judgment in *Van Wyk* delivered on 5 June 2015, is distinguishable, alternatively, should not be followed for the following reasons:

61.1. *Van Wyk* involved a dispute about an assessment by First Respondent – whereas the present case concerns self-assessments submitted by the applicant;

61.2. The Court in *Van Wyk* relied heavily on the fact that s 105 of the TAA stipulates that a taxpayer may not dispute an assessment or decision described in s 104 in any court or other proceedings, except in proceedings under Chapter 9 of the TAA or by application to the High Court on review.

61.3. At the time judgment in *Van Wyk* was delivered, section 105 of the TAA read as follows: *A taxpayer may not dispute an assessment or 'decision' as described in*

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<sup>28</sup> *Mokoena v Commissioner, South African Revenue Services* 2011 (2) SA 556 (GSJ)

*section 104 in any court or other proceedings, except in proceedings under this Chapter or by application to the High Court for review.*

61.4. Shortly after the judgment was delivered, section 105 was amended to read as follows: *“A taxpayer may only dispute an assessment or ‘decision’ as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.”*<sup>29</sup>

61.5. There has thus been a material change (including a widening of the High Court’s powers) to the section relied upon by the Court in Van Wyk. Even if one deals with a decision or assessment, an application for a review is no longer required by Applicant to the High Court as the words “for a review” has been replaced by “unless a High Court otherwise directs”. A High Court can in other words rescind a judgement obtained by a certified statement and direct that the taxpayer may dispute the assessment or decision in proceedings under Chapter 9 (for instance in the Tax Court)

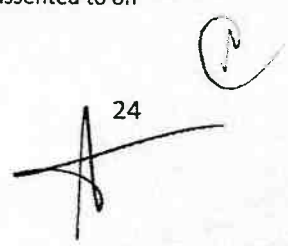
61.6. To be clear, while a court always enjoyed the power to rescind a certified statement judgment, the amendment of Section 105 of the TAA gave the High Courts the further power to refer a matter to the Tax Court for determination.

61.7. Moreover, the Court in Van Wyk acknowledged the comparability of section 40(2) of the VAT Act and sections 172 and 174 of the TAA. However, despite referring to Metcash in relation to the pay now argue later principle, it failed entirely to deal with the conclusion in Metcash that judgments obtained on a certified statement are subject to rescission in appropriate cases.

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<sup>29</sup> Section 105 was amended by section 52 of the Tax Laws Amendment Act 23 of 2015 which was assented to on 24 December 2015

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62. It is clear that none of the judgments relied upon by the High Court suggested that the reasoning in *Metcash* was wrong or no longer applicable under the current legislative scheme. In the circumstances, I respectfully submit that *Metcash* remains good law and continues to apply in respect of the proper interpretation of sections 172 and 174 of the TAA. Certainly, I submit there are strong prospects that another court (i.e. this Court) will disagree with the High Court's conclusions in this regard. This is all the more so in light of the Smith judgment.

63. I now deal briefly with the remaining grounds upon which the High Court concluded that it did not have jurisdiction to rescind First Respondent's judgment.

#### **Judgment not final**

64. While the final nature of a judgment is relevant to the question of appealability, finality is not a prerequisite for purposes of rescissions of judgment.

65. Furthermore, it is a feature of a superior court's inherent jurisdiction that it may rescind or vary judgments which are interim in nature, final, or not yet final.<sup>30</sup>

#### **Statement subject to withdrawal or amendment**

66. The reasoning of the High Court judgment as set out in paragraph 26 above does not bear scrutiny when considered against similar provisions in the VAT Act, the existence of which

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<sup>30</sup> See in this regard *National Director of Public Prosecutions v Phillips and Others* (043/2004) [2004] ZASCA 111; [2005] 1 All SA 635 (SCA) (30 November 2004) para 17.

In *Saxum Group (Pty) Ltd v Dalefern Properties (Pty) Ltd and Another* 2011 (1) SA 230 (GSJ) the court was willing to allow the application for rescinding of a final judgement to proceed. In *Muller v Paulsen* 1977 (3) SA 206 (E) the court was willing to allow an application to rescind a default judgment to proceed, while specifically stating that it was not a final judgment.

did not preclude the Constitutional Court in *Metcash* from concluding that judgments obtained on a certified statement are capable of rescission.

67. Regarding First Respondent's powers under section 176 of the TAA, to amend or withdraw a certified statement, these are powers expressly conferred on First Respondent by the legislature.
68. Those additional legislated powers, however, do not detract from the express provisions of section 174 that '[a] certified statement filed under section 172 must be treated as a civil judgment lawfully given in the relevant court in favour of First Respondent for a liquid debt for the amount specified in the statement.' Hence the fact that under the TAA certified statements may be withdrawn or amended, does not make them different from certified statements under the former VAT act, in respect of which *Metcash* held that rescission was possible.
69. Similar powers are, in any event, available to judgment creditors of civil judgments. Uniform Rule 41(2), for instance, authorizes "*any party in whose favour any decision or judgment has been given, may abandon such decision or judgment in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment.*" Such powers do not prevent an affected party for applying for a rescission of judgment.
70. Moreover, the erstwhile section 40(2)(b) of the VAT Act also authorised the Commissioner to withdraw or withdraw and file a new statement with an amended amount. Hence both withdrawal and amendment were also possible under the earlier provisions. Thus, the ability to withdraw or amend in terms of section 176 are not grounds for holding that certified statement judgments are not susceptible to rescission.

**Disputes under section 104 and 105 of the TAA**

71. While it is so that the nature of the complaints raised by the Applicant would best be ventilated in a Tax Court, the applicant is prejudiced in that the complaints raised by the Applicant do not qualify as either assessments or decisions which fall within the ambit of Chapter 9 of the TAA
72. Regarding the dispute mechanism provided in S 104 of the TAA, S 104 provides:

***104 Objection against assessment or decision***

*(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.*

*(2) The following decisions may be objected to and appealed against in the same manner as an assessment—*

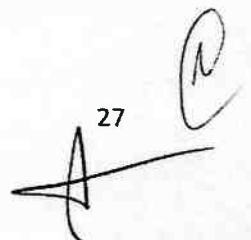
*(a) a decision under subsection (4) not to extend the period for lodging an objection;*

*(b) a decision under section 107(2) not to extend the period for lodging an appeal;  
and*

*(c) any other decision that may be objected to or appealed against under a tax Act.*

73. I submit it is clear that S 104 does not find application in the present instance because:

73.1. First Respondent admits that it accepted the applicant's self-assessments – there can thus be no suggestion that the applicant can be aggrieved by, and object to, its own self-assessment;

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73.2. Subsections 2(a) are not applicable as the matter in present instance does not involve a decision regarding the extension of the period for the lodging of an objection.

73.3. Subsection 2(b) is not applicable as it does not involve a decision on the extension of the period for the lodging of an appeal.

73.4. Subsection 2(c) also does not find application in the present instance because not all decisions may be objected to or appealed against.

73.4.1. Decisions that may be objected to or appealed against are specifically provided for in various statutes dealing with tax liability.

73.4.2. The allocation of payments and the levying of interest, for example, are not decisions that may be objected to or appealed against under a tax Act.

73.4.3. It therefore cannot be accepted that each time a payment is credited or journalled, this constitutes a 'decision' by First Respondent – certainly, there is no provision in any of Tax Act that permits an objection or appeal to such 'decisions' as envisioned in S 104(2).

73.4.4. To further illustrate, S 2 of Part II of the Income Tax Act, dealing with Employees' Tax – i.e. PAYE – permits an objection to penalties levied. In the present matter, the levying of penalties for PAYE is only one of the issues in dispute.

73.4.4.1. To the extent that the penalty component regarding PAYE does create a decision as set out in the previous paragraphs, the First Respondent did not allege that the Applicant was at the relevant times informed about such decision;

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73.4.4.2. Furthermore, it is submitted that once First Respondent noted the judgment only the High Court (or a higher court on appeal) can set aside its judgment.

74. In terms of section 105 of the TAA, if a complaint does not constitute an assessment or 'decision' as described in section 104 (which the Applicant's complaints do not), then the dispute resolution mechanisms provided for in Chapter 9 can only be utilised if a High Court (or another higher court on appeal) so directs.
75. The Tax Court is a creature of statute and as such its powers are limited to those specified in the relevant tax statutes.<sup>31</sup>
76. What further bolsters the applicant's interpretation of Chapter 9 is that, in every instance that the TAA refers to a decision that may be objected to or appealed against, the term 'decision' is placed between quotation marks. This necessarily illustrates that the term adopts a specific definition for purposes of Chapter 9 and does not refer to any and all decisions taken by First Respondent. More specifically, it does not apply to how payments are allocated.
77. In the circumstances, the Applicant cannot utilize the much-welcomed machinery of the Tax Court unless a superior court authorizes it to do so.

#### **Pay now argue later**

78. Regarding the 'pay now argue later' argument, *Metcash* confirms that judgments of the nature in question are susceptible to rescission despite the pay now argue later principle. In relation to similar objection and appeal procedures, as well as the 'pay now argue later'

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<sup>31</sup> Ackermans Ltd v Commissioner, South African Revenue Service 2015 (6) SA 364 (GP)

principles, that pertained under the VAT Act, the Constitutional Court in *Metcash* highlighted that:

*“The Act creates a tailor-made mechanism for redressing complaints about the Commissioner’s decisions, but it leaves intact all other avenues of relief.”*<sup>32</sup> and

*‘[66] ... [relying on an excerpt from *Kruger v Sekretaris van Binnelandse Inkomste*]<sup>33</sup>’*

*The observation not only signifies that section 42 is no bar to an application for rescission once a judgment has been entered under s 40(2), but necessarily implies that a ‘wide field of defences’ would be available to the taxpayer who wishes to pre-empt the entry of such judgment’*

79. Thus, despite the application of the pay now argue later principle under the Vat Act, the Constitutional Court nevertheless *held* that judgments obtained by First Respondent on the basis of certified statements are capable of rescission by the Court in which the judgment was taken.

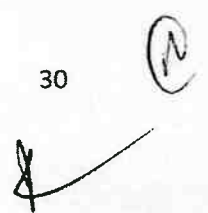
#### **BREACH OF CONSTITUTIONAL RIGHTS**

80. Alternatively, if the Applicant is wrong on its interpretation of sections 172 read with 174 of the TAA, then the provisions are unconstitutional and invalid.
81. The High Court did not deal at all with the applicant’s alternative constitutional challenge, as foreshadowed in its Rule 16A Notice. Instead, the court *a quo* finds that no constitutional issue arises in these proceedings. This notwithstanding its conclusion that

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<sup>32</sup> *Metcash* para 33

<sup>33</sup> 1973 (1) SA 394 (A)



- it does not have jurisdiction to rescind First Respondent's judgment or, put differently, that such judgments are not susceptible to rescission.
82. If sections 172 and 174 are interpreted to exclude the Court's jurisdiction to rescind, those sections would;
- 82.1. erode the judicial oversight of the Courts;
- 82.2. authorise self-help of the kind rejected by the Constitutional Court in *Metcash* (paragraphs 50-52), *Chief Lesapo*, *University of Stellenbosch Law Clinic CC* and *Smit*; and
- 82.3. enlarge the already draconian powers of the First Respondent to such an extent that it would not be justifiable to uphold them in an open and democratic society based on human dignity, equality and freedom.
83. If Sections 172 and 174 preclude applications for rescission of judgment, then those sections infringed violate, at the very least, sections 34, 165 and 169 of the Constitution. It has been held in various matters before this court and confirmed in *Metcash* that self-help is not justifiable in an open and democratic society.
84. Contrary to the prescripts to s 165, the interpretation of ss 172 and 174 proposed by the Respondents would render a Court a mere conduit or rubber stamp for First Respondent.
85. Moreover, the Constitutional Court in *Metcash* specifically refused to confirm the court a quo's declarations of invalidity in respect of section 40(2) of the VAT Act precisely on the basis that that section did not deny tax payers the right to, *inter alia*, rescission of judgment.
86. Thus, if the provisions of the TAA Act cannot be interpreted in the same constitutionally compliant manner, the reasoning of the court *a quo* in *Metcash* as quoted in paragraph 49

above must prevail in respect of sections 172 and 174 of the TAA and the judgment rescinded. The reasoning of this court in *Chief Lesapo, University of Stellenbosch Law Clinic CC* and *Smit* also compel a declaration of constitutional invalidity if the impugned sections cannot be read in a manner which passes constitutional muster.

#### **GENERAL PUBLIC IMPORTANCE AND INTERESTS OF JUSTICE**

87. This matter is of general public importance for the following reasons:

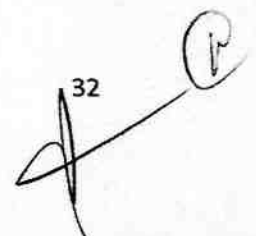
87.1. The taxation laws are draconian and for this reason have always required the oversight of the courts. In light of the current interpretation of the Respondents, justice calls out for balance to be restored;

87.2. It is important that there are checks and balances to protect the rule of law and prevent the revenue authorities from operating unchecked by merely using the courts as a rubber stamp with no genuine powers of oversight;

87.3. First Respondent is part of the executive and the provisions of the tax legislation takes away the courts discretion to keep in check and/or correct obvious errors in judgments obtained by First Respondent in terms of the impugned provisions;

87.4. The narrow interpretation (which prevents rescission in deserving cases) erodes the judicial function (for which the courts exist) from the powers of the courts;

87.5. The principle needs to be confirmed that where the First Respondent fails to withdraw an erroneous judgment, it can only be rescinded in the court in which such judgment was noted (or by a higher court on appeal); and

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87.6. It will confirm that a High Court may on rescinding the judgment refer the matter to other structures in terms of the TAA for adjudication on the details as provided for in the amended Section 105 of the TAA.

88. The First Respondent first raised the issue that the court does not have jurisdiction to rescind the judgement in their answering papers. The Applicant could only at this stage reply to this allegation and make the submission made in the Rule 16A notice. The basis for these submissions were set out in the Applicant's founding affidavit in support of its application for rescission of judgement.

## THE MERITS

### Separation of point *in limine* from merits

89. As I indicated in paragraph 24 above, at the commencement of the hearing before the High Court on 17 March 2020, and in line with the Minister's limited involvement in the dispute and the respondents' practice notes in the High Court, the High Court indicated that it will hear the parties' submissions on the point *in limine* – the implication being that the merits would only be heard if and after the point *in limine* had been determined.

90. Unfortunately, when it came to the applicant's application for leave to appeal in the High Court, both respondents and the court *a quo* denied that any such direction was given. In the circumstances, it is necessary for me to deal with this aspect in some detail.

91. First in this regard, is the fact that both the first respondent and second respondent, in their respective practice notes advised the High Court not to read the following pages of the record: 116-158; 252-365; 431-609. The aforementioned pages constitute the bulk of the annexures relied upon by the applicant in support of the merits of its application. Some of these of the aspects are dealt with below (under the heading: The Merits).

92. Second, although the proceedings started 9 am, an hour earlier than is ordinarily the case in the division, the presiding Judge informed the parties at the commencement of the proceedings that all were to conclude for the day by 11 am. While this fact is not determinative of the extent of the hearing in itself, it does suggest that, in a matter with a record running over 600 pages, and in which a wide range of issues are in dispute, the truncated time frame strongly suggests that the Court did not intend to deal with all the issues raised.

93. Third, the opening exchange between the Court and counsel for the applicant was the following:

*Counsel: [referring to the point in limine] "If we could get an indication from your Ladyship whether we should deal with the point in limine as well as the merits"*

*Court: "The point in limine. Address the Court as to how it finds jurisdiction"*

*(The point in limine is the question is to whether the judgment noted by certified statement is susceptible to rescission or not.)*

94. In the circumstances, and although certain aspects of the merits were referred to in passing, the merits of the applicant's application for rescission were not fully canvassed before the High Court.

95. Even in reply, the applicant's counsel stated:

*"So then, once we get to the merits of the matter I can take your Ladyship in detail through those provisions. If your Ladyship will allow me I can do some of it now... Perhaps just one example to show your Ladyship that while at no stage is the applicant wanting your Ladyship to make the calculations and ask [the Court] what the applicant owes, the aim*

*of pointing out these specific anomalies is to alert your Ladyship to the fact that there are problems.”*

96. Also, when addressing the issue of costs in reply, the applicant’s counsel stated:

*“...we are dealing today only with the points raised in limine, the point in limine is what necessitated the Constitutional challenge. So for purposes of that argument before your Ladyship today, the applicant has raised constitutional challenges and I submit that there is nothing before your Ladyship that suggests your Ladyship should depart from the Biowatch principle...”*

97. At no stage did either the Court or the Respondents interject by stating that the merits were being determined together with point *in limine*.

98. Thus, considering:

98.1. the respondents’ direction to the Court not to read the full record;

98.2. the express indication from the Court referred to above;

98.3. together with the truncated time for the hearing;

98.4. The court never indicated to the Applicant to address the merits fully. Nor did the court point to the contrary when counsel for the Applicant clearly indicated that she was under the impression that the court was only dealing with the point in limine;

all indicate that the Court was dealing only with the preliminary legal issues raised by the respondents.

99. Certainly, it was reasonable for the applicant and its counsel to interpret those facts in the manner that it did: that it should limit its arguments to the point *in limine*.

100. Without a clear indication to the contrary from the Court, the applicant was not afforded a fair and reasonable opportunity to address the merits of its application for rescission.

101. The reference by the Constitutional Court in *Van der Walt v S* is particularly apposite in light of the court *a quo*'s limited focus on the merits of the application for rescission. Despite the acknowledgement that procedural issues could sometimes be raised without merit, the court says that:

*"Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly."*<sup>34</sup>

102. At the conclusion of the arguments on 17 March 2020, judgment was reserved. The High Court judgment was handed down electronically on 15 May 2020. Despite the indication to the parties to address the court *a quo* on the point *in limine*, the High Court judgment:

102.1. Canvasses some aspects of the merits - though the discussion focuses on the conduct of the applicant and First Respondent over the relevant period and not the errors made by First Respondent, which errors formed the basis of the application for rescission;<sup>35</sup> and

102.2. Appeared to make adverse factual findings regarding the applicant's conduct prior to First Respondent obtaining the judgment in December 2017 without this really being before court whilst the point *in limine* was adjudicated.<sup>36</sup>

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<sup>34</sup> *der Walt v S* [2020] ZACC 19 para 29

<sup>35</sup> Paras 6 to 15 of the High Court judgment

<sup>36</sup> Paras 56 to 59 of the High Court judgment

103. It is not fair to ask a litigant to deal with the merits of the matter before the point in limine is decided, particularly where the indication is clear that deciding the point in limine will impact how the litigant deals with the rest of its argument.
104. All of these findings were made without giving the applicant a fair opportunity to illustrate the ways in which First Respondent has made errors in allocating payments made by the applicant over a number of years – errors which, necessarily, affect the amount reflected in First Respondent’s certified statement. I shall address some of the errors and the court *a quo*’s apparent factual findings further in the discussion on prospects of success below.
105. The Applicant duly applied to the High Court for leave to appeal against the High Court judgment. Due to the various directives aimed at limiting the spread of Covid-19, the parties acceded to Mantame J’s request to have the application for leave to appeal dealt with without a hearing. The parties, however made written submissions to the court *a quo*.
106. Judgment in the application for leave to appeal was handed down on 17 July 2020. The court *a quo* dismissed the application for leave to appeal with costs, including the costs of all Counsel. This was on a twofold basis. First, the court *a quo* considered there to be no prospects of success. Second, the court *a quo* concluded there are no compelling reasons for granting leave to appeal.
107. Despite the exchanges quoted above being drawn to the court *a quo*’s attention in the applicant’s written submissions, the High Court categorically stated:

*“The assertion that the applicant was not given an opportunity to argue its case in its entirety is incorrect”.*<sup>37</sup>

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<sup>37</sup> Para 10 of the judgment on leave to appeal

And

*“The fact that the applicant’s counsel was the only counsel who understood the Courts’ [sic] to be directing this way, also boggles one’s mind. However, in my view, the applicant seeks to create an impression of prejudice where none exist. The fact that the court suggested to the parties the structure of the submissions during the hearing did not mean that only preliminary points will be heard.”<sup>38</sup>*

The important fact is that Applicant dealt with the in limine point on that day and thereafter would deal with the merits only after adjudication of the point in limine.

107.1. First, it is curious and, I submit, inconceivable for a matter to be decided in full in the absence of a court considering the full record. Certainly, there is no indication that the court *a quo*, in fact, read the full record despite the directions from the respondents not to do so; and

107.2. Second, the question quoted above in paragraph 93 was aimed precisely at clarifying the ambit of the hearing.

108. With respect, these comments by the Court, as well as the opportunistic ‘support’ by the respondents, cannot be sustained in light of the *verbatim* quotes and facts discussed above.

109. The applicant has obtained a transcription of the hearing on 17 March 2020. To the extent necessary, same shall be made available to this Court.

110. In order to illustrate why the court *a quo* erred to the extent that its order relied on the findings of fact referred to above, I provide a brief exposition of the merits of the

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<sup>38</sup> Para 29 of the judgment on leave to appeal

application. I further point out that many of these examples are illustrated in those parts of the record the respondents instructed the High Court not to read.

**The amount claimed by First Respondent is patently and materially incorrect**

111. The judgment obtained by First Respondent dates back to amounts alleged to be owing since as early as 2005.
112. At some point before 2009, the applicant realized that, despite making substantial payments towards arrear taxes, the total amount outstanding, according to First Respondent, had not decreased.
113. My fellow director and I held a meeting with representatives of First Respondent on 22 October 2009 to discuss the arrear amounts and disputes regarding the applicant's payment history. At that meeting:
  - 113.1. It was agreed that First Respondent had not correctly allocated certain amounts;
  - 113.2. That First Respondent would allocate payments in accordance with the Applicant's instructions.
114. Despite much correspondence over more than a year, in May 2011, First Respondent then indicated to the Applicant that it owed arrear taxes in an amount of over R1.2 million.
115. Two years later, First Respondent sent a final demand on 29 April 2013 claiming arrears of R823'117.98.
116. In September 2013, First Respondent obtained judgment in terms of section 172 of the TAA in the amount of R817'573.04 - slightly less than what was demanded in April that year.

117. Despite the multitude of correspondence addressed to First Respondent by the Applicant before that judgment was taken, it was only after judgment was noted and after the Applicant applied for rescission of the Magistrate's Court judgment that First Respondent appeared to accept and appreciate 'the substantial nature of the unallocated payments for VAT, PAYE, UIF and SDL at that stage' (this is a direct quote from First Respondent answering affidavit in the High Court).
118. Thereafter, First Respondent remitted the penalties charged against the Applicant's tax accounts and assigned one Ms Theron to allocate the unallocated amounts and the judgment was withdrawn.
119. Importantly, First Respondent admits the judgment was withdrawn because 'the judgment amount had significantly changed due to the allocation of the unallocated amounts and the remission of the penalties...' (this is another quote from First Respondent's answering affidavit in the High Court).
120. The judgment amount was reduced to R601'873.58 – i.e. by more than R200'000.00.
121. Against that backdrop, the applicant contends that, since the 2013 judgment was taken, the applicant has paid R938'671.38 towards taxes, which amount exceeds the sum of the returns submitted in that time by R289'174.83.
- 121.1. In the Court *a quo*, First Respondent makes a bald denial to this allegation and states that the applicant has not raised any objection through the TAA dispute mechanism;
- 121.2. However, I am advised that neither the TAA or any of the other applicable acts allow objections to be raised in respect of interest charged and, it is clear in this

matter that the disputed part of the arrears is, in large part, due to interest on the capital arrears.

122. Despite receiving the excess payments of almost R300'000.00 (since First Respondent withdrew the 2013 judgment), on 26 September 2017, First Respondent demanded payment of R819'077.51.

123. And on 15 December 2017, First Respondent obtained judgment in terms of S 172 of the TAA in the amount of R804'747.44.

124. Interestingly, the capital component of the judgment debt is R517'612, almost identical to the capital component in respect of the 2013 judgment which was R517'821.67 - reduction of a mere R209.65. It is very difficult to imagine that the capital outstanding would not have decreased substantially in the time since First Respondent withdrew the 2013 judgment.

125. I now draw the court's attention to a few specific examples of errors made by First Respondent since it withdrew the 2013 judgment (all of which are evident from the record which will serve before this Court if leave to appeal is granted):

125.1. On 31 July 2014, the applicant paid R3'481.32 for the PAYE period of June 2011.

125.1.1. However, only R2'806.50 was allocated;

125.1.2. On 29 February 2015 (more than 6 months later), the balance of R674.82 is reflected;

125.1.3. And 5 months later, the entire amount is reversed.

125.2. Then, the following two payments by the applicant were only allocated on 15 June 2016:

125.2.1. R2'470 which had, in fact, been paid on 1 October 2015;

125.2.2. R1'606 which had, in fact, been paid on 1 April 2016;

125.2.3. These late allocations would necessarily have an impact on the interest and penalties levied on the applicant's tax debt.

125.3. In June 2016 the applicant had paid R23'985.70 but First Respondent had only allocated R10'027.55 and then levied a penalty and interest on what it alleged to be an 'outstanding balance'.

125.4. On 31 May 2015 an 'additional declaration' is debited to the Applicant's account in the amount of R143'374 and reversed (purportedly into an 'assessment') on 29 July 2015:

125.4.1. First, even on First Respondent's own version in this matter, the applicant's tax debt was never subject to any assessment by the First Respondent;

125.4.2. Second, interest was charged on the total outstanding tax debt during that period and there has been no reversal of that interest after the 29 July 2015;

125.4.3. Thirdly the First Respondent alleges no notice of this assessment to the Applicant

125.5. In April 2015, the Applicant submitted a VAT return in the amount of R19'800.87.

125.5.1. Despite the applicant making payments in the amount of R26'367 before the due date, the relevant statement reflected a balance of R14'345.24 which included a penalty and interest.

- 125.6. The applicant provides more examples in its papers in the High Court.
126. Even though the errors each seen in isolation and the relevant amount of interest or capital concerned, may not be large, there are many such instances which add up and this together with the roll-on effect makes an impact on the alleged account. In each instance where an error occurs, that amount should have been used towards the capital or alleged older outstanding amounts. This would then on its turn have reduced the effect of the interest.
127. The fact that excess interest or capital was charged had and still has a roll-on effect.
128. In response to the very specific examples of anomalies, First Respondent gave a bare denial and criticized me of 'speaking in generalized terms' and that 'it is incumbent upon the taxpayer to provide a proper accounting'.
129. It is disingenuous to suggest that a taxpayer must be able to account for anomalies in First Respondent's allocation when the taxpayer is unaware thereof as no notice is given of the anomalies.
130. In the circumstances, I submit that the Applicant has sufficiently established that the amount claimed in the judgment is, in all likelihood, not accurate and definitely includes amounts which have already been paid. When debts have been paid an alleged debtor should be allowed to raise such payments as a defence.
131. Because much of the problem lies in unallocated or reversed payments and the fact that interest has been improperly levied against the applicant's tax debt, the applicant cannot reasonably be expected to calculate the correct amounts.
132. In the judgment on leave to appeal, the court *a quo* finds that the application falls to be dismissed on the undisputable facts, relying on *Plascon-Evans*. The court failed to take

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into account that it is trite that a Court in motion proceedings may dismiss a Respondent's version if and to the extent that it entails bare and unsubstantiated denials, as was the case in this matter.<sup>39</sup>

133. But because argument in the court *a quo* proceeded on the basis of the point *in limine*, the Applicant was not afforded an opportunity to fully canvas the discrepancies of the First Respondent on the record. Had it been afforded a fair opportunity to do so, the fact that *First Respondent disputed such contention* would have been shown to amount to nothing more than bare denials that did not raise any genuine disputes of fact.

134. In the circumstances, to the extent that the court *a quo*'s dismissal of the application for rescission was based on the apparent factual findings at paragraphs 56 to 59 of the judgment, without having considered the errors made by First Respondent in the allocation of payments made to it by the applicant, the High Court erred.

134.1. The First Respondent accuses the Applicant and I incessantly of default and does not deal with the crux of the matter, namely that allocations of payments by the applicant are not made correctly by the First Respondent. This has a roll-on effect on the alleged outstanding amount which has been illustrated in the founding affidavit of the Applicant's application for rescission of judgement and other subsequent affidavits.

134.2. The First Respondent alleges that the Applicant did not respond to its correspondence and therefor it had no other option but to take judgement. In the initial founding affidavit to its application for rescission of judgment the Applicant listed 21 letters written to the First Respondent from 30 October 2009 to 14 September 2017, setting out the problems it was experiencing with the non-

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<sup>39</sup> Para 26 of the judgment on leave to appeal

allocations of payments. The First Respondent responded only scantily to these letters and further requested the Applicant to provide information to the First Respondent it already had been provided with or information that the Applicant had no access to. The First Respondent hardly replies to these facts in any of its affidavits to court. The Applicant realized that further meetings would be counterproductive as the First Respondent did not consider the detail set out in the correspondence and the Applicant could not afford to discuss matters where the First Respondent and its employees were continuously unwilling to apply their minds to the details on record.

- 134.3. The court *a quo* took exception to the length of time the Applicant took to try and resolve the matter. As set out above in previous paragraph, the Applicant corresponded with First Respondent. The First Respondent listened to some extent but not all the problems were resolved, despite repeated requests by the Applicant. In essence the Applicant tried to resolve the matter by way of an alternative dispute resolution mechanism.
- 134.4. The Applicant repeatedly showed the incorrectness of alleged outstanding amounts, yet the First Respondent failed to accept this and to recalculate the alleged outstanding amount, where any amount might still have been due. The Applicant does not have access to the First Respondent's systems to do so and has set this out in its papers.
- 134.5. As has been pointed out numerous times in correspondence to the First Respondent and at meetings with the First Respondent and in the various affidavits to support the legal processes, the Applicant is NOT objecting to an assessment. This again indicates that the First Respondent does not take serious

cognisance of the predicament of the Applicant. It has created a constant challenge for the Applicant.

135. A litigant in the position of the Applicant should be permitted to enforce its rights to the utmost. This does not mean the Applicant is trying to delay paying taxes. Again, as has been pointed out over and over in its affidavits, it is continuing to pay. However, since the Applicant sought the protection of the High Court, and in the applications before the SCA, the First Respondent, rather than substantially addressing the legal objections, has in an *ad hominem* way preferred to discourage the Applicant by downplaying it as a recalcitrant taxpayer. The Applicant hopes that such an approach will not detract from the very serious and comprehensive exceptional circumstances involved in a matter such as this before the courts.
136. Even more than the devastating impact on the Applicant, the approach of the Respondents and the outcome of the court process thus far also serve to circumvent the constitutional caution against self-help laid down by the Constitutional Court regarding enforcement and rescissions of tax judgments. The final outcome of this judgment and appeal will no doubt effect the rights or interpretation thereof for all taxpayers. As such it is indeed an aspect of general public importance.

#### **REMEDY**

137. If the judgment is rescinded and the dispute is referred to the Tax Court in terms of section 105 of the TAA (either by the above Honourable Court or by the High Court after remittal), then the Applicant's actual tax liability can be properly ventilated and determined. There is simply no other path for the Applicant's dispute to be ventilated by a Tax Court. This is all the Applicant really seeks, to know exactly what it must pay the First Respondent, if anything, and to be unfairly burdened to re-pay amounts it has already paid.

138. For the avoidance of doubt, unless a High Court otherwise directs in terms of section 105 of the TAA, section 107(1) of the TAA provides that

*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'.*

139. The First Respondent did not give notice or allege that any such notice was sent to the Applicant to initiate the dispute mechanisms of Chapter 9 of the TAA.

### **COSTS**

140. The High Court also erred in ordering the applicant to pay the respondents' costs.

141. In light of the respondents' denial that judgments taken on a certified statement are rescindable, the applicant had no choice but to raise the conditional, alternative constitutional challenge which it raises.

142. The points raised are important for both First Respondent and the taxpayers as it would determine whether tax judgments obtained by certified statement may be rescinded on application to court. It is not fair that the Applicant should be saddled with the enormous legal costs in pursuing this matter of constitutional interpretation.

143. Confined as it was to the preliminary points, it is respectfully submitted that the High Court should have applied the principles set out in *Biowatch*<sup>40</sup> and confirmed in *Harillall*<sup>41</sup>.

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<sup>40</sup> *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009)

<sup>41</sup> *Harrielall v University of KwaZulu-Natal* (CCT100/17) [2017] ZACC 38; 2018 (1) BCLR 12 (CC) (31 October 2017)

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144. In *Harillall*, in particular, even though the Constitutional Court refused leave to appeal on the merits, it granted leave to appeal on the issue of costs alone.
145. It is also worth noting that the history of the current litigation underlines the abuse by First Respondent of the powers it has. In the precursor to the current battle for survival, in 2013, the Applicant applied to rescind a similar judgment in the Somerset West Magistrates Court. The access to justice in the 2013 matter before the Magistrate had, amongst others, 3 important results:
- 145.1. First Respondent withdrew judgment, it never persisted with the opposition of the rescission application, which application was similar to the application later brought in the High Court in this matter;
- 145.2. The Somerset West Magistrate's Court thereafter awarded costs in favour of the applicant;
- 145.3. The alleged debt decreased in excess of R200'000.00.
146. I submit the probable reason why SARS approached the High Court for its judgment was to discourage (and make more costly) any opposition of the kind which it encountered from the Applicant in the Magistrates' Court in respect of the 2013 judgment.
147. Now, instead of facing costs on a Magistrate's Court scale, the Applicant faces costs on high court tariff, including the costs of two counsel. The Respondents have virtually unlimited access to a choice of legal teams. Both Respondents have employed teams including attorneys and two counsel each. By contrast, the Applicant has had to limit itself in legal fees by curtailing its legal team. The approach of the First Respondent in this matter to discourage the Applicant's access to justice is in similar vein to plaintiffs or applicants

approaching the High Court in credit agreement matters, conduct justifiably criticized as it was in Mostert<sup>42</sup>.

148. In *Nedbank Ltd v Thobejane* and similar matters<sup>43</sup> at paragraph (92) the court held “...Lastly, there is an obligation, not only on financial institutions, but also on all litigants, to consider the question of access to justice when actions or applications are issued, and the courts have a duty to ensure that access to justice is ensured by exercising appropriate judicial oversight”.

149. This matter has the potential to render the applicant unable to provide further legal services. The potential prejudice this has for the applicant and its employees is great. Such harm cannot be rectified by a costs order.

## CONCLUSION

150. It is thus the case of the Applicant that Sections 172 and 174 of the TAA properly interpreted permits the aggrieved party to apply for rescission of tax judgments which were noted by the filing of certified statements. In other words, tax judgments noted by filling such certificates have always been and are still susceptible for applications for rescission. Alternatively, should the TAA not be so interpreted the said sections breach the self-help constraints of the Constitution as clearly accepted by the court in *Metcash* (paragraphs 50-52), *Chief Lesapo, University of Stellenbosch Law Clinic CC and Smit*.

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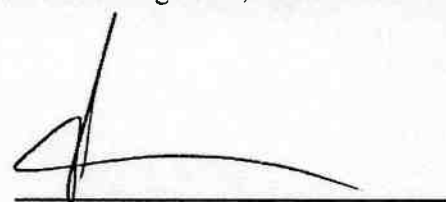
<sup>42</sup> In Re: *Several Matters on the Unopposed Roll of 06 July 2020, First Rand Bank Ltd Applicant v JFG Mostert and S Mostert; Standard Bank of SA Ltd v JJ Meyer and ME Meyer; Nedbank Ltd t/a MFC v T Makatini*, (4050/18 & 3269/19 & 3166/19), 30 July 2020, Mpumalanga Division, Middelburg, at paragraph 34 “Access to justice as envisaged by the Constitution is not served, where alternative courts are created and equipped to deal with matters and litigants bypass those institutions, because they claim that they have a right to do so. What section 34 envisages is a meaningful opportunity to institute and defend legal action in a court of law, and places an obligation on the state to take steps to remove any regulatory, social or economic obstacles which may prevent or hinder the possibility of access to justice. The position that a plaintiff is *dominus litis* and can choose any forum that suits him/her is at best outdated. It loses sight of the deep-seated inequalities in our society and the constitutional imperative of access to justice.”

<sup>43</sup> 2019 (1) SA 594 (GP)

151. There are thus clear grounds why leave to appeal should be granted regarding the finding of the High Court on the point in limine. Further the Applicant has shown that it has set out sufficient facts on the merits to substantiate that the amounts claimed in the First Respondent's certified statement is patently and materially incorrect and does not sufficiently reflect all payments made by the Applicant, thus empowering the fiscus to use the High Court as a rubber stamp and enabling the First Respondent to collect more than it is entitled to and neutralise a tax payer who seeks assistance from the courts.

152. Thus, I respectfully submit this matter clearly raises constitutional issues and it raises important questions of law which are of general public importance.

153. I accordingly ask that leave to appeal to Constitutional Court be granted, and that costs be costs in the appeal.

  
SONJA LABUSCHAGNE

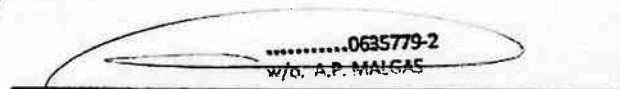
I certify that-

- (a) the deponent-
  - (i) acknowledged that she knows and understands the contents of this declaration;
  - (ii) informed me that she does not have any objection to taking the prescribed oath;
  - (iii) informed me that she considers the prescribed oath to be binding on her conscience;

(b) the deponent then uttered the words, 'I swear that the contents of this declaration are true, so help me God'; and

(c) the deponent signed this declaration in my presence at SOMERSET WEST on the 24<sup>th</sup> day of February 2021

SOUTH AFRICAN POLICE SERVICE  
COMMUNITY SERVICE CENTRE  
  
24 FEB 2021  
  
SOMERSET WEST  
AMADOLISA OZANITSIKI AFIRICA

  
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w/o. A.P. MARGAS  
COMMISSIONER OF OATHS

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