OLD HABITS DIE HARD – THE SOUTH AFRICAN REVENUE SERVICE'S INABILITY TO COMPLY WITH ITS OWN LEGISLATION

Sip Project Managers (Pty) Ltd v C:SARS
Case number: 11521/2020 Gauteng Division, Pretoria (30 April 2020)

1 Introduction

The South African Revenue Service (SARS) has identified third-party appointment as an important weapon in its tax-collection arsenal (SARS *Tough New Penalties for Outstanding Income Tax Returns* (2009) 4). In terms of section 179(1) of the Tax Administration Act 28 of 2011 (TAA), SARS is permitted to issue a third-party appointment notice in terms whereof a third party becomes liable for the taxpayer's tax debt in instances where the third party holds (or will hold) money on behalf of or due to the taxpayer. Although the usefulness of the appointment of a third party from a collection perspective is apparent, it remains important to ensure that certain built-in measures are in place to ensure that SARS does not use this power in an overzealous manner and that taxpayers' rights are respected.

In 2015, subsection 179(5) of the TAA was inserted (through s 57 of the Tax Administration Laws Amendment Act 23 of 2015) to provide such a built-in measure. This subsection provides:

> "SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice, which demand must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act, including, in respect of recovery steps that may be taken under this section–
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> (*a*) if the tax debtor is a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on the basic living expenses of the tax debtor and his or her dependants; and
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> (*b*) if the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship."

This case note reflects on the case of *Sip Project Managers (Pty) Ltd v C: SARS* (Case number: 11521/2020 Gauteng Division, Pretoria (30 April 2020)), where section 179(5) of the TAA was considered. The *SIP Project Managers* case is important because it provides some perspective on this relatively new insertion in the TAA. In the first part of this case note, the facts

of the case and the judgment are provided. In the next part, the judgment is analysed by considering the consequences of SARS's failure to adhere to peremptory wording and by contemplating whether the tax debt must be "due and payable" before a notice in terms of section 179(5) of the TAA can be delivered. Thereafter, some conclusions are drawn.

2 Facts of the case and judgment

In terms of a tax assessment that was issued in June 2019, SARS owed SIP Project Managers (Pty) Ltd (the taxpayer) a refund of about R1.6 million. Subsequently, SARS requested additional information to verify the assessment. However, the taxpayer failed to provide the additional information and on 9 October 2019, SARS issued an additional assessment, which resulted in the taxpayer owing an amount of R1 233 231 to SARS (*SIP Project Managers supra* par 4). The notice of assessment indicated that the tax debt must be paid by 30 November 2019 (*SIP Project Managers supra* par 19; par 5 erroneously reflects the date of payment as 30 September 2019).

According to SARS, it had delivered three letters of demand to the taxpayer on 7 November 2019, 11 November 2019 and 22 January 2020 (*SIP Project Managers supra* par 8), without the desired result. SARS then proceeded with tax collection by way of a third-party notice, which was issued to Standard Bank on 3 February 2020. Standard Bank, acting in accordance with the third-party appointment notice, paid over R1 262 007 from the taxpayer's bank account at Standard Bank (*SIP Project Managers supra* par 6 and 15).

The taxpayer approached the court to have the third-party appointment notice set aside and to have SARS refund the money that Standard Bank had paid in terms of the third-party appointment notice (*SIP Project Managers supra* par 1). The taxpayer sought this recourse primarily on the basis that SARS did not comply with section 179(5) of the TAA.

The taxpayer averred that the letters of demand (a prerequisite in terms of section 179(5) of the TAA for issuing a third-party appointment notice) were not delivered to the taxpayer (*SIP Project Managers supra* par 14). Despite Mrs Tati, the official who authorised the third-party appointment, stating that the letters of demand "show on the SARS e-filer view", the taxpayer and its accountant were unable to view the letters on the taxpayer's e-filing profile (*SIP Project Managers supra* par 8) and provided a screenshot of the e-filing profile showing the lack of such a letter (*SIP Project Managers supra* par 16). Furthermore, the taxpayer and its accountant averred that the letters of demand were not sent to them in any other manner (*SIP Project Managers supra* par 9). In further support of their argument, Mrs Campbell, an employee at SARS's call centre, was also unable to find any letter of demand on the taxpayer's e-filing profile when the taxpayer's accountant phoned the call centre (*SIP Project Managers supra* par 10).

SARS chose to rely only on the letter dated 7 November 2019 (*SIP Project Managers supra* par 20; par 15 erroneously specifies the date as 7 September 2019). SARS chose not to rely on the letter dated 11 November

2019, because it did not comply with the requirements for a letter of demand as stipulated in section 179(5) of the TAA. Also, SARS did not rely on the letter dated 22 January 2020, because it was not issued at least 10 business days before the third-party appointment notice was submitted (*SIP Project Managers supra* par 15). As such, the court had to consider whether the letter of demand dated 7 November 2019 was delivered to the taxpayer and if not, the consequences thereof.

Considering section 179(5) of the TAA, the court remarked that the wording in this subsection is clearly peremptory and, as such, SARS should deliver a letter of demand before it can commence with recovery of taxes by way of a third-party appointment notice (*SIP Project Managers supra* par 22). Thus, it was important to establish whether there had been "delivery" of the section 179(5) notice dated 7 November. A notice is considered to be "delivered" when SARS correctly submits the letter to the taxpayer's electronic filing page (s 251(*d*)(iii) of the TAA read with s 255(1)(*a*) of the TAA and rule 3(2)(*b*)(ii) of the Rules for Electronic Communication prescribed under s 255(1) of the TAA). Because no acknowledgement of receipt is required (rule 3(3) of the Rules for Electronic Communication prescribed under section 255(1) of the TAA), SARS only had to prove that the notice was reflected on the taxpayer's e-filing profile (*SIP Project Managers supra* par 17).

Yet, SARS could not provide a consistent explanation of who sent the letter of demand. In SARS's answering affidavit, it was indicated that (i) the Debt Management Division sent the notice via e-filing (par 15 of the affidavit); (ii) Mrs Tati sent the notice (par 103 of the affidavit); and (iii) the letter was system-generated and sent automatically via the SARS system (par 107 of the affidavit). Moreover, neither the deponent of the SARS affidavit, Mrs Tati, nor any other SARS employee claimed that they had personal knowledge that the section 179(5) notice was indeed sent to the taxpayer on the e-filing profile (*SIP Project Managers supra* par 16). Also, SARS failed to provide any evidence that the notice reflected on the taxpayer's e-filing profile (*SIP Project Managers supra* par 16). Hence, the court held that the notice was not delivered to the taxpayer and, as such, SARS had not complied with section 179(5) of the TAA.

Nonetheless, the court stipulated that SARS's failure to comply with the section 179(5) requirement does not necessarily render the third-party appointment null and void. The court determined that, in such instances, a court has to consider whether "it was fatal that it [the requirement] had not been complied with" (*SIP Project Managers supra* par 24). To determine whether an omission is fatal, the purpose of the requirement must be established (par 24 quoting from *Maharaj v Rampersad* 1964 (4) SA 638 (A) 646C). In this respect, the court declared that section 179(5) of the TAA limits SARS's power to recover tax by way of a third-party appointment notice by requiring a notice advising the taxpayer of the outstanding tax debt, SARS's recovery powers, and the taxpayer's debt relief mechanisms (*SIP Project Managers supra* par 26). A failure to deliver a section 179(5) notice would clearly disregard the restriction that section 179(5) establishes on SARS's tax recovery power. Accordingly, the court held that the third-

party appointment notice was unlawful and thus null and void (*SIP Project Managers supra* par 23).

The court held that, even if the letter dated 7 November 2019 had been found to have been "delivered" to the taxpayer, the letter would have been unlawful, the reason being that at the date of this letter, namely 7 November 2019, the tax debt was not yet outstanding, because the date of payment on the assessment was 30 November. The court held that, in terms of the *contra fiscus* rule, "outstanding tax debt" must be interpreted against SARS and therefore, the letter would have been premature (*SIP Project Managers supra* par 21).

SARS argued that, in spite of the letter not being delivered and despite it being premature, the court should still not order SARS to repay the money it had received in terms of the unlawful third-party appointment notice. The basis for this argument was that, at the time the matter was heard by the court, namely 30 April 2020, there was indeed an outstanding tax debt, which was not suspended in terms of section 164 of the TAA. This means that if SARS were to repay the third-party notice money, it could simply use its recovery powers to collect the outstanding tax debt. Essentially, SARS argued that the repayment would be of no purpose (*SIP Project Managers supra* par 26) and relied on the matter of *Oceanic Trust v C:SARS* (unreported, case of 22556/09 (WCC) 13 June 2011), where the court held that it was neither just nor convenient to order repayment, because SARS could use set-off or could appoint a third party again in relation to the outstanding tax debt (*Oceanic Trust v C:SARS supra* par 89).

Notably, the court indicated that the *Oceanic Trust* matter was considered before there was a peremptory provision stipulating that a taxpayer must receive a final letter of demand in terms of section 179(5) of the TAA. If the court were to decide not to order a repayment in the current matter, despite there being no valid section 179(5) notice, it would mean that the insertion of section 179(5) served no purpose (*SIP Project Managers supra* par 26). As a result, SARS was ordered to pay back the money that it received from the third party, with interest from date of payment.

Consequently, SARS would need to start afresh with the collection procedure by issuing and *delivering* a section 179(5) notice to the taxpayer. Alternatively, SARS could use some of the other collection powers at its disposal.

3 Case analysis

3 1 Failure to adhere to peremptory wording, again

From this judgment, it is clear that action by SARS, when it fails to act in accordance with the peremptory wording of section 179(5) of the TAA, will be null and void. The same approach to peremptory wording in the TAA is evident in the matter of *Nondabula v C: SARS* (2018 (3) SA 541 (ECM) (27 June 2017)), where it was held that SARS could not issue a third-party appointment notice in terms of section 179(1) of the TAA when it did not

furnish a notice of assessment that complies with the requirements stipulated in section 96 of the TAA (*Nondabula supra* par 21).

Significantly, the court in *Nondabula* (par 26) held:

> "The least that is expected of the first respondent is to comply with its own legislation and most importantly promote the values of our Constitution in the exercise of its public power."

From this *dictum* in *Nondabula*, it is clear that to declare SARS's conduct unlawful the court did not only rely on the peremptory wording of section 96 of the TAA, but also on the rule of law, which section 1(*c*) of the Constitution of the Republic of South Africa, 1996 (Constitution) lists as a founding value, and on section 195(1) of the Constitution, which sets out the values and principles governing public administration.

In relation to the rule of law, SARS may not act arbitrarily (Fritz *An Appraisal of Selected Tax-Enforcement Powers of the South African Revenue Service in the South African Constitutional Context* (doctoral thesis, University of Pretoria) 2017 38), meaning that fair procedure must be followed (Currie and De Waal *The Bill of Rights Handbook* (2013) 540–547). In *Nondabula*, the court held that SARS did not follow fair procedure because it failed to comply with requirements of the TAA (*Nondabula supra* par 25). Thus, SARS acted contrary to the rule of law.

In relation to section 195 of the Constitution, the court held that SARS did not comply with, among others, section 195(1)(*f*) of the Constitution (*Nondabula supra* par 25). This subsection provides that public administration, of which SARS forms part (s 195(2) of the Constitution), must be accountable. In *Nondabula,* the court stipulated that SARS has to comply with the provisions of the TAA to ensure accountability (*Nondabula supra* par 24).

As in *Nondabula,* SARS in the current matter did not follow fair procedure when it failed to deliver a letter of demand. Also, SARS did not act in an accountable manner as SARS did not comply with the TAA. Thus, comparing the matter under discussion, namely *SIP Project Managers*, with the court's approach in *Nondabula*, the question as to why the court did not also pronounce SARS's conduct in *SIP Project Managers* to be contrary to the Constitution arises.

Perhaps, it is because in *SIP Project Managers* the court indicated that the failure to "deliver" the notice was not SARS's fault (*SIP Project Managers supra* par 4). Yet, SARS, as part of public administration, is held (or should be held) to a higher standard than other debt collectors or creditors. This is evident from section 195(1) of the Constitution. As such, SARS should make sure that a letter is "delivered", because "[i]t is not enough to pro[ve] the existence of a final letter of demand; the letter should be delivered to the taxpayer" (*SIP Project Managers supra* par 17).

While it could be onerous on SARS to verify whether all section 179(5) notices, or any other required notices for that matter, display on the taxpayer's e-filing profile, a SARS system failure or glitch should not prejudice the taxpayer. Even if it is found to be unrealistic to expect SARS to

verify "delivery" of all documents, once it has come to SARS's attention that there was in fact no "delivery", as was the case when Mrs Campbell could not find a letter of demand on the taxpayer's profile, SARS should take steps to rectify its non-compliance.

In a similar vein, the court in *Siphayi v C: SARS* (unreported decision Gauteng Local Division, Johannesburg case no: 34975/2019) held that when SARS is satisfied that a notice has not been delivered to a taxpayer and the taxpayer would suffer material disadvantage as a result thereof, the notice must be withdrawn and delivered anew (*Siphayi v C: SARS supra* par 10–11).

However, in the matter under discussion, SARS did not even investigate the taxpayer's version pertaining to the non-delivery of the notice, let alone rectify the situation by repaying the money that was paid over by the third party. Instead, it allowed the matter to proceed to court, which meant that both parties had to incur legal expenses to have the matter resolved. Whereas SARS's legal expenses are paid with taxpayers' money, the taxpayer did not have the same good fortune. Fortunately, the taxpayer in *SIP Project Managers* had sufficient funds to obtain legal representation and to proceed with this matter to court. If the applicant had been a less affluent taxpayer, namely one who could not afford to incur legal expenses when R1 262 007 had been paid over to SARS by virtue of an unlawful third-party appointment, SARS's conduct would not have been brought to the fore.

3 2 "An outstanding tax debt"

The court did not consider in detail the taxpayer's alternative argument pertaining to a tax debt that was not yet payable at the time the section 179(5) notice was issued, because the taxpayer's argument pertaining to the non-delivery was successful. Nonetheless, the question is still pertinent.

In its brief discussion of the "outstanding tax debt" aspect, the court indicated that, in accordance with the *contra fiscum* rule, the words "outstanding tax debt", as contained in section 179(1) of the TAA, must be interpreted against SARS. As such, the court held that the notice was premature and unlawful (*SIP Project Managers supra* par 21).

The court was correct to decide that outstanding tax as intended in section 179(1) of the TAA means that the tax debt must be due and payable at the time the third-party appointment notice is issued. Already in *Mpande Foodliner CC v the Commissioner* ((2000) 63 SATC 46 par 33), the court held that a third-party appointment can only be made "if an amount of tax, additional tax, penalty or interest is due and payable".

Even though *Mpande Foodliner* dealt with a third-party appointment in terms of section 47 of the Value Added Tax Act 89 of 1991, which was replaced by section 179 of the TAA, "a due and payable" tax debt remains a requirement. In terms of the TAA, the term "outstanding tax debt" refers to an amount of tax that is due and payable, but which has not been paid on or before the required day (the definition of "outstanding tax debt" and "tax debt" in s 1 of the TAA read with ss 162 and 169(1) of the TAA). In this regard, the required

day refers to the date indicated in the assessment as the date of payment. Consequently, in *SIP Project Managers,* the third-party notice could only have been issued after the date of payment, namely 30 November 2019.

Even so, the court's line of argument is misdirected. While it is important to consider at what stage a third-party notice may be issued, it is irrelevant for purposes of this case. Rather, the relevant question is whether the tax debt must be due and payable before a notice in terms of section 179(5) of the TAA may be issued and delivered.

An initial response may be that the section 179(5) notice may only be sent once the tax debt is due and payable and not before such time. Then again, there is nothing in section 179 of the TAA that explicitly prohibits the section 179(5) notice from being worded in future terms. On a simple reading of the provision, this means that SARS could perhaps draft the section 179(5) notice ahead of time, warning the taxpayer of the recovery steps that SARS has at its disposal if the taxpayer does not pay by the due date and the debt relief mechanisms that are provided for in the TAA. Consequently, the question of whether the tax debt must be due and payable before a section 179(5) notice can be delivered must be analysed further.

While it would be prudent to consider the purpose of the section 179(5) notice to ascertain whether an "impending" interpretation tallies therewith, neither the *Explanatory Memorandum to the Tax Administration Law Amendment Bill, 2015* nor the *Short Guide to the Tax Administration Act, 2011 (Act 28 of 2011)* (2018) provide insights as to its aim(s).

In the author's view, section 179(5) serves two purposes – namely, to inform and to demand. In relation to the first purpose, it first informs the taxpayer of the collection powers SARS has at its disposal, which include the third-party appointment. Secondly, the taxpayer is informed of the debt relief mechanisms available to the taxpayer, which include, among others, an instalment payment arrangement (s 167 of the TAA) and a compromise (s 200 of the TAA). In addition, section 179(5) provides that a taxpayer may, within five business days after receiving the section 179(5) notice, request a reduction of the amount that has to be paid to SARS in terms of a third-party notice. When considering the possibility of a reduction, SARS may consider the basic living expenses of the taxpayer and any dependants in instances where the taxpayer is a natural person, or the serious financial hardship the taxpayer will suffer in instances where the taxpayer is a person other than a natural person (s 179(5)(*a*) and (*b*) of the TAA).

This additional debt relief mechanism afforded to the taxpayer, acknowledges the financial impact tax collection has on taxpayers. A failure to inform a taxpayer of this additional opportunity, or a failure to ensure that the notice was indeed delivered to the taxpayer, deprives the taxpayer of this option. Moreover, the impact of appointing a third party and of the taxpayer's money being paid over to SARS, where the taxpayer was unaware of the possibility of requesting a reduction, stretches further than possibly affecting the taxpayer and any dependants. As highlighted in *Nondabula*, the ripple-effect must be considered. In *Nondabula***,** the court took cognisance of the fact that the taxpayer was a businessman who employed a substantial number of people in a country where the unemployment rate is extremely

high (*Nondabula supra* par 25). Currently, the unemployment rate is at 29,1 per cent (Stats SA "Work & Labour Force: Key Statistics" http://www.statssa.gov.za/?page_id=737&id=1 (accessed 2020-05-26). From this discussion, it is clear that the purpose to "inform" is an important one. However, this is only one of the two purposes of section 179(5) of the TAA.

When considering the "demand" purpose, it is acknowledged that generally a letter of demand is used to place a debtor in *mora* where no specific date for performance is stipulated (Nagel (eds) *Business Law* 6ed (2019) 63). Only once a debtor is in *mora* can one proceed with legal action. In the same way, if the purpose of a section 179(5) notice was only to demand payment, this notice should have placed the taxpayer in *mora.* However, this would be unnecessary because the assessment already stipulates a date by which payment should be made, meaning that the taxpayer would naturally be in *mora ex re* if the taxpayer did not pay by the date stipulated in the assessment.

As such, it is envisioned that the "demand" purpose of section 179(5) of the TAA is not aimed at establishing *mora*, but rather at demanding payment one last time. This is evident from the wording of section 179(5) of the TAA, which refers to "final demand of payment". Again, this requirement recognises the impact a third-party appointment could have on a taxpayer, hence the requirement of an additional demand.

Allowing the "demand" to be made in relation to a tax debt, which is not yet due and payable, would be nonsensical. If the intent was that the notice should serve as a reminder, which SARS can furnish in anticipation of the possibility that a taxpayer would not pay its tax debt by the date of payment as indicated in the assessment, the section would not refer to "final" and "demand". Therefore, I opine that the words "final" and "demand" point, however indirectly, towards the time at which this notice should be delivered, in other words, to when the debt is due and payable.

Besides, as stated by the court (*SIP Project Managers supra* par 21), but in relation to the wrong subsection, the *contra fiscus* rule dictates that the court must follow the interpretation that is in the taxpayer's favour in instances where the relevant provision is ambiguous (*Glen Anil Development Corporation Limited v CIR* 1975 (4) SA 715 (A) 726–728). This would mean that the provision should be interpreted so that the notice can only be given when the tax is due and payable. Nonetheless, I suggest that the wording of section 179(5) be amended to create certainty. This can be done by explicitly indicating that the tax debt must be due and payable when the section 179(5) notice is delivered, similar to the wording used in section 179(1) of the TAA, or by stating that the taxpayer must be in default. The latter option would be similar to the wording used in section 129(1) of the National Credit Act 34 of 2005, which requires a specific notice informing a debtor of available options, before the creditor can proceed to issue a summons.

4 Conclusion

Section 179(5) of the TAA recognises the impact tax recovery can have on a taxpayer and dependants by requiring a final demand of payment and by providing an opportunity for the taxpayer to request a reduction based on the taxpayer's financial circumstances. In light of *Nondabula*, where the ripple-effect of tax collection was pointed out, section 179(5) serves an extremely important purpose – a purpose so important that SARS cannot simply brush over it. Meticulous compliance is essential.

Nonetheless, it is disappointing that the court in *SIP Project Managers* did not go as far as the court did in *Nondabula*, namely to declare SARS's conduct to be unconstitutional. Although the court declared the third-party appointment to be invalid and unlawful and ordered repayment, which orders achieved the result the taxpayer sought, it is imperative that SARS's conduct be framed in the correct context. Its conduct does not constitute a mere failure to comply with peremptory wording; it constitutes unconstitutional conduct. Perhaps, if SARS was an ordinary creditor, it would have been sufficient to pronounce its conduct as unlawful and invalid. However, SARS is not an ordinary creditor and must be held to the standard required from SARS in terms of the Constitution. A specific declaration of unconstitutional conduct would have shown that SARS's failure to comply with legislation will not be tolerated. Moreover, such a declaration would have sent a warning to SARS to engage with taxpayers. If a taxpayer avers that the section 179(5) notice was not delivered, SARS must investigate and, if it finds that the required procedure was not followed, withdraw any steps it took and repay money it received.

In the matter of *SIP Project Managers*, SARS blatantly neglected its constitutional duty and failed to take the appropriate steps to rectify the situation of its own accord. This matter should never have proceeded to court. If it were not for a taxpayer with sufficient funds to litigate, this injustice would never have been brought to the fore. A harsher judgment, condemning SARS's behaviour, could have seen the death of this old, bad habit of SARS, flaunting the provisions of its own legislation.

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