IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG, PRETORIA

CASE NUMBER: 33400/2019

Reportable

Of Interest to Other Judges

In the matter between:

MEDTRONIC INTERNATIONAL TRADING S.A.R. L	Applicant
And	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Respondent

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JUDGMENT

HUGHES J

Introduction

[1] Medtronic International Trading S.A.R.L, the applicant, seeks to review two decisions taken by the respondent, the Commissioner for the South African Revenue Services (SARS). This judicial review against the decisions of SARS is sought in terms of the Promotion of Administration of Justice Act 3 of 2000 (PAJA), alternatively on the principle of legality, the common law and section 33 of the Constitution of the Republic of South Africa. Significantly, aside from the review per se, the applicant seeks declaratory relief on a question of law.

[2] The applicant seeks the following relief:

'1. That it be declared that:

1.1. the provisions of Chapter 16, Part B, sections 225 to 233 of the Tax Administration Act, Act 28 of 2011 (" the TAA") relating to voluntary disclosure programmes ("VDFF') do not prohibit a request for remission of interest in terms of section 39(7) of the Value-Added Tax Act, Act 89 of 1991 (PVAT Act") notwithstanding a VDP agreement having been entered into;

1.2 notwithstanding a prior VDP agreement having been entered into, the respondent has a statutory duty to consider, adjudicate and decide on a request for the remission of interest in terms of section 39(7)(a) of the VAT Act.

2. That the following decisions of the respondent be reviewed and set aside in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA"), alternatively the principle of legality, and remitted back to SARS for reconsideration, namely:

2.1. The decision set out in the respondent's letter dated 1 November 2018, of which the applicant was informed per e-mail on 20 November 2018, to refuse to consider the applicant's request for remission of interest in terms of section 39(7)(a) of the VAT Act;

2.2. Alternatively, the respondent's decision set out in its letter of 13 March 2019, of which the applicant was informed per e-mail on 28 March 2019, to refuse to withdraw its decision referred to in paragraph 2.1 above and to decide that it cannot consider the request for the remission of the interest levied.

3. That the respondent be ordered to consider, adjudicate and decide on the applicant's request for remission of interest in terms of section 39(7)(a) of the VAT Act, dated 12 October 2018, and inform the applicant of its decision within 15 days of the order being granted. SARS' decision may not be contrary to the declaratory relief as set out above;

4. That in the event of the respondent deciding not to remit the interest, that it provide detailed written reasons as envisaged in the VAT Act, read with the TAA and PAJA within the same 15 days of the order being granted;

5. That in the event of the respondent failing to comply with paragraphs 3 and 4 above, that the applicant be granted leave to approach this Court on the same papers, supplemented if necessary, for further appropriate relief;
6. That the respondent be ordered to pay for the costs of this application, including the costs occasioned upon the employment of two counsel.'

[3] According to the parties this review essentially involves two interrelated decisions. The first being, the review of the decision taken by the respondent refusing to consider the applicant's request for remission in terms of section 39(7)(a) of the Value- Added Tax Act (VAT Act). Additionally, the decision not to withdraw such aforesaid decision in terms of section 9 of the Tax Administration Act 28 of 2011(Tax Act).

Brief Background

[4] During the course of June 2004 and May 2017, Ms Hildegard Steenkemp, who was employed by the applicant in the Africa group, as an accountant, embezzled an amount of R537,236,176.00 from the applicant. Ms Steenkemp achieved this by submitting false VAT 201 returns to the respondent and she sought reimbursements from the respondent in order to conceal her embezzlement. Eventually, Ms Steenkemp was arrested following investigations and forensic audits having been conducted.

[5] The applicant contends that it is a victim as a result of the conduct of Ms Steenkemp and has suffered a substantial loss. Hence, on 13 December 2013, the applicant applied to the respondent for Voluntary Disclosure Programme (VDP) relief in terms of section 225 and 233 of the Tax Act. Around 29 March 2018, during the VDP discussions with the respondent, the applicant sought that the respondent waives the interest. According to the applicant, about 10 April 2018, the VDP unit responded by stating that SARS was prepared to waive all understatement and late payment penalties, as it did not have the authority to waive the interest arising from the underpayment of the VAT.

[6] On 14 and 18 June 2018 the two VDP agreements were concluded between SARS and the applicant. According to these VDP agreements the applicant was liable

for the payment of the capital VAT amount of R286, 464, 756.62 and interest of R171,205,356.12, which the applicant submits it paid. Having undertaken to pay the capital and interest amounts, SARS contends that it agreed with the applicant that it would grant the applicant relief in respect of the understatement and administrative non-compliance penalties in the amount of R172million. In addition, SARS would not pursue any criminal action for any of the offences in respect of the default.

[7] The applicant contends that in terms of section 39(7)(a) of the VAT Act read with interpretation note 61 (*IN61*) it is entitled to a 'waive' of interest for the period. To this request the respondent's view is that the applicant is attempting to renegade on the VDP agreements reached in the face of having been granted a reprieve of the R172million in penalties. Hence, SARS concluded that the request made by the applicant was not valid. In fact, SARS states that the applicant ought to have submitted a notice of objection for the remittance of the interest. The respondent went so far as to state that section 39(7)(a) of the VAT Act and to the extent of section 187(6) of the Tax Act applying, do not apply to VDP agreements.

[8] Lastly, to further qualify the above the respondent advised the applicant that section 232 of the Tax Act specifically excluded assessments pursuant to a VDP agreement from being subject to an objection and appeal. Hence, in the instance of an assessment pursuant to a VDP sections 39(7)(a) of the VAT Act and 187(6) of the Tax Act likewise do not apply. The applicant was told to proceed by way of an objection to the decision taken by SARS not to accede to the request for the remission, by completing the prescribed Notice of Objection form.

[9] The applicant having received SARS decision requested that they withdraw same in terms of section 9(1) of the Tax Act, as the existence of the VDP agreements does not preclude them seeking remission. The applicant further contends that the decision not to remit the interest is not subject to an objection in terms of section 104(2) of the Tax Act, section 32 of the VAT Act and section 271 of the Tax Act, as alluded to by SARS.

The Law

[10] It is not in dispute that the parties concluded two VDP agreements which complied with section 230 of the Tax Act. Section 230 reads as follow:

'The approval by a senior SARS official of a voluntary disclosure application and relief granted under section 229, must be evidenced by a written agreement between SARS and the qualifying person who is liable for the outstanding tax debt in the prescribed format and must include details on-

(a) the material facts of the 'default' on which the voluntary disclosure relief is based;

(b) the amount payable by the person, which amount must separately reflect the understatement penalty payable;

(c) the arrangements and dates for payment; and

(d) relevant undertakings by the parties.'

[11] The request by the applicant is in terms of section 39(7)(a) of the VAT Act which states:

'Where the Commissioner is satisfied that the failure on the part of the person concerned or any other person under the control or acting on behalf of that person to make payment of the tax within the period for payment contemplated in subsection (1)(a), (2), (3), (4), (6), (6A) or (8) or on the date referred to in subsection (5), as the case may be-

(a) was due to circumstances beyond the control of the said person, he or she may remit, in whole or in part, the interest payable in terms of section ....'

[12] The explanatory as regards what constitutes 'circumstances beyond a person's control' is to be found in explanatory note 61. The interpretation note, *IN61,* states that: 'circumstances beyond a person' control are generally those that are external, unforeseeable, unavoidable or in the nature of an emergency, such as an accident, disaster or illness which resulted in the person being unable to make payment of VAT due.'

[13] The last relevant section is that of section 187 of the Tax Act as is set out hereafter:

'(1) If a tax debt or refund payable by SARS is not paid in full by the effective date, interest accrues, and is payable, on the amount of the outstanding balance of the tax debt or refund

....

(6) If a senior SARS official is satisfied that interest payable by a taxpayer under subsection (1) is payable as a result of circumstances beyond the taxpayer's control, the official may, unless prohibited by a tax Act, direct that so much of the interest as is attributable to the circumstances is not payable by the taxpayer.

(7) The circumstances referred to in subsection (6) are limited to—

(a) a natural or human-made disaster;

(b) a civil disturbance or disruption in services; or

(c) a serious illness or accident.

(8) SARS may not make a direction that interest is not payable under subsection (6) after the expiry of three years, in the case of an assessment by SARS, or five years, in the case of self-assessment, from the date of assessment of the tax in respect of which the interest accrued.'

The case at hand

[14] The applicant contends that it was entitled to seek a request in terms of a remittance for the interest imposed as a result of the default occasioned by Ms Steenkemp. The applicant contends, they qualify for the remittance of the interest, as the requirements set out in section 39(7)(a) have been met. However, the respondent refused to consider the applicant's request and it is that decision which is the subject of this review application.

[15] According to the applicant, the respondent's defence in this application places reliance on a legal question, which is evident from a concession made during interlocutory proceedings and is evident in its answering affidavit. This being *'whether SARS may consider a request for the remission of interest in terms of section 39(7)(a) of the VAT Act once a taxpayer has agreed to pay such interest in terms of a voluntary disclosure agreement contemplated by section 230 of the TAA'*.

[16] In essence, this comes down to the respondent or the applicant's interpretation of section 39(7)(a) of the VAT Act and to an extent section 187(6) of the Tax Act. These are the same sections which the respondent contends that they purport to deal with 'remission of interest following a taxpayer's failure to make timeous payment of a tax debt.' In the same breath the respondent states that the provisions of section 39

of the VAT Act were to be deleted by section 271 of the Tax Act, however, somehow section 39 is still in force as the evolution of Chapter 12 of the Tax Act is still underway.

The VDP agreement

[17] It is common cause that the VDP agreements are regulated by sections 225 to 233 of the Tax Act. In this case section 230 being applicable. Thus, disclosure was made by the applicant, a prescribed agreement was concluded, which led to relief being granted by the Commissioner in terms of section 229. This all took place prior to the applicant seeking the remission.

[18] The VDP agreements were introduced by the enactment of the Voluntary Disclosure Programme and Taxation Laws Second Amendment Act 8 of 2010 (Act 8 of 2010). As regards the relevant relief which would follow having made a voluntary disclosure, section 6 of Act 8 of 2010 had applied. This section reads as follows:

'Voluntary disclosure relief

6. Despite the provisions of any tax Act, the Commissioner must, pursuant to the making of a valid voluntary disclosure by the applicant and the conclusion of the voluntary disclosure agreement under section 7—

(a) not pursue criminal prosecution for any statutory offence under a tax Act or a related common law offence;

(b) grant 100 per cent relief in respect of any penalty and additional tax (excluding a penalty imposed in terms of regulation 5 of the regulations issued under section 75B of the Income Tax Act or in terms of a tax Act for the late submission of a return or for the late payment of tax); and

(c) grant, in respect of a person described in—

(i) section 3(1), 100 per cent; or

(ii) section 3(2), 50 per cent,

relief in respect of interest otherwise payable, up to the date of assessment described in section 9'

[19] However, with the enactment of the Tax Act in 2011 the applicable provision is section 229. The relief that follows after making a voluntary disclosure is:

'- immunity from prosecution in respect of any tax offence arising from the "default" in respect of which the VDP application was made;
- a reduction or waiving of the understatement penalty that would ordinarily have been payable; and
- the waiving of certain other penalties.'

[20] In terms of section 232 of the Tax Act the respondent may issue an assessment or make a determination to give effect to the VDP agreement. Once the aforesaid has been issued it is not subject to an appeal or objection.[1]

[21] Notably, in giving an effect to the VDP an assessment or determination may be made. If, the respondent seeks to issue an assessment or determination, any one of these is not subject to an objection or appeal in terms of section 232(2) of the Tax Act. Thus, in my view the respondent uses its discretion in both instances. In terms of section 229, it further uses its discretion when entering the VDP agreement, with regards to what penalties to waive or reduce.

[22] Hence, the VDP agreement is binding between the parties entering into same and final as regards the understatement of the relevant party. Pertinently, under the header 'Whole Agreement' at clause 11.1:

'The parties agree that -

11.1.1 A variation to any part of this Agreement has no effect until the variation is agreed to by the Parties, reduced in writing and signed by both Parties.'

[23] The VDP agreement is governed by Part B of Chapter 16 of the Tax Act. Critical is the fact that the agreement makes provision that the Tax Act will prevail if conflict arises between the terms of the agreement and the Tax Act:

'Where any term, obligation or benefit under this Agreement conflicts with any provision of Part B of Chapter 16 of the TA Act, the provisions of the TA Act shell prevail.'

[24] Even so the statute cannot be ignored for the benefit of the terms of the VDP agreement, as was stated by Wallis JA in *President of the Republic of South Africa v Reinecke*:

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[1] Section 232 reads:
"(1) If a voluntary disclosure agreement has been concluded under section 230, SARS may, despite anything to the contrary contained in a tax Act, issue an assessment or make a determination for purposes of giving effect to the agreement.
(2) An assessment issued or determination made to give effect to an agreement under section 230 is not subject to objection and appeal."

'The correct view is that one cannot divorce a contract arising from the performance of statutory functions and the exercise of statutory powers from its statutory background. Sometimes the contractual aspects will be crucial and sometimes the statutory. Which are the more important will depend upon the facts giving rise to the dispute.'[2] (Footnotes omitted)

[25] Of relevance in my view is clause 4 of the VDP agreement. The facts permitting the conclusion of a VDP agreement are not verified, however, there is a calculation and evaluation process conducted by the respondent on those facts, advanced by the applicant in good faith, in respect of the tax, interest and penalties. Clause 4 relatedly reads:

'4 TAX, INTEREST AND PENALTIES ARISING FROM THE DEFAULT

4.1 Save for verifying the eligibility requirements pertaining to and the validly of the VDP application, the facts in relation to the default have not been verified by SARS during the VDP evaluation process in preparation for this Agreement.

4.2 The amounts of tax, interest and penalties arising from the default have been calculated with reference to the facts disclosed in the VDP application.' [My emphasis]

[26] In the circumstances, the respondent exercised its discretion, guided by the advances made by the applicant in good faith to grant a waiver of the penalties or interest during its evaluation process.

Section 39(7)(a) remission request

[27] Fundamental to this review application is the legal inquiry whether a request in terms of section 39(7) of the VAT Act is competent after a VDP agreement has been concluded. The respondent argues that the application of section 187(6) of the Tax Act and likewise section 39(7)(a) of the VAT Act are not applicable to a situation where the VDP agreement is in play. Whist the applicant argues otherwise, that it is entitled to request a remission in terms of section 39(7)(a).

[28] The applicant contends that the manner in which its remission in terms of section 39(7)(a) is sought ought to be dealt with in terms of *IN61*. The applicant argues

[2] *President of the Republic of South Africa and Others v Reinecke* 2014 (3) SA 205 (SCA) at para [16].

that as such it is not prohibited from seeking a remission. It further argues that nowhere in the sections relating to the VDP agreement in the Tax Act does it prohibit a request in terms of section 39(7)(a). It matters not whether the request is subsequent to the conclusion of the VDP agreement. Ultimately, they argue that the respondent has a statutory duty to consider, adjudicate and make a decision as regards their request for remission.

[29] The applicant persist that they do not seek to amend the VDP agreement. In fact, they state that it is common cause that they have complied with same and the full amounts have been paid over to the respondent, neither do they seek to renege on their responsibilities, having already fore filled same.

[30] According to the applicant the explanatory note *IN61* states that it will not consider remission of interest which was paid five years ago, hence, the applicant contends that it is implicit that remission of interest may be considered after interest has been paid. That being said the applicant request of the respondent to act in terms of their remedial legislative provisions in terms of the VAT Act.

[31] The respondent argues that the interest which was due and payable was in terms of the VDP agreement and not the VAT Act and that the VDP agreement cannot be varied by waiving the interest, as only in terms of section 231(1) can it be amended, equally the VDP agreement is not subject to an objection nor an appeal.

[32] It is pointed out by the applicant that the aforesaid argument differed to the written response of 1 November 2018 initially received from the respondent. Here the respondent stated that the provisions of section 39(7) do not pertain to VDP agreements, as objection and appeal procedures are not permitted in respect of a VDP agreement. Similarly, remission of interest does not apply. The sole purpose of the remission sought by the applicant is to seek an amendment of the VDP agreement using section 39(7) as the instrument therefore, so the argument goes.

Analysis

[33] An ideal starting point is to appreciate the complex and sophisticated tax system in South Africa, when addressing the legal determination sought in this matter. As is evident from the facts and submissions above various concept of our tax system are at play: the Tax and VAT Acts, VDP agreements and remission of interest.

[34] The remission of interest sought is in relation to the VAT Act. Thus, I find it apt to point out the legislative purpose of section 39(7). Firstly, interest is raised on late VAT payments in terms of section 39(1) of the VAT Act. A taxpayer is obliged to submit his/her/their returns timeously. There can be no doubt that the levy of interest in respect of VAT is in terms of the VAT Act.

[35] Failure to do so empowers the respondent to levy interest in order to compensate those who would have lost opportunity with productivity, due to late or non-payment.[3] Hence, the levy of interest in terms of section 39(1) of the VAT Act.

[36] In section 39(7) lies the reprieve a taxpayer attains in respect of interest. This is only so if the delay in making the payments timeously were due to circumstances beyond the taxpayers control.[4]

[37] Notably, the explanatory note *IV61* as set out above is descriptive of what constitutes circumstances beyond one's control. In the same explanatory note clause 4.2 sets forth a cut off period which makes provision for a taxpayer to receive this remission. The taxpayer has five years from the date of payment of the interest to claim the remission reprieve. Which is not more than five years after the interest has been paid. I must point out that in terms of *IV61* the remission process is subject to an appeal and an objection, in terms of clause 8 and 9 of the explanatory note.

[3] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1145D-G.
[4] Section 39(7)(a) of VAT Act.

[38] Now turning to the VDP agreement this process is not subject to an appeal nor an objection. Factually, this is an agreement between parties governed by the prescripts of the Tax Act 225 to 233. Conspicuously, these sections make provision and spell out that no objection nor appeal is permitted, however, it is silent on whether remission is permitted, so the applicant advanced. Further, if it is not legislated and cannot be interpreted therefrom, then that could have never been the intention of the legislature. [5] I am in agreement with these submissions and this is fortified by the recent judgment of the Supreme Court of Appeal in *Commissioner, South Africa Revenue Service v United Manganese of Kalahari (Pty) Ltd*.[6]

[39] In my mind it is evident that the interest and penalties were added to the eventual amount attained in the VDP agreement by virtue of the application of section 39 (1) of the VAT Act. That being the application, how then does one divorce this Act from the VDP agreement? The penalties and taxes employed could only have been done so by virtue of the VAT Act. That being the case, it cannot then exclude the application of the said Act when a remission or reprieve is sought in terms of the very same Act.

[40] Turning to the VDP agreements. These agreements are a by-product of the VDP program which is regulated by Chapter 16, Part B, sections 225-233 of the Tax Act. Critically, this voluntary disclosure programme, in my view, is succinctly set out in the aforesaid provision. These provisions cover who may qualify, what is valid disclosure and what is not, the relief attainable, the VDP agreement, the withdrawal of the relief, the assessment and determination to give effect to the agreement and lastly the reporting of VDP agreements. Notably, the legislature sets out step by step what the voluntary disclosure programme entails and its consequences. Likewise, the necessary criteria of the VDP agreements and giving effect thereto, with the relief one would attain.

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[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at para [26].
[6] *Commissioner, South Africa Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) 433 at para [8].

[41] In the VDP agreement it commences to place emphasis on the purpose and the intention of these agreements. The purpose of the VDP agreement, in my view, is set out in the preamble of the VDP agreement:

'1 PREAMBLE

1.1 The Applicant applied for relief afforded by the Voluntary Disclosure Relief programme (the VDP) that is administered by the South African Revenue Service (SARS) in terms of the Tax Administration Act (no 28 of 2011).

1.2 The Applicant confirms that the default in respect of which relief is granted—

1.2.1 was disclosed to SARS on a voluntary basis;

1.2.2 has not occurred within five years of the disclosure of a similar default;

1.2.3 involves a behaviour referred to in column 2 of the understatement penalty percentage table in section 223 of the TA Act;

1.2.4 is a disclosure that is full and complete in all material respects;

1.2.5 will not result in a refund by SARS; and

1.2.6 was applied for in the prescribed form and manner.' [My underlining]

[42] Evidently from the above and as stated by Fabricius J in *Purveyors South Africa Mine Services* 'the purpose of the VDP provisions is to incentivize errant taxpayers to come clean.'[7] The VDP agreements entered into with the respondent are to cover all taxes administered by the respondent, but for customs and exercise. As stated above the VDP agreement constitutes the entire agreement and once a determination or assessment is made, it is not subject to an objection or appeal. Explicit from the terms set out in section 229, the respondent may determine which penalties to reduce or waive.

[43] The respondent's interpretation, into the provisions dealing with VDP program and agreements, is that any remission of interest sought whether in terms of section 39(7) of the VAT Act or section 187 of the Tax Act is not permissible once a taxpayer has paid such interest in terms of a VDP agreement.

[44] Hence, it is my view, if remission requests of interest were not intended to be sought in situations where there was a VDP agreement, either by way of section 187

[7] *Purveyors South Africa Mine Services (Pty) Ltd v The Commissioner for the South African Revenue Service* 2020 JDR 1830 (GP) at para [11.7].

of the Tax Act or section 39(7) of the VAT Act, the legislature would have set this out succinctly in the provisions regulating the VDP agreement and procedure. In this matter it cannot be discerned from the provisions of the relevant section and the explanatory note where the respondent gleans its interpretation that yields the result sought.

[45] The notion adopted by the respondent that the applicant seeks to vary the VDP agreement through the back door by seeking the remission cannot stand muster. This is so because it is common cause that the applicant has already complied with the VDP agreement as it has paid the interest sought. Thus, the parties have both complied with the whole of the agreement already and in any event any variation must be agreed by the parties, reduced to writing and signed by the parties.

[46] The entire purpose of the VDP process pertains to taxes and is regulated by Acts which are tax related with the Tax Act being the default position if there is conflict or confusion. How then does one exclude that which is a self-prevailing Act when dealing with a process borne out in that same Act. Hence, the analogy being that if section 187(6) can be applied then the equivalent that being section 39(7) of the VAT Act, most certainly is applicable.

[47] Following the above conclusion, it must be pointed out that on the respondent's own admission they did not consider the request for remission of the applicant. As their understanding of the legal position 'that the provisions of the relevant sections do not apply to interest that is due (or has been paid) in terms of a VDP agreement.' Conspicuously, no decision was taken by the respondent to be reviewed. Together with the conclusion, in the application to compel presided over by Thompson AJ, where he asserts that the respondent advanced a concession, as set out in the judgment:

'for all intents and purposes conceded that if the decisions taken are wrong, such decisions constitutes material errors of law and, on its own, justify a review and setting aside of the impugned decisions on the facts as established by this case…The decision sought to be reviewed is the interpretation accorded… on an issue of law.'

[48] To bolster the aforesaid conclusion reached by Thompson AJ I deem it necessary to also state what the respondent advanced in its heads of argument with regards to the aforesaid:

'80 If SARS's interpretation of the law is correct, the main application must be dismissed. But if SARS has erred in this regard, then the impugned decision ought to be reviewed and set aside, with the matter being remitted to enable the Commissioner to consider the request for the remission of interest. In such circumstances, the basis upon and /or the manner in which the impugned decisions were taken would not matter.'

[49] Bearing in mind that the grounds of review revolve around whether a request to remit interest in terms of section 39(7)(a) of the VAT Act is legally competent subsequent to entering into a VDP agreement. The applicant has shown that the impugned decisions taken by the respondent were pertinently swayed by errors in law, they were not authorised by any empowering provision and lastly important considerations as set out above were not considered whilst irrelevant considerations were. In the result, the applicant has succeeded in demonstrating the following ground allowing the review and setting aside of the decisions made by the respondent. These being section 6(2)(d), 6(2)(e)(i) and 6(2)(e)(iii) of the PAJA.

[50] In the premise, having come to the aforesaid conclusion for the reasons set out above I do not deem it necessary to consider the other grounds raised by the applicant.

Relief

[51] It is apparent from the papers of the applicant that it seeks declaratory relief in terms of section 8(1)(d), 8(1)(c)(i) seeking review and setting aside for onward reconsideration and mandatory relief in terms of section 8(1)(a)(ii) and 8(1)(b) of PAJA for consideration, adjudication and advancement of a decision. The respondent acknowledges that the impugned decisions having been reviewed and set aside the matter ought to be remitted to the Commissioner to consider the request.

[52] The respondent takes issue with prayer 4 sought by the applicant in its notice of motion. The crux of its argument is that the applicant pre-empts the decision of the Commissioner not to remit the interest and as such that order would be 'intrusive'. This

is so, because after the Commissioner takes a decision, in terms of prayer 4, he is now ordered ‘to do something in the future contingent upon the outcome of a decision …yet to be taken.’

[53] The respondent contends that the applicant has not made out a case for the relief it seeks in terms of prayer 4. In fact, there is no decision made as yet not to remit the interest thus this relief cannot come into operation at this stage, so the argument goes. In addition, if the Commissioner does not give reasons then the applicant has alternative relief in section 5 of PAJA.

[54] On the other hand, the applicant submits that it is entitled to the relief sought in prayer 4. I am in agreement with the respondent that the applicant has not laid out a basis for the granting of prayer 4 at all, save to argue that a court may grant that it sees as just and equitable or ‘appropriate relief, coupled with the court discretion to grant relief it deems apposite. If the remission of interest is not granted, the applicant has an alternative in the provisions of section 5 of PAJA to attain the reasons if same are required.

[55] In terms of explanatory note *IV61* to section 39, in the instance of remission of interest, the Commissioner is obliged to issue a written notice with reasons for the decision not to remit. Further, the applicant may raise an objection in 30 days of the date of the decision and if the objection is disallowed, written notice with reasons ought to follow. As regards the final decision of the Commissioner in respect of the aforesaid objection a taxpayer may appeal. Thus, the order sought in prayer 4 does not marry with that provided for in section 39 read together with its explanatory note *IV61*, and will not be competent.

[56] In the circumstances I make the order as is set out below.

Order

1. The provisions of Chapter 16, Part B, sections 225 to 233 of the Tax Administration Act, Act 28 of 2011 (" the TAA") relating to voluntary disclosure programmes ("VDFF')

do not prohibit a request for remission of interest in terms of section 39(7) of the Value-Added Tax Act, Act 89 of 1991 (PVAT Act") notwithstanding a VDP agreement having been entered into;

(a) notwithstanding a prior VDP agreement having been entered into, the respondent has a statutory duty to consider, adjudicate and decide on a request for the remission of interest in terms of section 39(7)(a) of the VAT Act.

2. That the following decisions of the respondent be reviewed and set aside in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA"), alternatively the principle of legality, and remitted back to SARS for reconsideration, namely:

(a) The decision set out in the respondent's letter dated 1 November 2018, of which the applicant was informed per e-mail on 20 November 2018, to refuse to consider the applicant's request for remission of interest in terms of section 39(7)(a) of the VAT Act;

(b) Alternatively, the respondent's decision set out in its letter of 13 March 2019, of which the applicant was informed per e-mail on 28 March 2019, to refuse to withdraw its decision referred to in paragraph 2.1 above and to decide that it cannot consider the request for the remission of the interest levied.

3. That the respondent be ordered to consider, adjudicate and decide on the applicant's request for remission of interest in terms of section 39(7)(a) of the VAT Act, dated 12 October 2018, and inform the applicant of its decision within 15 days of the order being granted. SARS' decision may not be contrary to the declaratory relief as set out above;

4. That in the event of the respondent failing to comply with paragraphs 3 above, that the applicant be granted leave to approach this Court on the same papers, supplemented if necessary, for further appropriate relief;

5. That the respondent be ordered to pay for the costs of this application, including the costs occasioned upon the employment of two counsel.

W Hughes
Judge of the Gauteng High Court, Pretoria

Virtually Heard: 15 October 2020
Electronically Delivered: 15 February 2021

Appearances:
For the Applicant: Adv. Snyman SC
Adv. Craucamp
Adv. Nee Van Niekerk
Instructed by: Webber Wentzel

For the Respondent: Adv Berger
Adv. Jongani
Instructed by: Salijee Govender Van der Merwe Inc