IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE:	YES/NO
(2)	OF INTEREST TO OTHER JUDGES:	YES/NO
(3)	REVISED	
	DATE: 29 April 2016	
	SIGNATURE:	

29/4/2016.

CASE NO. 76306/2015

In the matter between:

JULIUS SELLO MALEMA Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

JANSEN J

[1] In this application the applicant seeks a declaratory order to the effect that SARS is bound to a compromise agreement entered into by the applicant with SARS on 26 May 2014 in terms of the Tax Administration Act 28 of 2014 (the "**TAA**").

[2] The crisp issue to be decided is whether SARS, as a result of alleged non-disclosures and misstatements made by the applicant, who expressly warranted the truth of the facts furnished by him, is no longer bound by the compromise agreement in terms of section 205(a) to (c) of the **TAA**.

[3] It is common cause that the applicant had been assessed to pay income tax, with interest, on the amount of R 18 192 295.36 by May 2014. This amount was payable in respect of the 2005 to 2011 tax years.

[4] The applicant objected to the assessment on the basis that the amounts to which SARS assessed him were donations or dividends in respect of which the applicant declared he could not be assessed to tax.

[5] The applicant addressed four requests for a compromise to SARS. The first request for a compromise was made on 31 October 2012 and a Mr Ravele, on behalf of SARS, was handed the request by the applicant for pre-vetting purposes. Mr Ravele returned an edited version to the applicant, which created the impression on the part of the applicant, on his version, that the request as amended had been approved.

[6] It is important to mention that once the applicant entered into a compromise agreement with SARS, he could no longer dispute his tax debt, in terms of section 194 of the TAA. The applicant was thus in the unenviable position of electing to deny his tax debt and appeal the dispute the assessed taxes or to attempt to enter into a compromise. By choosing the latter route the applicant forfeited the right to appeal against the dismissal of his objection to his tax debt.[1]

[7] As a result, the applicant made a second request (incorporating Mr Ravele's amendments) dated 1 November 2012, which was rejected by SARS during January 2012. It was rejected because the applicant had allegedly failed to make full and frank disclosure of his tax affairs. SARS failed to give instances of such alleged failures to make disclosure and the court has thus not been informed of what had allegedly not been disclosed. Apparently SARS was aware of further facts obtained from sources other than the applicant. This fact becomes important when assessing the alleged non-disclosure by the applicant of dealings pertaining to Erf 662, Bendor Township, Limpopo, to which I refer below ("**the Bendor Property**").

[8] On 29 January 2013, almost immediately after rejecting the second settlement agreement, SARS issued sequestration proceedings against the applicant and he was provisionally sequestrated on 11 February 2014. SARS also took judgment against the applicant for the disputed tax on 11 September 2012 by filing a statement as provided for by section 172 of the TAA.

[1] It is pointed out by SARS that the applicant only requested a compromise on 31 October 2012 and he had only until 26 October 2012 to submit an appeal which he failed to do. It is unclear why he failed to submit an appeal.

[9] On 14 May 2014, the applicant made a third request for a compromise, which request was similarly rejected by SARS. It was of great importance for him not to be sequestrated as he had taken up a seat in Parliament.

[10] During this period SARS launched various investigations and enquiries into the applicant's tax affairs as well as into the affairs of persons as entities linked to him. An interrogation of the applicant was also conducted in terms of section 163 of the **TAA**. It is the applicant's version that at this juncture SARS knew more about the affairs of his estate than he did. It was submitted on behalf of the applicant that, on the facts available to him, he made full disclosure of his assets and liabilities. Mr Murray, his *curator bonis*, also investigated his affairs.[2]

[11] The main reason for the rejection of the third request was because it was contingent upon a R4 million donation to be made to the applicant in order to enable him to finance a part of the compromise amount. The applicant failed to identify the donor and failed to address the payment of donation tax. As a result, the applicant supplemented his request and submitted a fourth request to SARS. In this request the applicant identified the donor who would pay the donation tax, failing which the applicant would be jointly liable for the payment thereof.

[12] The fourth request, dated 21 May 2014, was successful and resulted in the compromise agreement being entered into. The compromise agreement included an undertaking by the applicant to make full and frank disclosure

[2] I revert to the appointment of Mr Murray as *curator bonis* below.

of all material facts and to keep his tax affairs current and included an express guarantee that the facts advanced were true.

[13] It bears mention that the applicant was provisionally sequestrated on 10 February 2014. The return day of the sequestration order was initially set for 26 May 2014. It was, from time to time, extended.

[14] The third request for a compromise dated 14 May 2014, was submitted when the applicant was under provisional sequestration.

[15] R4 million was allegedly partially funded by a Mr Martin, another part with funds held by the applicant's *curator bonis,* and the balance with six instalments of R30 000.00 paid from his salary as a member of parliament.

[16] SARS commenced making enquiries about the agreement during October and November 2014 and SARS' officials and Mr Malema's attorneys exchanged correspondence during these months. The final date for compliance with the compromise agreement was 30 November 2014.

[17] By 1 December 2014, the applicant had paid the amount of R7 259 953.79 to SARS (in tranches), as stipulated in the compromise agreement. The applicant thus complied fully with all his payment obligations in terms of the compromise agreement.

[18] On 13 March 2015, SARS contended that it was no longer bound by the compromise agreement as set out in an affidavit of Mr Engelbrecht, a senior SARS official (as contemplated in section 6(3) of the TAA).

[19] At the stage when the compromise agreement was entered into, the applicant also stated that should the "*anticipated assessments be levied as anticipated*" in respect of the 2011 and 2012 tax years, he would pay them as well utilising payments of R30 000.00 from his salary. The 2011 assessment was anticipated to be R1 493 117.05 at that stage and the 2012 assessment R10 567 110.00. These amounts were assessed, respectively, as R1 569 492.35 on 26 July 2014 and R11 985 248.72 during August 2014 for the years 2011 and 2012 respectively. In terms of clause 3.5 of the compromise agreement it was agreed that these assessments would be dealt with in the normal course.

[20] In paragraph 4.7.1 of the fourth request it was stated by the applicant that during the 2013 year of assessments, donations in the amount of R2.4 million were paid to the applicant's firm of attorneys, Brian Kahn. The applicant could not identify the donors and acknowledged that he might have to pay donations tax in the event that the identities of the donors could not be established. Hence, SARS was, at that stage, fully aware of the fact that an amount of R2.4 million had been paid to Brain Kahn Attorneys. (SARS' complaint is that the applicant did not pay any donation tax and did not declare the donations in his tax return.)

[21] Most importantly, in terms of clause 2.2. of the compromise agreement, the applicant warranted that the information provided to SARS was accurate, verifiable and complete. (The use of the term "verifiable" would indicate that SARS was in a position to assess the accuracy of the information provided by the applicant.) Clearly SARS' role is not to adopt a *non*

possumus attitude. Section 200 of **TTA** authorises a senior SARS official to authorise a compromise but only if the purpose thereof is to secure the highest net return from the recovery of the tax debt and only when the compromise is consistent with considerations of good management of the tax system and administrative efficacy.

[22] The compromise agreement includes the provisions of section 205 of the **TTA** in that clause 7.1 thereof stipulated that SARS would not be bound thereby: —

- ***If the applicant failed to make a full, verifiable and complete disclosure of all material facts to which the compromise relates;***

- ***If he supplied materially incorrect information to which the compromise relates;***

- ***If he failed to comply with any provision or condition contained in the compromise agreement, or was guilty of breach of contract; or***

- ***His estate was finally sequestrated prior to full compliance with the compromise agreement.***

[23] The compromise agreement also stipulates that in the event of a breach, SARS could cancel the agreement and claim the full tax debt owing before the compromise agreement was entered into, or claim specific performance of the compromise agreement.

The alleged breaches of the compromise agreement:

[24] SARS ascertained that Mr Martin never donated the R4 million referred to above. A meeting was held with the applicant who promised to furnish the name of the donor and proof of the payment of donations tax by or on 17 November 2014. The information was not forthcoming and the matter was referred to a committee, and the applicant was informed accordingly. On 25 November 2014, SARS provisionally informed the applicant that it considered itself no longer bound by the compromise agreement, subject to representations to be made by the applicant by 15 January 2015.

[25] On 26 January 2015, the applicant disclosed that the first R1 million paid to SARS in terms of the compromise agreement was indeed not financed with a donation. He now contended that the amount was sourced from a certain Kyle Phillips by way of a loan. In essence, SARS is stating that his applicant misrepresented the identity of the donor. The applicant contends that the identity of the donor was never elevated to a warrantee, and that at the time he identified Mr Martin as a donor, he stated the facts as he knew them at the time. The applicant also states that the identity of the donor is of no consequence to SARS. However, SARS' complaint seems to be that it would not receive the anticipated donation tax of R800 000 as no tax was payable on a loan.

[26] The Julius Sello Malema Trust allegedly paid the remaining R3 million by way of R500 000.00 instalments. The Trust was allegedly created to assist the applicant with the payments of his taxes. SARS adopted the attitude

that because the applicant did not comply with his undertaking to furnish the name of a donor and to provide proof of donation tax, the compromise agreement had been breached. Donation tax was indeed not paid and would not be paid.

[27] In other words, SARS adopted the attitude that the compromise agreement had to be complied with to the letter.

[28] The argument developed by SARS is that SARS is a creature of statute with a strict mandate in terms of section 193(1) of the **TTA**, to assess and collect all taxes and not to forego any tax debts. It was emphasised that prior to the enactment of section 205, SARS had no power to compromise a tax debt and when it did, the provisions of section 205 had to be met.

[29] The applicant argued that he had entered into a horizontal, common law agreement with SARS, with the result that issues such as misrepresentations and breach of the contract came into play, as they would in the case of contracts at common law. It was further argued that an agreement entered into with an organ of state is imbued with constitutional values as was held by Cameron J in the matter of ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, SASSA and Others*** **2014 (1) SA 604 (CC)**.

[30] SARS argued that the use of the word "material" within the context of section 205 rendered that which the applicant did not disclose, material. It was argued that SARS was entitled to full and accurate information in order to exercise its mandate as envisaged in section 193(1). According to SARS'

argument, the intention of a tax payer (let alone *dolus*) did not form part of the enquiry. To use an analogy – SARS contended that the information furnished in terms of section 205 was either accurate or inaccurate, as though the applicant were writing a mathematics examination, and once answers were incorrect, or not furnished, the applicant immediately scored nought. However, this scenario does not even hold true in the case of a mathematics examination. Depending on the percentage of incorrect answers or answers not furnished, one can still pass or even receive a distinction. Even at common law, a breach of an agreement has to go to the root of the contrast before it gives rise to a right to cancel an agreement.

[31] When SARS' argument is followed to its logical conclusion the use of the word "material" in section 205 is otiose – any form of non-compliance with a compromise agreement, however insignificant, would result in a breach thereof. Whether an omission or misrepresentation caused SARS to enter into the compromise agreement, would, according to the argument put forward on behalf of SARS, be wholly irrelevant. Such an argument appears to overlook the use of the word "material" as used in the section. The word "material", properly construed within section 205, appears to convey that the misrepresentation or omission has, to a significant extent, to induce SARS to enter into a compromise agreement or to reject it. Based on the information furnished, SARS, when entering into a compromise agreement, must be of the opinion that it is fulfilling its mandate not to forego the payment of taxes, where possible.

[32] Clearly SARS has to analyse the information provided to reach a conclusion as to whether it should enforce payment of all taxes due and payable or forego any tax debts. On the information provided by the applicant, SARS deemed it prudent, and a fulfilment of its mandate in terms of section 183, to forego certain taxes. SARS may only do so "*if it would be to the best advantage to the State*". Hence it appears that to argue that causal effect is not a factor is not feasible. The information provided either induces SARS to forego a debt or, in the alternative, to enforce it. Only when the information provided is materially inaccurate or incomplete will SARS be induced to forego a debt when it would not have done so had the information furnished been materially different.

[33] The information furnished dictates the route which SARS will follow in the exercise of its discretion. SARS ensures that it obtains accurate information by requesting a tax payer to warrant that the information is "*accurate, verifiable and complete*" (emphasis added). The question arises as to the consequences for a tax payer who is unaware of certain facts and only ascertains them after an agreement of compromise has been entered into. One can understand a situation where the tax payer intentionally or negligently induces SARS to enter into a compromise agreement. On the face of it one could not expect SARS to be bound by such a compromise agreement. However, where the taxpayer is unaware of certain facts, the consequences may be different. SARS argues for absolute liability, whatsoever the circumstances.

[34] It was a term of the compromise agreement that once the terms thereof had been complied with, SARS would request that the provisional sequestration order be discharged.

[35] As reflected in the supplementary affidavit of 13 March 2015, deposed to by Mr Engelbrecht on behalf of SARS in the sequestration application, SARS made it clear that it was of the view that it was no longer bound by the compromise agreement on the following grounds, namely that the applicant had failed: —

- ***to identify the donor and to see that donations tax was declared and paid resulting from the compromise amount being allegedly paid by donations;***

- ***to keep his tax affairs current and paid up to date as set out in paragraph 3.8 of the compromise agreement, in that he, inter alia***

  - ***failed to see to it that the donations tax resulting from part of the compromise amount being paid by donations was paid. He did not only accept liability for this, but he was in fact liable in terms of the provisions of the Income Tax Act; and***

  - ***failed to make payment of the previously acknowledged liability for the (additional) 2011 and 2012 assessments, and in fact subsequently proceeded to object against the assessments and failed to declare the donations received by***

attorney Brian Khan (which the applicant contends were paid to settle fees and disbursements).

- ***He had made further misstatements in the request for the compromise: for instance, that he was a beneficiary of the JSM Trust and that the Trust was formed to assist him to pay his tax liability, although that was not the case. It was also alleged that the JSM Trust had failed to keep its tax affairs in order.***

[36] A fifth ground was later added namely that Mr Malema did not disclose his interest in the Bendor Property.

[37] As a result, SARS informed the applicant that it would seek the confirmation of the provisional sequestration order on 16 March 2015, based on the entire amount payable by then as well as on the further assessments in a total of R32 934 232.28. (16 March 2015 was after the date when the compromise agreement had to be complied with in full by the applicant.)

[38] The above grounds for cancellation are disputed. The issue of the identity of the donor has been dealt with above. In terms of clause 3.5 of the compromise agreement the 2011 and 2012 assessments would be dealt with in the normal course. It was argued by SARS that the applicant had unequivocally accepted liability for these assessment which the applicant disputed and, in any event stated that the amounts were not taxable as income in his hands as they were dividends or donations.

[39] Interestingly, SARS alleged, that the applicant had been negligent in under declaring of his income, which the applicant denied. SARS knew of the payments to Brian Kahn and makes it clear that this court is not to determine this issue for present purposes.

[40] Regarding the JSM Trust's tax affairs, it is common cause that although initially it was not the case, the Trust did, to the satisfaction of SARS, regularise its tax affairs. The applicant contends that he issue whether the JSM Trust's tax affairs were regularised or otherwise, has nothing to do with his rights and obligations under the compromise agreements.

[41] The return date of the provisional sequestration order was extended in order to allow the applicant to file an answering affidavit. The applicant also filed an application akin to the current application as a counter-application. On the return date, namely 1 June 2015, the application served before Wright J. By then, the Economic Freedom Front ("**the EFF**") and the JSM Trust had launched applications to intervene in the sequestration application and the applicant had filed a counter-application seeking an order declaring the compromise agreement valid. Both applications were struck from the roll due to lack of urgency and the sequestration application and counter application were withdrawn and SARS agreed to pay the applicant's costs.

[42] As a result, when the applicant wished to re-enrol the current application it was met with a procedural challenge by SARS. The Deputy Judge President directed that a (new) self-standing declaratory application be launched, which is the application dealt with in this judgment.

[43] It is the applicant's contention that SARS' decision that it is no longer bound by the compromise agreement is unlawful. It was contended on behalf of the applicant that the matter could have been treated as unlawful administrative action but that it elected to treat it as one of private and not public law. It was contended by the applicant that SARS, as an organ of state, however played a special role and had to conform with the prescripts of the Constitution. It was argued on behalf of the applicant that the applicant's rights to human dignity, freedom of trade, occupation and profession, property and administrative action, had to be complied with by SARS.

The *fans et origo* of the tax dispute:

[44] It is common cause that Mr Malema received donations from donors and dividends from a company during the period 2005 to 2012.

[45] The real dispute between the applicant and SARS is how these donations and dividends should be classified. These donations and dividends were classified by SARS as income in Malema's hands; and SARS raised the assessments mentioned above. The applicant contends that it is not taxable income. It is the applicant's contentions that the donations were made out of generosity or disinterested benevolence and that dividends received by the applicant during that period were not taxable.

[46] SARS alleged that these payments were not made out of pure liberality but with the motivation of self-interest or at least an expectation of a *quid pro*

quo. That this is not a dispute which can be resolved on affidavit is self-evident.

[47] The dispute between the applicant and SARS seems to be purely factual – were the monies indeed donations and/or dividends. That politicians routinely do receive donations cannot be denied.

[48] After obtaining a provisional sequestration order against the applicant on 11 February 2014, SARS took judgment against the applicant. On 4 March 2014, SARS obtained a preservation order against the applicant in terms of section 163 and a Mr Murray was appointed as his *curator bonis*. Mr Murray was authorised to collect all the applicant's assets and convert them into cash and to pay the proceeds to SARS, which he did during 2013.

[49] The compromise agreement provided that: —

> "***Once the terms contained in the compromise agreement have been complied with: —***
>
> ***3.4.1. SARS will request that the provisional sequestration order… be discharged.***"

[50] However, as set out above, after the applicant had paid the entire amount owing in terms of the compromise agreement, SARS decided that it was no longer bound by the compromise agreement.

[51] The high water mark of SARS' case seems to be the allegations that the applicant did not make full and frank disclosure and failed to keep his tax

affairs current. As set out below, these allegations are in dispute. The latter reference relates in part to the R120,000 paid in respect of Municipal rates in respect of the Bendor property. It should be self-evident that these statements are difficult to assess on the evidence provided.

[52] As set out above, due to certain developments on the return day of the sequestration application including the filing of a counter-application by the applicant to declare the proceedings an abuse of process and a declaration that the compromise agreement was valid and binding, SARS withdrew the sequestration agreement. However, it then contended that it was no longer bound by the compromise agreement.

Chapter 14 of the Tax Administration Act:

[53] In terms of section 192 of the **TAA**, a compromise of a debt can only take place when the liability to pay the debt is not disputed by the debtor. The applicant contends that there is a difference between "not disputing" a debt and "admitting" a debt. Although, semantically, there might be a difference, in practice, there is none.

[54] One of the pitfalls of a compromise for a tax payer is that he/she loses his/her right to object to a debt and the right to appeal an assessment. Hence, SARS cannot be allowed to enter into a compromise with a taxpayer only to deny its validity based on unwarranted grounds. An onus lies on SARS as well, to secure the highest net income from a tax debt and to enter into compromises on an informed basis. Thus section 100(4) of the **TTA**

entitles senior SARS officials to require that an application for compromise be supplemented by further information.

[55] A SARS official entering into a compromise has all the obligations set out in section 202 of the **TTA**, for example, that the debt will be collected at an earlier date and yield a greater amount. In terms of section 203(b) of the **TTA** when a debtor's tax affairs are not up to date, no senior SARS official may compromise a tax debt. SARS was auditing aspects of the 2011 and 2012 tax years and apparently kept the on-going assessments outside the ambit of the compromise agreement.

[56] In terms of section 200(4) of the **TTA**, once a senior SARS official and a debtor has signed a compromise agreement setting out the amount to be paid in full satisfaction of the debt, SARS must give an undertaking that it will not pursue the recovery of the balance of the tax debt.

[57] The only circumstances when SARS is not bound by a compromise are set out in section 205 which have been referred to above.

[58] Whether a term is material to a contract may be gauged as to how "vital" the terms is, as was held in ***O'Connell v Flischman* 1948 4 SA 191 (T)**.

[59] Regarding the non-disclosure of the Bendor Property, SARS claims that the applicant intentionally did not disclose his interest. Such fraud will always be material. Regarding the other four grounds relied upon by SARS to state that it is no longer bound by the compromise agreement, SARS does not contend that the applicant intentionally misled SARS. As pointed out above

negligence was alleged on the part of the applicant in respect of the R2,4 million paid to Brian Kahn attorneys. In any event, SARS states in its heads of argument that it is not for this court to decide this issue.

[60] What is apparent, though, is that SARS alleges that any misstatement or failure to make a disclosure is automatically material. As stated, it is then not understood why the word "material" is necessary or used in section 205.

[61] In fact, in its preamble, the compromise agreement states the following: —

"***SARS has determined***

a) that it would be in the best interest of the State and the Debtor that the debt be compromised;

b) the compromise complies with the requirements of section 204;

c) the purpose of the 'compromise' is to secure the highest net return for the recovery of a tax debt; and

d) the 'compromise' is consistent with considerations of good management of the tax system and administrative efficiency."

[62] Regarding the Bendor Property, it is common cause that the applicant made an offer to purchase it for the amount of R373 000.00 on 30 November 2009 According to the affidavit of attorney Rafique Satar Essa (the transferring attorney) the Polokwane Local Municipality was represented by Ms Nare, Essa alleges that when the offer for purchase of the Bendor property was made, the applicant allegedly knew in 2012 that the property had been paid for and also knew that the property was transferred to him in 2014. Whether attorney Essa is telling the truth is in dispute, as well as his

"attesting" to certain "affidavits" signed by the applicant, years after he had signed them. It appears as though Ms Nare's "signature" on "an affidavit", relied upon by Mr Essa, is not authentic as stated by her in an affidavit.

[63] The applicant's Ratanang Family Trust, paid the pro forma transfer costs of R10 500.00 on 29 April 2010. The purchase price was payable within a year, from 30 November 2010, failing which the agreement would lapse. The applicant never paid the purchase price. However, he had to pay municipal charges from the time he signed the offer to purchase. Unbeknown to him, on the applicant's version, a company by the name of On-Point Engineering (Pty) Ltd, on behalf of Gwama Properties (apparently at the behest of a Mr Gwangwa) paid a large part of the purchase price on 25 May 2011.[3] Attorney Essa alleges that he informed the applicant about this fact because the cheque was returned, which the applicant denies. SARS, relying on Mr Essa's affidavit contends the contrary.

[64] When he made his first request for a compromise, the applicant informed SARS of the existence of the Bendor property. In paragraph 15.1 of the first request, the applicant states the following: —

> "***A deed of sale was signed by me in 2009 for a municipal property to be purchased in Polokwane for the sum of R373 000-00. To date, no payments have been made for the property and transfer has not taken place to me.***"

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[3] Many of the dates relied upon by the applicant and SARS are different. In a chronology of events furnished by SARS the date of this payment is stated to be 25 May 2011.

[65] In fact, when the applicant made this statement, Attorney Essa alleges that the purchase price had been fully paid by the first week of December 2012. This allegation cannot be accurate as the deposit and an amount of R340,000 only was paid leaving R22 500 short. Furthermore, there was no payment of disbursements or fees in respect of the property.

[66] Thus SARS knew about the offer to purchase yet nonetheless deemed it fit to enter into a compromise agreement with the applicant.

[67] When the applicant was experiencing a turbulent time, the Municipality claimed payment of services rendered in respect of the property. On the applicant's version, he simply paid an amount of R70 000.00 on 14 May 2014 claimed by the Municipality of Polokwane with the intention of sorting out the demand for payment at a later stage. On 14 September 2014 2014 he paid another R50 000 to the Municipality of Polokwane. He was in the process of becoming a member of Parliament and did not wish to be blacklisted by a Municipality. SARS denies that the applicant would have paid these amounts in order not to be embarrassed by political opponents but rather because he had full knowledge of the fact that he owned the property.

[68] Only after the applicant had made the last payment in terms of the compromise agreement, was the applicant's attorney, Mr Molokwane, informed that the Bendor Property had been transferred into the applicant's name on 3 December 2014. A transfer, by necessity, has tax implications, which the applicant would have had to disclose to SARS.

[69] Mr Essa, the transferring attorney, "attested" to "affidavits", documents which had been signed by the applicant and Ms Nare years before. These backdated documents raise serious doubt regarding Mr Essa's credibility. (Even Ms Nare's signature is suspect as set out above.)

[70] The applicant contends that he is absolutely truthful in contending that he had all but forgotten about the Bendor Property mentioned in his first request for a compromise. SARS states that he would not have "forgotten" a property with a current value of approximately R800,000.

Referral to trial:

[71] At the hearing, the applicant's advocate requested that not only the issue of the Bendor Property, but the entire application be referred to trial because of the factual disputes in the application.

[72] In addition to the issue of the Bendor Property, which this court is not in a position to decide on affidavit, the other issues, which gave rise to SARS declaring that it is no longer bound by the compromise agreement, are equally difficult to decide on the conflicting versions set out in the affidavits. Even though SARS seeks to argue that it is merely a matter of interpretation it cannot be discounted that the information available to the parties and the reasons and facts upon which they entered into the compromise agreement may be relevant. In this regard reference is made to the case of ***Natal Joint Municipal Pension Fund v Endumeni Municipality***

(920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

[73] In this matter, at p 604 *et. seq.* Wallis JA embarked on an in-depth analysis of the rules of construction of written instruments and emphasised the importance, from the outset, to read words used in the context of the document as a whole and in the light of all relevant circumstances such as the background to the preparation and production of the document. Wallis JA emphasised that most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of the case, is an unhelpful exercise. In order to decide on the correct meaning of words, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. One must also take into consideration the material known to those responsible for the production of the written instrument. Judges must guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used but must prefer a sensible meaning.[4]

[4] Spigelman CJ describes this as a shift from text to context. See 'From Text to Context: Contemporary Contractual Interpretation', an address to the Risky Business Conference in Sydney, 21 March 2007, published in Spigelman *Speeches of a Chief Justice 1998 – 2008*, 239 at 240. The shift is apparent from a comparison between the first edition of Lewison *The Interpretation of Contracts* and the current fifth edition. So much has changed that the author, now a judge in the court of appeal in England, has introduced a new opening chapter summarising the background to and a summary of the modern approach to interpretation that has to a great extent been driven by Lord Hoffmann.

[74] The less said about the correct legal interpretation of section 205, at this stage, the better. Whether the respondent's or the applicant's interpretation of the compromise agreement is correct, cross-examination in respect of the parties' knowledge of the facts and the circumstances attendant upon the compromise being entered into will bring clarity to matters of great importance to all the parties. Cross-examination may even demonstrate that SARS would in any event have entered into the compromise agreement had it been aware of all the facts which SARS contends the applicant did not disclose or disclosed inaccurately or incompletely – or prove the exact opposite.

[75] There is also the troublesome fact that Mr van Loggerenberg, who was originally in charge of the investigations against the applicant, was subjected to an enquiry (the so-called Sikhakhane enquiry) and had to resign from SARS. There is a further aspect to be borne in mind namely that should the applicant be sequestrated, he can no longer serve as a member of Parliament. The applicant alleges that the attempt by SARS to set aside the 2014 compromise is the result of political interference – which species of interference he had witnessed personally in the affairs of President Mbeki and Mr Zuma (as he then was).

[76] According to Mr Malema, the disgraced Mr van Loggerenberg acted illegally in establishing a so-called "van Loggerenberg Unit" which was a secret information gathering unit within SARS. In the Sikhakhane report it was unequivocally stated that SARS may not establish and operate such a unit. The applicant also contends that Mr Engelbrecht, who deposed to the

affidavit on behalf of SARS setting out the reasons why SARS was allegedly no longer bound by the compromise agreement, had a close relationship with Mr van Loggerenberg. During the hearing it was suggested that there was "political skulduggery" on the part of SARS to which SARS' counsel strongly objected.

[77] To reach a conclusion on the facts set out in the affidavits may very well lead to an incorrect conclusion. The use of the word "material" in section 205 must be given some meaning and whether facts are to be termed "material" does not, necessarily, merely entail an objective test. The facts which persuaded SARS to enter into the compromise agreement and, thereafter, to adopt the stance that it is no longer bound thereby will contextualise the said agreement and give rise to fertile grounds for cross-examination as may the knowledge on the part of the applicant when he entered into the compromise agreement and furnished (or failed to furnish) certain facts.

[78] As stated, it was argued on behalf of the applicant that genuine, disputes of fact had arisen which warranted a referral of the application to trial, particularly in respect of the Bendor Property, but also in relation to the other grounds relied upon by SARS. When regard is had to the evidence before the court it is a veritable quagmire.

[79] The applicant has seriously engaged with the factual allegations it seeks to challenge and has furnished not only an answer but also countervailing evidence, where such facts fall within his personal knowledge. [5] [6]

[80] Motion proceedings, unless concerned with interim relief are about the resolution of legal issues based on common cause facts. Factual issues cannot be resolved to establish probabilities. In circumstances where the applicant's version cannot be rejected as being clearly without merit, the only way in which the factual issues can be resolved is by way of *viva voce* evidence.

[81] In the matter of ***Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*** **(66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008)** it was held at paragraph [12] that the truth almost always lies beyond mere linguistic determination. At par [13] the following was held: —

> ***"A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely***

[5] ***Minister of Land Affairs and Agriculture & Others v D&F Wevell Trust*** **2008 (2) SA 184 (SCA)** paragraph [56].

[6] ***Wightman t/a JW Construction v Headfour (Pty) Ltd & Another*** **2008 (3) SA 371 (SCA)** paragraph [13].

within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision."

[82] To what extent the alleged flaws in the facts provided to SARS can be attributed to intent on the part of the applicant, and to which extent they can be termed material to allow SARS to assert that it is no longer bound by the compromise agreement, are issues which SARS wishes to have resolved on affidavit. Put simply, the only conclusion that can be drawn for SARS' argument is that any non-compliance with the terms of the compromise agreement is material. Logic dictates that this is not the case but depends on the facts attendant upon the compromise agreement being entered into.

[83] In any event, fraud cannot be decided on affidavits as it was aptly put in the matter of ***Commissioner for the South African Revenue Services v Sassin and Others*** **(6927/2014) [2015] ZAKZDHC 82; [2015] 4 All SA 756 (KZD) (21 October 2015)**.

[84] SARS is careful not to allege fraud in relation to the other four grounds which caused it to adopt the attitude that it is no longer bound by the compromise agreement.

[85] The court was referred to the matter of ***AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (1) SA 604 (CC)*** **for** the proposition that, in assessing the term "material" within the context of alleged administrative irregularities, what has to be determined is whether the purpose which the administrative actions (in that case tender requirements) was intended to serve, had substantially been achieved.

[86] To a large extent, the applicant's argument is akin to the argument in ***AllPay Consolidated*** – he states that any non-disclosures and alleged inaccurate facts were inconsequential. SARS contends the contrary, but its contention is based on its legal interpretation of section 205 to the effect that any inaccurate fact or non-disclosure is substantial, and no regard should be had to the consequences of such inaccurate facts or non-disclosures.

[87] It does not avail SARS to state that it matters not whether the non-disclosures and inaccuracies were intentional. Adopting this stance SARS is seeking to force the matter to be heard on the affidavits. Given the fact that the fifth ground advanced by SARS is, in any event, fraud, this issue has to be referred to trial. All the issues, as was submitted by counsel for the applicant, should then be referred to trial in order to obtain clarity regarding the correct facts upon which the matter should be adjudicated. Should the conduct of the applicant have been fraudulent in all respects,

then SARS will have no difficulty in persuading a court that it is not bound by the compromise agreement.

[88] For this reason, and in an exercise of the court's discretion, the matter is referred to trial.

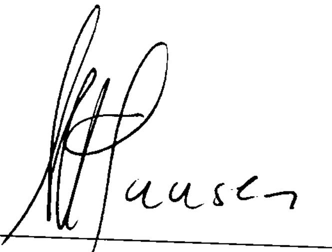
[89] Sight is not lost of the fact that it was the applicant who sought a declarator, but its understanding was that fault on the part of the applicant in conveying or failing to convey facts to SARS played a cardinal role. In any event, the applicant opined that he had complied with the compromise agreement. It was only in argument that SARS at the hearing adopted the argument that it does not matter whether there was fault on the part of the applicant or otherwise. The bold statement is made in the answering affidavit that "in view of the material breaches, nondisclosures and misstatements SARS is of the view that it is not bound by the compromise agreement." It is never precisely explained in which respects the aforesaid breaches etc. are material. It is left for the court to speculate or make deductions, which it is unable to do on the conflicting facts presented.

[90] This court does not wish to bind the court hearing the trial and does not express an opinion on which interpretation of section 205 of the **TTA** is accurate. These issues will be clarified when evidence is led regarding the rationale for SARS entering into a compromise agreement and later adopting the stance that it is not bound by it.

[91] In the premises, the following order is made: —

Order

1. The matter is referred to trial.
2. The Applicant's notice of motion stands as the simple summons and the Respondent's notice of intention to oppose stands as a notice of intention to defend.
3. The Applicant is directed to file his declaration within 30 days of this court order.
4. Thereafter the Uniform Rules of Court regarding the filing of pleadings and all processes and procedures shall apply.
5. The costs incurred to date are costs in the action, which costs include the costs consequent upon the employment of two counsel.



MM JANSEN J
JUDGE OF THE HIGH COURT

Counsel for the applicant: **P F Louw SC**

Instructed by: **Tumi Mokwena Inc.**

Counsel for the respondent: **JJ Gauntlett SC, HGA Snyman SC**

Instructed by: **Mahlangu Attorneys Inc**