THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 846/2023

In the matter between:

HENQUE 3935 CC t/a PQ

CLOTHING OUTLET **APPELLANT**

and

COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Henque 3935 CC t/a PQ Clothing Outlet v Commissioner for the South African Revenue Service* (846/2023) [2025] ZASCA 56 (12 May 2025)

Coram: ZONDI DP, DAMBUZA and MOLEFE JJA and KOEN and DOLAMO AJJA

Heard: 19 AUGUST 2024

Delivered: 12 May 2025

Summary: Company in business rescue – whether tax liability arising from additional assessment raised by Commissioner for South African Revenue Service (SARS) after commencement of business rescue is a pre- or post-commencement debt – whether such liability may be set off against VAT credit which became due to the company by SARS after the company was placed in business rescue.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Vally J, sitting as court of first instance):

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the high court is set aside and substituted with the following order:

'It is declared that:

(a) any liability for income tax in terms of the Income Tax Act 58 of 1962, in respect of a period of assessment which ended on or before 31 January 2018, being the commencement date of business rescue, is a liability which was owed by the applicant prior to the commencement of business rescue and is accordingly a pre-commencement' claim;

(b) any liability for VAT in terms of the Value Added Tax Act 89 of 1991 in respect of a supply of services or goods, that took place on or before 31 January 2018 being the commencement date of business rescue, is a liability which was owed by the applicant prior to the commencement of business rescue and is accordingly a pre-commencement claim;

(c) any claims that arose prior to commencement of business rescue proceedings are not capable of being set off against the liabilities of the respondent to the applicant during the existence of the business rescue plan or until business rescue proceedings have ended or until substantial implementation of the business rescue plan.

(d) the respondent is ordered to pay the costs of the application such costs to include the costs of two counsel.'

JUDGMENT

Zondi DP (Dambuza and Molefe JJA and Koen and Dolamo AJJA concurring):

Introduction

[1] This is an appeal against the judgment of the Gauteng Division of the High Court, Johannesburg (the high court) dismissing the appellant's application for certain declaratory relief. At issue is whether the income tax debt of a company in business rescue, arising from additional assessments raised by the Commissioner for the South African Revenue Services (SARS) after the company had commenced business rescue, in respect of income tax which was owed for a period prior to business rescue, is a pre- or post-commencement debt and whether such debt may be set off against the VAT refunds that became due to the company by SARS after the company was placed in business rescue. The high court held that such debt constitutes a post-commencement debt which is not subject to the business rescue plan and that it could be set-off against the VAT refund that became payable by SARS to the company after it was placed in business rescue. The high court granted the appellant leave to appeal to this Court.

[2] On 2 April 2025, a notice was given to the parties for the delivery of the judgment on Friday, 4 April 2025. However, during the course of preparing the judgment for delivery, it came to my attention that, on 31 March 2025, the Constitutional Court delivered its judgment in the matter of *United Manganese of Kalahari (Pty) Ltd v Commissioner for SARS and four other cases* (*United Manganese*)[1] in which, inter alia, the provisions of s 105 of the Tax Administration Act 28 of 2011 (the TAA) and how they have been interpreted by the high courts and this Court, were extensively considered. The Constitutional Court held that the high court cannot, in matters falling within the scope of s 105, exercise the declaratory jurisdiction it has unless and until, in a particular case, it has given a section 105 direction.[2]

[3] As the Constitutional Court judgment in *United Manganese* was not available when this appeal was heard, a directive was sent to the parties calling upon them, if they so wished, to submit by no later than Wednesday, 9 April 2025, supplementary heads of argument addressing the provisions of s 105 of the TAA as interpreted by the

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[1] *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and four other cases* [2025] ZACC 2; 2025 (5) BCLR 530 (CC) (*United Manganese*).
[2] Ibid para 54.

Constitutional Court in *United Manganese*. I have since received the supplementary heads from the parties and have fully considered their submissions.

Background

[4] The appellant, Henque 3935 CC t/a PQ Clothing Outlet (Henque), is a close corporation. It traded as a retailer of apparel and beauty products, sold through branded stores located in shopping malls around South Africa. At the relevant time, it traded in 40 such stores. In terms of s 5(1)(*d*) of the Income Tax Act 58 of 1962 (the Income Tax Act), it was required to pay tax on its income earned or accrued during each of its financial years. It filed a tax return for 2017 with SARS in which it claimed to have made a loss of R46 000 and was therefore not obliged to pay any income tax.

[5] On 29 November 2017, SARS issued a notice of an original assessment for the 2017 year of assessment. The assessment was based solely on the claims made by Henque in its tax return. In the same notice, SARS informed Henque that it would be subjected to an audit.

[6] On 31 January 2018, Henque commenced business rescue in terms of the Companies Act 71 of 2008 (the Companies Act). On the same day, the business rescue practitioner was appointed and SARS was informed of Henque's commencement of business rescue. On 12 February 2018, the first meeting of creditors and employees was held. On 4 April 2018, SARS gave notification of an adjustment to assessment. On 1 May 2018, SARS raised an additional assessment for the 2017 income tax year of assessment. On 31 May 2018, the business rescue plan was published and sent with a notice of meeting of creditors to all known creditors. The business rescue plan and all the annexures were served on SARS.

[7] On 13 June 2018, the creditors held a meeting to consider and approve the business rescue plan. On 2 August 2018, SARS lodged a claim with the business rescue practitioner recording the 2017 additional assessment as a pre-business rescue debt. The business rescue practitioner also submitted Henque's VAT returns for the period 06/2018

to 03/2019. At that stage, Henque had accumulated a VAT credit of R1 018 320.80. SARS verified and approved this VAT refund but later revoked it.

[8] On 14 February 2019, SARS informed the business rescue practitioner that it had set-off the VAT credit against the 2017 additional income tax assessment debt and the VAT liability for the period 01/2018. SARS asserted that it was entitled to apply the set-off as both liabilities were post business rescue debts which were not subject to the payment and enforcement terms under the business rescue plan. Various correspondence was exchanged between the parties to resolve the dispute regarding the refund of the VAT credit. When that failed, Henque, on 11 June 2020, issued a statutory notice, in terms of s 11(4) of the TAA, informing SARS of its intention to institute legal proceedings.

[9] Thereafter Henque, on 3 November 2020, brought the application in the high court in which it sought the following declaratory relief:

'1.1 any liability from normal tax in terms of the Income Tax Act, 1962, in respect of a period of assessment which ended on or before 31st January 2018, the date of commencement of business rescue, is a liability which arose prior to the commencement of business rescue;

1.2 any liability from VAT in terms of the Value Added Tax Act, 1991 in respect of a supply, that took place on or before 31st January 2018, the date of commencement of business rescue, is a liability which arose prior to the commencement of business rescue;

1.3 the liabilities referred in paragraphs 1.1 and 1.2 above are pre commencement claims and thus not capable of being set off against a liability of the respondent, to the applicant, that arose after 31 January 2018.'

The high court's findings

[10] The high court (per Vally J) dismissed the application. It held that the 2017 additional assessment is not a pre-business rescue debt. Its reasoning is to be found in para 18 of the judgment in which it stated:

'Section 96(1)(f) of the Tax Administration Act, as we have already noted, provides that SARS must issue a notice of assessment which is to include "the date for paying the amount assessed".

In this case the additional assessment was made on 4 April 2018 and issued to Henque on 1 May 2018. The notice of the additional assessment identified the "due date" to be 1 May 2018 and the "second date" to be 31 May 2018. The second date is the date by when it is to be paid. The amount assessed, thus, only became due and payable on 31 May 2018. Until then it was not a "debt". Thus, it constitutes a post- commencement debt or finance. . .'

[11] The high court rejected Henque's submissions that: in terms of s 5(1) of the Income Tax Act the liability for the tax arose on 28 February 2017; and that the assessment including an additional assessment of the liability after 28 February 2017 only quantified the liability and did not create it. According to the high court, s 5(1) of the Income Tax Act only establishes 'generally the liability' but in terms of the relevant provision of the TAA, the tax became due and payable when the additional assessment was made. Only when it was quantified and became due and payable, did it become a debt.

The issues in this Court

[12] The appeal raises the following issues:

(a) The first one relates to the question whether the high court has jurisdiction to hear an application for declaratory relief concerning the tax liability of a company in a business rescue. This issue was not raised either on the papers filed by SARS, or in the heads of argument filed on its behalf in the high court, or during the hearing in the high court. It was only raised for the first time by SARS in the heads of argument filed in this Court.

(b) The second one is whether Henque's liability arising from the 2017 additional income tax assessment and for the VAT period 01/2018 is a pre- or post-commencement debt.

(c) The third, is whether SARS is entitled to set off VAT refunds, to which Henque became entitled after the commencement of business rescue, against Henque's liability arising from the 2017 additional income tax assessment and for the VAT period 01/2018. The second and third issues only arise if the question raised in the first issue is in the affirmative.

Contentions of the parties

[13] As regards the first issue, SARS submitted that the high court did not have jurisdiction to entertain the application for a declarator, contending that Henque incorrectly

launched the proceedings for a declarator after receipt of the additional income tax assessment for the 2017 year of assessment, instead of disputing that assessment in the tax court in terms of s 104(1) of the TAA. SARS argued that a taxpayer, such as Henque, who disputes an assessment, including an additional assessment must follow the dispute resolution legal framework set out in chapter 9 of the TAA which entails objecting to the assessment and appealing against the assessment or decision to the tax court. Flowing from this argument, SARS accordingly submitted that Henque should have appealed to the tax court if any objection lodged was disallowed by SARS. To the extent that Henque was desirous that the high court should entertain its income tax assessment dispute, proceeded the argument, it was under a statutory obligation to first apply to the high court for an order in terms of s 105 of the TAA directing that the dispute may be heard and adjudicated by the high court (a section 105 direction).

[14] SARS argued that in the absence of a section 105 direction, the high court did not have the requisite jurisdiction to entertain the matter. Section 21 of the Superior Courts Act 10 of 2013 (the Superior Courts Act), runs the argument, is not intended to accord jurisdiction to the high court where the legislature had established specialist courts for the adjudication of certain categories of disputes such as tax disputes. Therefore, s 21 does not clothe the high court with jurisdiction to entertain and adjudicate tax disputes, unless the jurisdictional requirement set out in s 105 of the TAA has been met. In support of this proposition SARS relied on *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service (United Manganese I)*[3] in which *Commissioner for the South African Revenue Service* v *Rappa Resources (Pty) Ltd (Rappa Resources)*[4] was followed. In *United Manganese I*, this Court held that:

'The purpose of s 105 is clearly to ensure that, in the ordinary course, tax disputes are taken to the tax court. The high court . . . does not have jurisdiction in tax disputes unless it directs otherwise…'[5]

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[3] *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* [2023] ZASCA 29; 85 SATC 529 (*United Manganese I*).
[4] *Commissioner for the South African Revenue Service* v *Rappa Resources (Pty) Ltd* [2023] ZASCA 28; 2023 (4) SA 488 (SCA); 85 SATC 517 (*Rappa Resources*).
[5] *United Manganese I* para 11; see also *Rappa Resources* para 20.

[15] Henque disputed SARS' contentions that the real dispute between the parties was the additional assessment SARS raised against it for income tax in the 2017 year of assessment, which Henque sought to set aside. It argued that it had not disputed the assessment, nor the self-assessment for the VAT period 2018/01. It contended that it did not seek relief to set the assessment aside.

[16] The question Henque sought to have determined was whether the resultant tax liability, arising from the assessments, was a liability that existed at commencement of business rescue proceedings (a pre-business rescue debt) or a liability which arose after the commencement of business rescue proceedings (a post-business rescue debt). It argued that the declaratory relief sought related to neither an assessment, nor a decision made by SARS. It argued further that the declaratory relief sought was not a matter that engaged the jurisdiction of the tax court and that a section 105 direction was not required.

Discussion on s 105 point

[17] Section 105 of the TAA provides as follows:

'Forum for dispute of assessment or decision.

A taxpayer may only dispute an assessment or "decision" as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.'

[18] Section 104 of the TAA provides:

'Objection against assessment or decision.

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

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

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

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

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

(3) A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the "rules".

(4) A senior SARS official may extend the period prescribed in the "rules" within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection.
(5) The period for objection must not be so extended–
(a) for a period exceeding 30 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection*;*
(b) if more than three years have lapsed from the date of assessment or the "decision"; or
(c) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the "decision".'

[19] The dispute between the parties relates to the characterisation of the tax liability of a company in business rescue for the purposes of s 154 of the Companies Act and whether such liability may be set-off against the VAT refund that becomes due to the company after the commencement of business rescue. Does it constitute a pre- or post-commencement debt? Henque's grievance does not concern 'an assessment' or 'decision' in terms of s 104(2)*(c)* of the TAA.[6] Henque does not seek a declaratory order on a question going to the correctness of an assessment. What Henque challenges is not a decision or assessment which is appealable to the tax court.[7] Henque is not challenging the correctness of the assessments or seeking their setting aside, it disputes the manner in which SARS characterised its income tax liability arising from the 2017 additional assessment and whether such liability could be set-off against the VAT refunds which became payable to Henque after it commenced business rescue. The issue is whether such liability fell to be paid in terms of the business rescue plan as a pre-business rescue debt or whether it should be paid as a post-business rescue debt. The declaratory relief that Henque seeks will not have any effect on any of the assessments that SARS has issued against Henque since it was placed in business rescue on 31 of January 2018. The declaratory order that is sought will merely direct how the amounts owing to SARS by Henque should be paid.

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[6] *Barnard Labuschagne Incorporated v Commissioner, South African Revenue Service* [2022] ZACC 8; 2022 (5) SA 1 (CC); 2022 (10) BCLR 1185 (CC); 84 SATC 351 para 41.
[7] *United Manganese* para 38.

[20] I therefore find that the high court did have jurisdiction to consider the application for declaratory relief. Accordingly, the respondent's contention that the high court could not exercise its declaratory jurisdiction absent a section 105 direction, must fail. I then proceed to consider the merits of the appeal.

Merits

[21] As regards the second issue, Henque submitted that the income tax liability arising from the 2017 additional income tax assessment and the liability for the VAT 01/2018 is a pre-business rescue commencement debt. It argued that it is the creation of the obligation that determines whether the debt is a pre- or post-business rescue commencement debt. This is because, continued the argument, a debt comprises three elements, namely its creation, quantification or liquidity and when it is payable. To substantiate its argument, Henque submitted that s 5 of the Income Tax Act creates liability in respect of a taxable income for a particular year, or shorter period and that the liability can only arise at the end of the year or shorter period, and not before, because the tax liability is imposed in respect of amounts that comprise gross income less deductions for the whole year or shorter period.

[22] Henque submitted further that the re-quantification of the debt in the additional assessment does not create a new liability and, that being so, any income tax liability that it owed to SARS in respect of the 2017 financial year, was owed at the end of the 2017 financial year, prior to the commencement of business rescue on 31 January 2018. As such, it is a pre-business rescue commencement liability, payable in terms of the approved business rescue plan.

[23] Henque argued that the fact that the income tax debts became liquid and payable after business rescue does not alter their nature as pre-business rescue debts, payable and enforceable in terms of a business rescue plan. Henque accordingly submitted that SARS' contention that a tax debt only comes into existence when it is quantified in the notice of assessment, conflates the creation of the debt and its liquidity.

[24] As regards the timing of the VAT liability, Henque submitted that the liability for the VAT period 01/2018 was created in terms of s 7 read with s 16 of the Value Added Tax Act 89 of 1991 (the VAT Act) when Henque made and received supplies and/or provided and received services in the course of its enterprise on/or before 31 January 2018. It argued that the 01/2018 VAT liability became liquid and mature when it submitted the self-assessment VAT return accounting for the tax actually payable to SARS on 18 March 2018. Henque submitted that, as the debt arises on the supply, the debt is owed when the supply is made. It does not arise when the return is due or made. Proceeding from this premise, Henque submitted that its liability for VAT for the 01/2018 VAT period are claims to which SARS is entitled to be paid in terms of the dividend plan distribution, for so long as the business rescue plan is being implemented.

[25] To counter Henque's arguments, SARS submitted that its claim for income tax relates to the 2017 additional assessment which was due and payable on 31 May 2018, which is after the commencement of the business rescue. SARS argued that this is so because a tax debt is owed upon receiving notice by SARS in respect thereto. It submitted further, that the moratorium does not prohibit set-off as envisaged in s 191 of the TAA.

[26] SARS argued that both s 5(1) of the Income Tax Act and s 7 of the VAT Act establish a general charging provision in respect of income tax and in respect of VAT respectively. SARS submitted that a liability for income tax purposes only arises upon assessment by SARS, in the absence of which there can be no liability. For this proposition, SARS referred to the dissenting judgment in *CSARS v Medtronic International Trading S.A.R.L (Medtronic)*,[8] in which it was stated:

'The liability to pay a tax debt does not arise except by assessment of the liability by SARS or by the taxpayer, in the form of self-assessment. In the absence of such an assessment, liability, and the concomitant duty to pay, do not arise, even though at law the underlying tax obligation subsists'.

[8] *CSARS v Medtronic International Trading S.A.R.L* [2023] ZASCA 20; 2023 (3) SA 423 (SCA); 86 SATC 158; [2023] 2 All SA 297 (SCA) para 69.

[27] SARS submitted that its notice of assessment, dated 4 April 2018, as well as its additional assessment, complied with s 96(1) of the TAA. The notice of additional assessment identified the due date for paying the assessed amount of tax as 1 May 2018 and 31 May 2018 as the date upon which the amount assessed became payable. SARS accordingly submitted that, until 1 May 2018 or 31 May 2018, no amount of tax was due or payable by Henque.

[28] In relation to the VAT liability, SARS, relying on *Medtronic*[9], submitted that the tax debt only arises upon self-assessment. It argued that the VAT liability is a post-commencement debt as the VAT 2018 tax return for 01/2018 was due and payable on 23 February 2018. SARS also referred to *Esselmann v Secretary of Finance*[10] and *Singh v Commissioner, South African Revenue Service*[11] (*Singh*).

Whether the 2017 tax debt arising from additional assessment is a pre- or post-business rescue commencement debt

[29] The concept of 'business rescue' is defined in terms of s 128(1)*(b)* of the Companies Act as:

'. . . proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company . . .'

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[9] Ibid para 71.
[10] *Esselmann v Secretary of Finance* [1990] NASC 5; 1991 (3) SA 681 (NmS).
[11] *Singh v Commissioner, South African Revenue Service* [2003] ZASCA 31; 2003 (4) SA 520 (SCA); 65 SATC 203 (*Singh*).

[30] Once a company is in business rescue, there is a moratorium on legal proceedings in respect of debts incurred prior to business rescue including enforcement action. Section 133(1) of the Companies Act provides:

'During business rescue proceedings, no legal proceedings, including enforcement action, against the company . . . may be commenced or proceeded with in any forum.'

[31] In terms of s 152(4), a business rescue plan that has been adopted is binding on each of the creditors of the company. Section 154(2) makes it clear that, where the business rescue plan has been adopted and implemented, a creditor is not entitled to enforce any debt owed by the rescued company at the commencement of the business rescue process, except to the extent as provided for in the business rescue plan.

[32] Section 5 of the Income Tax Act creates and imposes a liability for income tax in respect of the taxable income received or accrued during the relevant year. Immediately after the end of the year, or shorter period, the taxation debt is owed, even though it may not yet have been quantified and is not due and payable. The process of quantification is by means of the submission of a return by the taxpayer for the assessment of tax in a further period allowed after the end of the year or period of assessment, in terms of s 66 of the Income Tax Act and the making of an assessment by SARS on the basis of such return in terms of s 91 of the TAA. The notice of assessment fixes the date by which the liquidated debt owed becomes due.

[33] SARS is empowered to make an additional assessment where the assessment does not reflect the correct application of the tax. The effect of this, is to permit SARS to re-quantify and correctly state the debt that was owed at the end of the relevant financial year. The re-quantification of the debt in the additional assessment does not create a new liability. Henque's 2017 financial year ended on 28 February 2017. SARS issued the original 2017 income tax assessment on 29 November 2017, after the end of Henque's 2017 financial year and prior to 31 January 2018, the commencement date of the business rescue. Accordingly, any income tax liability that Henque owed to SARS in

respect of the 2017 financial year was owed at the end of the 2017 financial year, prior to the commencement of business rescue on 31 January 2018. As such, this liability is a pre-business rescue commencement liability.

[34] This Court, in *Eravin Construction CC v Bekker NO and Others*,[12] was concerned with s 341(2) of the Old Companies Act[13] and s 154(2) of the Companies Act. It drew a distinction between when a debt is owed and when it is due and can be claimed in the context of business rescue proceedings. This Court held:

'Section 341(2) of the old Act and s 154(2) of the new Act are different. They are not concerned with when debts are due and can be claimed, but when they are owed. On this account, the prescription analogy is not apposite and, as was demonstrated in this case, is apt to mislead.

The question to be answered in this case is thus when the debt was owed. That must be answered in the first instance with reference to s 341(2) of the old Act. It states expressly that a disposition in the terms contemplated by it 'shall be void'. The recipient has no right, on this account, to retain it. Consequently, it owes a debt to the body which made the prohibited disposition, and that debt is owed as soon as the disposition was received.

Section 154(2) of the new Act is as clear: if a debt was owed by a company 'before the beginning of the business rescue process' – before, in other words – the filing of the resolution when a company places itself under business rescue – then the creditor 'is not entitled to enforce' that debt.

In this case, the payment was made on 21 October 2010 and, being void, its repayment was immediately owed by Eravin. Its business rescue proceedings began on 26 September 2012, being the date on which the resolution was filed with the CIPC. As the debt was owed prior to 26 September 2012, the debt may not be recovered.'[14]

[35] Similarly, Henque's VAT return for the period 01/2018, did not originate the tax liability, it quantified the extent of the tax liability payable to SARS. The liability for VAT is

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[12] *Eravin Construction CC v Bekker NO and Others* [2016] ZASCA 30; 2016 (6) SA 589 (SCA) (*Eravin Construction*).
[13] The Companies Act 61 of 1973.
[14] *Eravin Construction* paras 20-23

created by s 7 of the VAT Act. This section provides that VAT shall be levied and paid on the supply by any vendor of goods or services supplied in the course or furtherance of any enterprise carried on by a vendor. The vendor's liability to pay the VAT to SARS is an 'output tax' as defined. The vendor's liability is reduced by the deduction from the output tax of VAT which the first vendor paid to other vendors for the supply of goods or services in the course of the first vendor's enterprise during the relevant period. This latter VAT is defined as 'input tax'.

[36] Liability arises, and the tax is owed, at the time of a relevant supply. The liability for VAT is thus a liability that arises on each individual transaction. Kriegler J held, in *Metcash Trading Ltd vs Commissioner, South African Revenue Service and Another,*[15] that:

'In principle VAT is payable on each and every sale; the VAT percentage, the details for its calculation and the timetable for periodic payment are statutorily predetermined, and it is left to the vendor to ensure that the correct periodic balance is calculated, appropriated and paid over in respect of each tax period. By like token the regularity of VAT payments on the one hand ensures a steady and generally more accurately predictable stream of revenue via a multi-staged taxation that is perceived as resting less heavily on the taxpayer, but on the other hand it does require a great deal of book-keeping by vendors and policing by the revenue authorities.'

[37] Henque was required to account to SARS for the tax by rendering a VAT return. But the submission of the return (self-assessment) quantified its liability – it did not create liability. In *Traco Marketing (Pty) Ltd and Another vs Minister of Finance and Others*,[16] Erasmus J was concerned with 38(1) of the VAT Act. He had this to say:

'It appears that the provision relates to tax payable but unpaid at the time of the assessment. The assessment therefore does not create the obligation to pay the tax. That obligation arises from the operation of s 38(1), read with the other relevant provisions of the Act. Section 40(2)(a) provides for the speedy and effective recovery of tax which has become due or is payable before assessment. Within the scheme of the Act, the right to object to an assessment does not affect

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[15] *Metcash Trading Ltd vs Commissioner, South African Revenue Service and another* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) para 17.

[16] *Traco Marketing (Pty) Ltd and Another vs Minister of Finance and Others* [1996] 2 All SA 467 (SE).

and therefore cannot suspend the pre-existing obligation to pay the tax. Nothing in the Act provides or indicates otherwise.'[17]

[38] As the debt arose on the supply, the debt was owed when Henque made the taxable supply. The debt did not arise when the return was due or made. While income tax is levied at the end of the year of assessment in which the tax debt is owed, VAT is levied on each individual relevant transaction (a supply). SARS' pre-commencement claims for VAT are therefore, in respect of those supplies that had taken place, or were deemed to have taken place in terms of the Companies Act, prior to the commencement date.

[39] The January 2018 VAT accounting period ended on 31 January 2018, which was the commencement date of the business rescue. The end of the VAT period, 31 January 2018, coincided with the commencement date and, accordingly, all the VAT supplies made or received by Henque in January 2018 up to and including 31 January 2018 are pre-commencement claims, subject to the business rescue plan by reason of provisions of s 154(2) of the Companies Act. Henque' s liability for VAT for the 01/2018 VAT period is a claim to which SARS is entitled to be paid in terms of the dividend distribution plan, for so long as the business rescue plan is being implemented.

[40] This Court, in *Christoffel Hendrik Wiese and Others v CSARS*,[18] considered the question whether the words 'tax debt' in s 183 of the TAA contemplate an existing liability for tax, though not yet assessed. This Court had this to say:

'In this sense, a "tax debt"' is that amount of tax for which the taxpayer is chargeable to tax which is payable by a taxpayer to SARS. The determination of the amount of tax due to SARS occurs by way of assessment. An assessment, however, does not establish or impose liability. The liability exists, by operation of law, whether or not there has been an assessment. The definition of the terms "tax debt" and "assessment" bear this out. An "assessment" means "a determination of the amount of tax liability or refund, by way of self-assessment by the taxpayer or assessment

[17] Ibid at 471i. This passage was quoted with approval by Olivier JA in *Singh* at para 23
[18] *Christoffel Hendrik Wiese and Others v CSARS* [2024] ZASCA 111; [2024] 4 All SA 108 (SCA); 2025 (1) SA 127 (SCA); 87 SATC 14.

by SARS." If the definition of "tax debt" is substituted, then an "assessment" means "a determination of a tax debt" which a taxpayer is obliged to pay to SARS. The tax debt exists, with or without an assessment. An assessment merely determines it and renders it recoverable in accordance with the recovery mechanisms provided by the TAA.'[19]

In my view, both tax liabilities are pre-business rescue commencement debts, subject to payment under the business rescue plan.

Set-off

[41] The next question is whether SARS is entitled to set-off VAT refunds against income tax liability. Sections 190 and 191 of the TAA make provisions for refunds, set-off and deferral. Section 191 provides as follows:

'(1) An amount refundable under section 190, including interest thereon under section 188(3)*(a)*, must be treated as a payment by the taxpayer that is recorded in that taxpayer's account under section 165, of an outstanding tax debt, if any, and any remaining amount must be set off against any outstanding debt under custom and excise legislation.

(2) Subsection (1) does not apply to a tax debt-

(a) for which the period referred to in section 164(6) has not expired or suspension of payment under section 164 exists;

(b) in respect of which an installment payment agreement under section 167 or a compromise agreement under section 204 applies.

(3) An amount is not refundable if the amount is less than R100 or any other amount that the Commissioner may determine by public notice, but the amount must be carried forward in the taxpayer account.'

[42] Section 133(1)*(c)* of the Companies Act prohibits the application of set off to any claim against a company while in business rescue. This section provides as follows:

'(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-

(a) . . .

(b) . . .

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[19] Ibid para 29.

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began . . .'

[43] Section 191 of the TAA entitles SARS to apply for set-off of an outstanding tax debt against an amount refundable to a taxpayer and treats the amount refundable as a payment. However, the TAA recognises that tax debt is irrecoverable at law if it is subject to a business rescue plan. The provisions of s191 of the TAA can only apply if, and when, the requirements for set-off are met. Tax debts subject to a business rescue plan are therefore excluded from the operation of a section 191 set-off. As a result, SARS cannot apply set-off for a pre-business rescue debt due to it by Henque, against a post-business rescue refund it owes Henque.

[44] SARS' attempt to rely on its right in terms of the common law to set-off refunds owed to Henque against tax debts it claims are due to it, would circumvent the legislative scheme regulating the payment and recovery of tax debts in the TAA and the statutory provisions relating to business rescue in the Companies Act. In any event, even under the common law, SARS' attempt to apply set-off should fail. It does not meet the requirements for the set-off.

[45] For set-off to apply at common law, the following requirements must be established: First, mutuality between the parties, that is, a debt must be owing between the same parties in the same capacity. Second, community, that is the same kind of debt payable by each of the parties. Third, liquidity, that is both debts must be liquid or liquidated. Lastly, the reciprocal debts must be due and enforceable.

[46] In the present case, set-off is not applicable since Henque's tax debts were, by operation of law, pre-business rescue debts. The debt SARS seeks to collect by applying set off of the VAT refunds due to Henque in the course of business rescue is a pre-business rescue tax liability. The additional assessment SARS raised on 1 May 2018, related to the 2017 year of assessment. SARS initially assessed Henque for income tax on 1 January 2018 for the 2017 year of assessment. The fact that SARS raised the

assessment on 1 May 2018, after business rescue had commenced, does not change the nature of this liability. The 01/2018 VAT liability became liquid and mature when Henque submitted the self-assessment VAT return, accounting for the January 2018 VAT period to SARS on 18 March 2018. Both the income tax debt and VAT debt are pre-business rescue debts to be paid in terms of s 154(2) of the Companies Act. This section reads:

'If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.'

[47] The VAT credits became payable by SARS to Henque after the commencement of the business rescue. These credits are post-commencement credits. SARS may not apply set-off of the pre-commencement debts against the post-commencement VAT refunds.

[48] In conclusion, I find that the re-quantification of the debt in the additional assessment did not create a new liability and therefore any income tax liability that Henque owed to SARS in respect of the 2017 financial year was owed at the end of the 2017 financial year before the commencement of the business rescue on 31January 2018. That tax liability is therefore a pre-business rescue commencement liability payable in terms of the approved business rescue plan.

[49] The liability for the VAT period 01/2018 was created in terms of s 7 of the VAT Act when Henque made and received taxable supplies on or before 31 January 2018. This liability was not created when a self-assessment was made. The self-assessment merely quantified the debt. It is therefore a pre-business rescue commencement liability payable in terms of the business plan. Both the income tax and VAT debts are not capable of being set off against the VAT refunds which became payable to Henque after the commencement of business rescue.

Order

[50] In the result, the following order is granted:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the high court is set aside and substituted with the following order:

'It is declared that:

(a) any liability for income tax in terms of the Income Tax Act 58 of 1962, in respect of a period of assessment which ended on or before 31 January 2018, being the commencement date of business rescue, is a liability which was owed by the applicant prior to the commencement of business rescue and is accordingly a pre-commencement' claim;

(b) any liability for VAT in terms of the Value Added Tax Act 89 of 1991 in respect of a supply of services or goods, that took place on or before 31 January 2018 being the commencement date of business rescue, is a liability which was owed by the applicant prior to the commencement of business rescue and is accordingly a pre-commencement claim;

(c) any claims that arose prior to commencement of business rescue proceedings are not capable of being set off against the liabilities of the respondent to the applicant during the existence of the business rescue plan or until business rescue proceedings have ended or until substantial implementation of the business rescue plan.

(d) the respondent is ordered to pay the costs of the application such costs to include the costs of two counsel.'

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DH ZONDI

DEPUTY PRESIDENT

Appearances

For the appellant:	W Luderitz SC (with C J Dreyer)
Instructed by:	Fluxmans Attorneys, Johannesburg
	Lovius Block Incorporated Attorneys, Bloemfontein
For the respondent:	C Dauds (with M Molea)
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