



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case no: 42076/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED: NO

4 November 2025

In the matter between:

**THE COMMISSIONER OF THE SOUTH AFRICAN
REVENUE SERVICE**

APPLICANT

And

AFRICA CASH AND CARRY (CROWN MINES) (PTY) LTD

FIRST RESPONDENT

Registration Number: 2013/133954/07

AFRICA CASH AND CARRY (PTY) LTD

SECOND RESPONDENT

Registration Number: 2002/004971/07

JUDGMENT

Introduction

- [1] This is an interlocutory application for the admission of hearsay evidence in the main application.
- [2] This judgment is delivered by two of the three original judges due to the passing of the third judge, Rautenbach AJ.
- [3] In this judgment, I shall refer to the Applicant as SARS, the First Respondent as ACC Crown Mines and the Second Respondent as ACC.
- [4] Mr Jackie de Beer (“Mr de Beer”), a SARS official appointed as the Manager, Forensic Debt of Illicit Economy Unit, deposed to the founding and replying affidavits on behalf of SARS.
- [5] Mr Bryce David Cawood (“Mr Cawood”) deposed to the answering affidavit in his capacity as the sole appointed director of ACC Crown Mines.
- [6] It is common cause that Mr Cawood was appointed in the above capacity during October 2021 by Mr Cloete Murry (“Mr Murray”) of Sechaba Trust. Mr Murray is the curator *bonis* who was appointed based on a preservation order granted against ACC Crown Mines on 1 October 2014.
- [7] By virtue of his appointment, Mr Cawood confirms that he has no personal interest in the affairs of ACC Crown Mines, including its tax affairs and he has no personal knowledge of the facts alleged by SARS prior to October 2021 and therefore cannot dispute them. However, he suggests that this must not be construed as an admission of those facts or that a factual allegation made by SARS should be deemed to be correct.
- [8] Mr Cawood describes his role in ACC Crown Mines as follows:

“From the time of my appointment in October 2021, I have overseen Crown Mines’ business, operations and financial affairs with the knowledge and operation of the curator bonis. Crown Mines’ erstwhile directors and shareholders were not involved in the management of its business since my appointment as director.”

[9] In the main application, SARS seeks declaratory relief and asks for an order declaring that:

- a) ACC Crown Mines is jointly and severally liable to SARS for the tax indebtedness of ACC in respect of the tax periods 1 March 2002 to 28 February 2014, in the amount of R5 139 894 370.1 as at 28 October 2022, in terms of an agreement of sale entered into between ACC Crown Mines and ACC, dated 31 December 2013 (“first declarator”).
- b) ACC Crown Mines is jointly and severally liable to SARS for the tax indebtedness of ACC in respect of the tax periods 1 March 2002 to 28 February 2009, in the amount of R1 499 692 534.63 as at 28 February 2009, in terms of an undertaking given by ACC Crown Mines on or about 25 September 2015 (“second declarator”).
- c) ACC Crown Mines is jointly and severally liable for the tax indebtedness of ACC, which liability is limited to the amount of R550 million, in terms of s182 of the Tax Administration Act 28 of 2011, alternatively in terms of s183 of the Tax Administration Act, further alternatively in terms of both ss 182 and 183 of the Tax Administration Act (“third declarator”).
- d) ACC Crown Mines’s incorporation and the transfer of ACC’s business to ACC Crown Mines constitute an unconscionable abuse of the juristic personality of ACC Crown Mines as a separate entity and declaring that for purposes of recovery of ACC’s indebtedness to SARS, ACC Crown Mines is deemed not to be a separate juristic person.

- [10] There is a long-standing history between the parties to this matter, especially between SARS and ACC. So, before considering the merits of the hearsay evidence admission application, it is important to consider some background information pertaining to the main application, which is set out in the founding and replying affidavits of SARS.

Background

I. ACC's tax indebtedness for the 2003 to 2009 tax periods

- [11] On 15 June 2011, SARS issued tax assessments against ACC regarding income tax and VAT for the 2003 to 2009 tax periods. SARS' letter of assessment is annexed to this application for declaratory relief as "JDB4".
- [12] ACC objected to the assessment, which went on appeal before a full bench of the Tax Court. The latter's decision was appealed by ACC to the Supreme Court of Appeal (SCA). I refer to these two judgments later.
- [13] Ms Pretisha Khoosal, a former SARS official, who was employed as a Specialist Auditor and was mandated to manage the tax audit process regarding the tax affairs of ACC provided a report to the Tax Court, which was annexed to her affidavit. Her report addresses among others; the issues raised in the tax appeal before the Tax Court relating to the 2003 to 2009 tax periods. In this application for declaratory relief, SARS relies on Ms Khoosal's affidavit and report ("the Khoosal report") annexed as "JDB3C".
- [14] SARS claims that ACC did not dispute the content of Ms Khoosal's report; only the methodology adopted by her to determine ACC's tax indebtedness. SARS contends that the methodology is valid and was confirmed by both the Tax Court and the SCA.
- [15] SARS avers that on 28 June 2011, ACC requested a suspension of their 2003 to 2009 tax indebtedness, which was rejected by SARS on 19 August 2011. The request for suspension and SARS rejection thereof are annexed to this application for declaratory relief as "JDB14" and "JDB15".

- [16] On 6 September 2011, SARS contends that ACC made a second request for suspension of their tax indebtedness, which SARS accepted on 22 March 2012. The request for suspension and acceptance thereof are annexed to this application for declaratory relief as “JDB16” and “JDB17”.
- [17] SARS claims that it reserved its rights to request the registration of a general notarial bond over the movable assets of ACC, and this was recorded in a letter annexed to this application for declaratory relief as “JDB18”.
- [18] The terms of the suspension agreement included:
- a) ACC’s business operations would continue should the tax debt not be enforced by SARS.
 - b) ACC would hold full stock at their premises to the value of more than R300 million.
 - c) If deemed necessary, SARS could register a general notarial bond over all the movable assets of ACC.
 - d) SARS would use the retained VAT refunds to pay the undisputed portion of ACC’s VAT liability.
- [19] On 31 December 2013, ACC and ACC Crown Mines entered into an agreement of sale, in which ACC sold its business to ACC Crown Mines. A copy of the sale agreement is annexed to this application for declaratory relief as “JDB21”.
- [20] SARS claims that while preparing for the tax appeal application, ACC breached the suspension agreement by divesting and transferring the assets tendered as security, to mainly ACC Crown Mines. This knowledge was ascertained when SARS became aware of an urgent interdict application that had been brought by one of ACC’s shareholders, the Cassim Aysen Family Trust in the South Gauteng High Court (under case number 43667/2013) against the remainder of ACC’s shareholders, all family trusts, and each holding a 25% interest in ACC. The urgent interdict application is hereafter referred to as the “South Gauteng application”. A copy of the notice of motion for the South Gauteng application is annexed to this application for declaratory relief as “JDB19”.

- [21] The remaining shareholders included:
- a) The Edrees Hathurani Family Trust,
 - b) The Mohammed Edrees Hathurani Family Trust, and
 - c) The Iqbal Ahmed Hathurani Family Trust.
- [22] SARS refers to the above three shareholders collectively as the Hathurani Family Trusts, and I shall do the same.
- [23] ACC's directors were Mr Cassim Aysen and Mr Mohammed Edrees Hathurani.
- [24] In the South Gauteng application, Mr Aysen claims that the Hathurani Family Trusts were unlawfully transferring the business and assets of ACC to ACC Crown Mines, and that the transfer was prejudicing the Aysen Trust as a shareholder of ACC.
- [25] SARS relies on Mr Aysen's affidavits regarding how the business and assets of ACC were divested and dissipated to ACC Crown Mines so that ACC Crown Mines took over among others, the trading premises, fixtures, fittings, stock, computer and other equipment, telephone systems and numbers, employees, accounting systems, debtors, and suppliers of ACC. Extracts of Mr Aysen's founding and replying affidavits are annexed, respectively, to this application for declaratory relief as "JDB24" and "JDB26".
- [26] SARS relies further on Mr Hathurani's answering affidavit in the South Gauteng application on behalf of ACC, ACC Crown Mines and the Hathurani family trusts, in which he confirms a winding-down of ACC, involving a divestment of its assets and business to ACC Crown Mines. An extract of Mr Hathurani's answering affidavit is annexed to this application for declaratory relief as "JDB25".
- [27] The South Gauteng matter was settled and an agreement between the parties was made an order of court ("South Gauteng order") on 6 December 2013. The order is attached to this application for declaratory relief as "JDB20". The effect of the settlement agreement was that the Cassim Aysen Family Trust sold its entire 25% shareholding in ACC to Edress Hathurani Trust.

- [28] On 2 July 2014, SARS launched an application for a preservation order to secure the assets of ACC and ACC Crown Mines as well as those of the shareholders and directors of ACC and ACC Crown Mines. SARS took the view that ACC Crown Mines is potentially liable for the tax debts of ACC and therefore notified ACC Crown Mines that it intended holding them liable for the tax debts of ACC. SARS founding affidavit in the preservation application is annexed to this application for declaratory relief as “JDB22”.
- [29] SARS contends that no guarantee was provided by ACC Crown Mines and that its acceptance of liability does not qualify as a guarantee. To support this contention, SARS annexed an extract of its answering affidavit in the preservation application to this application for declaratory relief as “RA5”.
- [30] On 10 July 2014, a provisional preservation order was granted, which was made final on 1 October 2014. As mentioned in the introduction to this judgment, Mr Murry was appointed as a curator *bonis* to oversee all of ACC and ACC Crown Mines’ assets.
- [31] On 14 July 2015, Mr Murray brought an application for contempt of court against Mr EA Hathurani and the other Hathuranis. The reason for the application was that the Hathurani’s had been acting in contempt of the preservation order of 1 October 2014. In a supplementary affidavit filed by one of the respondents, Ms Faayza Hathurani, she requested that her father, Mr EA Hathurani should not attend at the business premises of ACC until the tax appeal was finalised. Mr Hathurani agreed, and it was made an order of court on 11 March 2016. The application for contempt of court, the affidavits linked to it and the court order are respectively annexed to this application for declaratory relief as “JDB47” to “JDB50”.
- [32] On or about 13 August 2014, SARS revoked the suspension agreement due to among others, a material change in circumstances upon which the agreement had been based, and a demand against ACC and ACC Crown Mines was made for payment. SARS also claims that it gave ACC an opportunity to make written

representations as to why the suspension agreement should not be revoked. SARS' letter to ACC is annexed to this application for declaratory relief as "JDB27".

- [33] On or about 27 August 2014, the respondents in the preservation application filed an application for postponement. SARS alleges that in the founding affidavit of the postponement application, the respondents did not take issue with whether ACC Crown Mines could be held liable for the tax debts of ACC. The founding affidavit of the postponement application is annexed to this application for declaratory relief as "JDB23".
- [34] Between 19 August 2014 and 22 October 2014, several more correspondences were addressed between SARS, ACC and ACC Crown Mines, in which further requests for suspension of their tax indebtedness were made, which were all declined by SARS. These correspondences are annexed to this application for declaratory relief as "JDB28" to "JDB33".
- [35] SARS claims that ACC Crown Mines actively participated in the various requests for suspension of ACC's payment of its tax debts and offers a copy of a letter dated 1 September 2015 in support thereof, which is annexed to this application for declaratory relief as "JDB54".
- [36] In a letter dated 28 August 2015, SARS informed ACC Crown Mines that it intends holding it liable for its acceptance of liability for ACC's tax indebtedness. SARS further refers to letters dated 31 October 2014, 6 November 2014 and 25 September 2015 by ACC Crown Mines's legal representatives, which confirm ACC Crown Mines's liability. Copies of these letters are annexed to this application for declaratory relief as "JDB57" to "JDB60".
- [37] On 10 September 2015, SARS declined the request for suspension and invited ACC to make a payment proposal for consideration by SARS. A copy of this letter is annexed to this application for declaratory relief as "JDB55". ACC's response was recorded in a letter dated 14 September 2015, which is annexed to this application for declaratory relief as "JDB56".

- [38] In a letter dated 26 November 2015, SARS contends that Mr EA Hathurani's legal representative wrote to Mr Murray, advising about Mr Haruthani's role in ACC Crown Mines. A copy of this letter is annexed to this application for declaratory relief as "JDB51".
- [39] On 16 June 2016, the Hathuranis and ACC Crown Mines brought an application to vary the preservation order. In its founding affidavit deposed to by Ms Hathurani, she confirms that ACC Crown Mines furnished guarantees for the tax debt to the extent it is confirmed by the Tax Court. An extract of the affidavit is annexed to this application for declaratory relief as "JDB64".
- [40] SARS further relies on correspondences it obtained during its preparation of the tax appeal, which speak to the liquidation of ACC and that its business was continued by ACC Crown Mines. These correspondences are annexed to this application for declaratory relief as "JDB52" and "JDB53".
- [41] During the course of the tax appeal, SARS contends that it compiled a list of issues to be considered at the pre-trial conference of 15 October 2015, which was responded to by ACC and ACC Crown Mines's legal representative. SARS claims that the response by the latter records ACC Crown Mines's acceptance of liability for ACC's tax indebtedness, that ACC Crown Mines took transfer of ACC's business and assets on 1 November 2013, and that SARS would be entitled to among others, recover the amount for which ACC Crown Mines had accepted liability and as established by the judgment in the tax appeal. These documents are annexed to this application for declaratory relief as "JDB61" and "JDB62".
- [42] SARS annexes ACC Crown Mines's power of attorney to act on behalf of ACC Crown Mines to this application for declaratory relief as "JDB63".
- [43] On 16 May 2018, the Tax Court delivered its judgment¹ and amended the assessments, which SARS then changed on 21 May 2018, in accordance with the judgment and issued a letter of demand on 13 June 2018 to ACC based on the revised assessments. The judgment of the Tax Court, SARS' altered assessments

¹ *ABC (Pty) Ltd v Commissioner for the South African Revenue Service* [2018] JOL 40512 (TC).

and its letter of demand are annexed to this application for declaratory relief as “JDB5”, “JDB6” and “JDB34”.

- [44] SARS avers that the tax indebtedness of ACC regarding the 2003 to 2009 tax periods arose from a sale suppression system applied by ACC to evade the payment of tax. SARS contends that this evidence was placed before the Tax Court and was not disputed by ACC.
- [45] ACC’s appeal against the judgment of the Tax Court to the Supreme Court of Appeal (SCA) on 21 November 2019 was dismissed with costs.² The judgment of the SCA is annexed to this application for declaratory relief as “JDB7”.
- [46] SARS claims that it levied section 89(2) interest on the outstanding balance of R647 596 801.42 for the 2003 to 2009 tax periods. A copy of the statement of account is annexed to this application for declaratory relief as “JDB8”.
- [47] On 18 June 2018, prior to the hearing of the SCA, ACC had submitted a further request for suspension of payment and of its obligation to make payment, which SARS had declined on 1 October 2019. A copy of the letter containing SARS’ rejection is annexed to this application for declaratory relief as “JDB35”.
- [48] On 28 February 2020, ACC requested a compromise for its tax indebtedness for the 2003 to 2009 tax periods, which SARS similarly rejected on 19 March 2020.
- [49] SARS contends that in the above request for compromise, ACC confirms its inability to make payment of its tax indebtedness and its insolvency. A copy of the letter containing the compromise request with privileged portions redacted and SARS’ rejection of the compromise offer are annexed to this application for declaratory relief as “JDB37” and “JDB38”.
- [50] A further compromise offer was submitted by ACC and ACC Crown Mines on 29 March 2020 regarding their tax indebtedness for the 2003 to 2009 tax periods. The compromise offer dated 17 June 2020 is annexed to this application for declaratory relief as “JDB39”. Negotiations ensued between the parties, which resulted in SARS providing an agreement for signature. The latter agreement is

² *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* 2020 (2) SA 19 (SCA).

annexed to this application for declaratory relief as “JDB40”. Further correspondence followed between the parties concerning the wording of the agreement, culminating in a letter containing a final agreement offered by SARS, which is annexed to this application for declaratory relief with annexures as “JDB41”.

[51] However, ACC and ACC Crown Mines withdrew from the compromise agreement on 7 September 2020. A copy of the withdrawal is annexed to this application for declaratory relief as “JDB42”.

[52] SARS avers that part of the above compromise offer included resolutions by shareholders and directors of connected parties such as Elephante Import and Export (Pty) Ltd (“Elephante”), which SARS claims confirms the shareholders of Elephante’s acceptance of ACC Crown Mines’s liability for the tax debts of ACC. The relevance of including Elephante in its application for declaratory relief is that three of the shareholders of ACC are also shareholders of Elephante. The resolutions are attached to this application for declaratory relief as “JDB72” and “JDB73”.

[53] In a letter dated 28 July 2022, ACC Crown Mines’s legal representatives confirmed that their client denies liability in law to SARS for the tax debts of ACC. On 10 August 2022, SARS requested that ACC Crown Mines provide the facts and legal basis for their denial of liability, to which ACC Crown Mines’s legal representative responded that they were not obliged to disclose their internal findings. These letters are annexed to this application for declaratory relief as “JDB74” to “JDB76”.

[54] During May 2022, Elephante and its shareholders, being the same three shareholders of ACC launched an application against SARS, seeking a payment of funds held in the trust account of SARS’ attorneys. SARS claims that in their replying affidavit deposed to by Ms Faayza Hathurani, ACC Crown Mines’s acknowledged liability for the tax debts of ACC. A copy of the notice of motion and extracts of SARS’ answering affidavit and Elephante’s replying affidavit are respectively annexed to this application for declaratory relief as “JDB77” to “JDB79”.

II. ACC's alleged tax indebtedness for the tax periods 2010 to 2014

- [55] SARS claims that ACC submitted VAT returns for the tax periods 2012 to 2014, which also resulted in a tax debt based on SARS' assessments. SARS avers that ACC did not object to these assessments. The statements of account for the periods 2012-2014 are annexed to this application for declaratory relief as "JDB9".
- [56] SARS contends that the financial statements for the 2012 financial year of ACC and its draft financial statements for the 2013 financial year show that ACC Crown Mines took over all the known assets and liabilities of ACC, which included the loan accounts of the remaining shareholders. These statements are annexed to this application for declaratory relief as "RA1" and "RA2".
- [57] SARS additionally annexed a copy of ACC's unaudited, unreviewed financial statements for the year ended 28 February 2013 to this application for declaratory relief. These statements were provided by SARS to PwC who conducted an analysis of the financial records and provided an expert opinion regarding the valuation of ACC. The purpose of the valuation was to determine the market value of ACC's business that would have been available to remunerate SARS' claims against ACC. This business is now no longer available due to the transfer of ACC's business to ACC Crown Mines. The statements and affidavit confirming the expert report by PwC are annexed to this application for declaratory relief as "JDB80" and "JDB81".
- [58] Based on the financial statements of ACC Crown Mines for the year ended 28 February 2021 (annexed to this application for declaratory relief as "RA3"), PwC valued the shareholder's loans as R71.6 million and concluded a total equity value comprising ordinary equity and shareholder loans of between R550 million and R625 million on a non-marketable, controlling basis. ACC Crown Mines disputes the valuations and offers valuation findings by DG Capital, which places the valuation at R191 million. Nevertheless, ACC Crown Mines argues that the shareholder loans should be deducted from any presumed liability on their part.

- [59] SARS annexes an affidavit deposed to by Mr Groenewald of PwC to this application for declaratory relief as “RA4”, which among others, highlights the differences between the reports of PwC and DG Capital.
- [60] During November 2018, SARS raised additional income tax assessments against ACC for the 2010 to 2014 tax periods. Copies of the letter- and notices of assessment are annexed to this application for declaratory relief as “JDB10” and “JDB11”.
- [61] SARS claims that ACC initially objected to the above assessments but withdrew the objection on 14 October 2020. As a result, SARS advised ACC that their total liability was due and payable, which is recorded in its letter annexed to this application for declaratory relief as “JDB43”.
- [62] SARS contends that it issued statements of account for income tax and VAT against ACC as at 28 October 2022, which are annexed to this application for declaratory relief as “JDB12” and “JDB13”.
- [63] On 5 December 2018, ACC submitted a request for suspension of its tax indebtedness for the 2010 to 2014 tax periods, which was declined by SARS on 1 October 2019. A copy of the letter containing SARS’ response is annexed to this application for declaratory relief as “JDB36”.
- [64] On 16 October 2019, ACC submitted a settlement proposal regarding its tax indebtedness for the 2010 to 2014 tax periods, which was also declined by SARS on 14 February 2020.
- [65] On 14 October 2020, ACC withdrew its objection to the assessments for the 2010 to 2014 tax periods, and submitted a compromise offer, which was rejected by SARS on 25 March 2021. A copy of the rejection letter is annexed to this application for declaratory relief as “JDB44”.
- [66] On 16 March 2021, the legal representative for ACC Crown Mines addressed a letter to SARS’ legal representative, in which ACC Crown Mines’s liability for the tax debts of ACC is disputed. In their reply on 23 March 2021, SARS’ legal representative reiterated ACC Crown Mines’s contractual acceptance of

responsibility for ACC's tax liability. Copies of these letters are annexed to this application for declaratory relief as "JDB68" and "JDB69".

- [67] On 26 May 2021, ACC launched an application to review and set aside SARS' decision to reject its compromise offer, which application was withdrawn by ACC on 29 October 2021. Copies of the notice of motion for the review application and ACC's withdrawal of the application are annexed to this application for declaratory relief as "JDB45" and "JDB46".
- [68] SARS states that it is astonished by ACC Crown Mines's denial of liability seeing that in a letter dated 20 March 2020 by ACC Crown Mines's legal representative addressed to Ms Hathurani, ACC Crown Mines accepted liability for ACC's tax debts. The letter is annexed to this application for declaratory relief as "JDB70".
- [69] On 29 March 2021, ACC Crown Mines launched an urgent application to interdict SARS from collecting on a disputed VAT assessment that was raised against it. In the interdict application, ACC Crown Mines denies liability for the tax debts of ACC. In its answering affidavit, SARS denies the claims of ACC Crown Mines. The interdict application is annexed to this application for declaratory relief as "JDB65" and "JDB66".
- [70] Judgment for the interdict application was delivered on 31 May 2021 and vindicates SARS. A copy of the judgment is annexed to this application for declaratory relief as "JDB67".
- [71] Part B of the urgent interdict application was a review application, which ACC Crown Mines did not pursue.
- [72] SARS has launched an application for the liquidation of ACC and annexes an extract of the answering affidavit deposed to by Mr ME Hathurani in this application for declaratory relief as "JDB71".

Hearsay evidence application

- [73] Mr Coetzee, counsel for SARS, argued that it was necessary to include hearsay evidence in its main application to provide background information that is crucial to understanding the relationship between ACC and ACC Crown Mines and the

reason for the formation of the latter, which SARS contends was to evade the tax liabilities of ACC. For this reason, SARS relies among others, on the evidence of parties and judgments from previous proceedings, as well as correspondences between the parties, especially prior to the main application.

[74] According to Mr Coetzee, SARS was unable to obtain confirmatory affidavits from the parties involved in previous proceedings, in particular the Hathuranis as they declined to participate in these proceedings.

[75] In his answering affidavit, Mr Cawood contends that evidence from other proceedings is only admissible in strict circumstances, and that the evidence that SARS seeks to admit does not apply to these proceedings.

[76] More specifically, Mr Swanepoel, counsel for ACC Crown Mines, maintained that the affidavits and judgments from other proceedings, as well as correspondences between the parties constitute hearsay evidence and should not be admitted.

[77] The first question to consider is whether the evidence and judgments from previous proceedings and the correspondences between the parties that SARS seeks to rely on constitute hearsay evidence. If the answer to this question is in the affirmative, then the second question is whether the evidence comprise exceptions to the hearsay rule.

[78] Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 (“the LEA Act”) defines hearsay evidence as

“evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.”

[79] Regarding the judgments referred to in SARS’ affidavits, they are matters of public record and do not constitute hearsay evidence.

[80] In contrast, the correspondences between the parties, especially those relating to previous proceedings do constitute hearsay evidence because affidavits confirming their contents by the authors of the correspondences are not provided by SARS.

[81] Regarding evidence from previous proceedings in the form of affidavits, the Constitutional Court in *Rand Refinery Limited v Sehunane N.O.*³ (“*Rand Refinery*”) confirmed that it is hearsay evidence. At paragraph 22, the Court stated:

“The procedure which Mr Maseko followed – simply attaching copies of affidavits made by others in High Court litigation – was not strictly correct. The attached copies were hearsay evidence in the Labour Court. If Mr Maseko wanted Mr Mulafhi’s evidence in the High Court to be adduced in the Labour Court, he should have obtained a new affidavit from Mr Mulafhi. A copy of evidence given by a witness in earlier proceedings is not admissible in later proceedings merely because the witness gave the earlier evidence under oath.”

[82] In *Fourie v Morley* (“*Fourie*”),⁴ Broome J found that the record of previous proceedings could nevertheless be admitted as evidence if there was implied or express consent of both parties.⁵

[83] The *Fourie* case was decided before the *Rand Refinery* case and before the enactment of the LEA Act. Broome J’s finding in *Fourie* appears to have been codified as a hearsay rule exception in section 3(1)(a) of the LEA Act, which is set out below.

[84] Section 3(1) of the LEA Act sets out exceptions to the hearsay rule as follows:

“Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
- (c) the court, having regard to-*

³ 2023 (12) BCLR 1511 (CC).

⁴ 1947 (2) SA 218 (N).

⁵ Ibid at 222. As authority for the proposition, the Court refers to the case of *African Guarantee and Indemnity Co. Ltd v Moni* 1916 AD at 532.

- (i) *the nature of the proceedings;*
- (ii) *the nature of the evidence;*
- (iii) *the purpose for which the evidence is tendered;*
- (iv) *the probative value of the evidence;*
- (v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
- (vi) *any prejudice to a party which the admission of such evidence might entail; and*
- (vii) *any other factor which should in the opinion of the court be taken into account,*

is of the opinion that such evidence should be admitted in the interests of justice.”

[85] The promulgation of the LEA Act was both a recognition of the law as enunciated in *Fourie* and a mechanism to relax the strict rule pertaining to hearsay evidence. The long history of this matter was canvassed to assess whether the evidence sought to be admitted by SARS fits into any of the provisions set out in section 3(1), including any other factors that in the opinion of the Court should be considered for the admission of hearsay evidence in the interests of justice.

[86] Section 3(1)(a) of the LEA Act is of relevance to some of the evidence from previous proceedings, particularly the very evidence that ACC Crown Mines engages in the answering affidavit of Mr Cawood, but seeks to exclude as hearsay evidence namely:

[86.1] At paragraph 80.5, ACC Crown Mines argues that the Khoosal report in relation to an ooplant system through which income was not reported pertained only to ACC and not to ACC Crown Mines.

[86.2] At paragraphs 85.3.1 and 85.3.2, reference is made to specific paragraphs in the answering affidavit of Mr ME Hathurani in the South Gauteng application to refute the claim that all of ACC’s assets were transferred to

ACC Crown Mines and to suggest that ACC Crown Mines only received rebates regarding stock that it had sourced from its suppliers.

[86.3] At paragraphs 100.4. and 100.4.2, ACC Crown Mines again refers to the answering affidavit of Mr Hathurani in the South Gauteng application and contends that SARS incorrectly conveyed the contents thereof.

[86.4] At paragraph 100.4.1, ACC Crown Mines suggests that allegations made by Mr Aysen in his founding affidavit in the South Gauteng application were disputed by Mr Hathurani in his answering affidavit.

[87] The fact that ACC Crown Mines's engaged with the Khoosal report (annexed to Ms Khoosal's affidavit), Mr Aysen's founding affidavit, and Mr Hathurani's answering affidavit in the South Gauteng application indicates implicit consent to those affidavits being used in these proceedings, and on the basis of section 3(1)(a) of the LEA Act are admissible in the main application.

[88] Even if I am wrong in my conclusions regarding the Khoosal report, Mr Aysen's founding affidavit, and Mr Hathurani's answering affidavit, their admission, together with the remaining evidence that SARS seeks to admit from previous proceedings and the correspondences between the parties must be considered in terms of section 3(1)(c) of the LEA Act.

[89] In *Makhathini v Road Accident Fund*,⁶ the SCA stated that:

"[27] The purpose of the Act is to allow the admission of hearsay evidence in circumstances where justice dictates its reception. In Metedad v National Employers General Insurance Co Ltd 1992 (1) SA 494 (W) it was stated as follows at 498 I-499 G:

"It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any

⁶ 2002 (1) SA 511 (SCA).

uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value. ...There is no principle to be extracted from the Act that it is to be applied only sparingly. On the contrary, the court is bound to apply it when so required by the interests of justice."

In each case the factors set out in s 3(1)(c) are to be considered in the light of the facts of the case. The weight to be accorded to such evidence, once it is admitted, in the assessment of the totality of the evidence adduced, is a distinct question.

[28] The factors set out in s 3(1)(c)(i)-(vii) should not be considered in isolation. One should approach the application of s 3(1)(c) on the basis that these factors are interrelated and that they overlap. See Hewan v Kourie NO and Another 1993(3) SA 233 (T) at 239 B - C and Schmidt and Rademeyer's Bewysreg, supra, at 481 where the learned authors state:

‘Soos reeds uit die voorafgaande bespreking van die afsonderlike faktore sou blyk, behoort 'n hof nie die faktore onafhanklik, en sonder inagneming van die ander, in ag te neem nie. Die afsonderlike faktore hou tot 'n hoë mate op verskillende vlakke met mekaar verband, en elkeen kan gevolglik net effektief in aanmerking geneem word indien die hof, in die oorwegingsproses, die impak en invloed van die ander ook in die weegskaal plaas.’”

- [90] It is therefore not necessary to deal with each of the factors in section 3(1)(c) separately. They are interrelated and I accordingly consider them cumulatively.
- [91] Having regard to the background information provided by SARS, it is clear that an integral connection exists between ACC and ACC Crown Mines. To determine SARS’ application for declaratory relief, that background information is necessary to understand why SARS is seeking the relief that it claims. And the background information cannot be properly understood without reference to the judgments, affidavits and extracts of affidavits from previous proceedings as well as the correspondences between parties that SARS includes in its founding and replying affidavits. All this information forms a significant part of the narrative about ACC

and ACC Crown Mines's relationship and the purpose for which ACC Crown Mines was established. Therefore, they are relevant to the main application.

[92] As mentioned previously, on SARS' version, confirmatory affidavits by the persons who were engaged in the previous proceedings cannot be obtained because they do not wish to participate in these proceedings. Yet, their evidence and the correspondences between parties referred to in SARS' founding and replying affidavits are pertinent to the main application and provide important context for this court to consider SARS' main application. This is especially so in relation to SARS' contention that the sale of ACC's business and dissipation of its assets to ACC Crown Mines was unlawful, ostensibly demonstrating a pattern of tax evasion by the directors and shareholders of ACC who were also the same directors and shareholders of ACC Crown Mines.

[93] Mr Swanepoel correctly argued that witnesses cannot be called for the purpose of cross-examination in motion proceedings. Nevertheless, the affidavits from previous proceedings were made under oath and the judgments in which those affidavits were used would have considered the probative value of the evidence, which should be clear in the decisions delivered. Moreover, as I have already indicated, the evidence of the previous proceedings has a direct bearing on the main application as they provide necessary insight into ACC Crown Mines's potential liability for ACC's purported tax liabilities.

[94] Similarly, the correspondences between the parties also potentially offer crucial insight into the background and context for the main application and the weight attached to them can be ascertained during the main application.

[95] While admission of the aforesaid evidence may very well prejudice ACC Crown Mines, if there was indeed collusion between ACC and ACC Crown Mines to evade the tax liabilities of ACC then a greater prejudice would be suffered by the fiscus of this country, especially since the tax liabilities of ACC potentially run into millions of rands.

[96] It is therefore my considered view that admission of the hearsay evidence in the main application is necessary to advance the interests of justice.

[97] I accordingly find that the evidence from previous proceedings including judgments, affidavits, extracts of affidavits, and correspondences in the form of letters and emails is admissible in the main application. To be clear, this means that the whole of SARS' founding and replying affidavits including annexures, are admissible in the main application.

[98] Costs are costs in the cause.



W AMIEN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

I agree,

G MALINDI
JUDGE OF THE HIGH COURT
PRETORIA

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Judgment number: 42076/2022

Date heard: 6 August 202

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is **4 November 2025**.