REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:66096/2020

1. REPORTABLE: **NO**/YES
2. OF INTEREST TO OTHER JUDGES: **NO**/YES
3. REVISED.

2022/05/20

SIGNATURE DATE

In the matter of:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **Applicant/ Defendant**

AND

MORGAN BEEF (PTY) LTD **Respondent/Plaintiff**

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY EMAIL. THE DATE AND TIME OF HAND DOWN IS DEEMED TO BE 20 MAY 2022

A. Introduction

1. This is an opposed application for separation of the issue of prescription, in terms of Rule 33 (4) of the Uniform Rules. In the background to this application are action proceedings lodged in terms of section 47 (9) (e) of the Customs and Excise Act[1], (the Act), by the present respondent or the plaintiff in the underlying action. As part of his defence in the underlying action, the applicant (defendant) raised the special plea of prescription. In the present proceedings, the applicant seeks an order that will see the special plea of prescription determined separately, while the remainder of the issues of merits and quantum are stayed for later determination.

2. Rule 33 (4) states:

> 'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

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[1] Act 91 of 1964, as amended

3. To the extent necessary, I shall soon set out the background of how litigation arose between the parties. For now, it needs to be mentioned that the applicant submits that the question of prescription can be decided separately and conveniently, in order to save costs. On the first issue of convenience, the applicant says prescription is a legal issue that involves interpretation and argument. As such, no evidence need be led. In so far as the question of saving costs, the applicant points to the projected duration of four weeks over which the trial will be held and suggests that deciding the special plea on its own will save costs, in the event its special plea is upheld.

4. The respondent opposes the application on the basis that there is no convenience to be achieved with the separation. The respondent places reliance on several previously decided cases of Superior Courts on how this court must go about in deciding this application. Of the factors this court must consider before granting an order of separation, the respondent says the applicant has not successfully demonstrated a single one of those factors. The respondent points to overlap of evidence and urges this court to refuse the separation and award costs in its favour. I begin by introducing the parties.

B. Parties

5. The applicant is the Commissioner for the South African Revenue Service (CSARS), appointed in terms of section 6 of the South African Revenue Service Act[2], with its head

[2] Act 34 of 1997

office at Lehae la SARS, 271 Bronkhorst Street, Nieuw Muckleneuk, Pretoria, Gauteng. The applicant is charged with, *inter alia*, the administration of the Act. I use CSARS and SARS to refer to the same person in this judgement. The respondent is Morgan Beef (Pty) Ltd. (Morgan Beef or Morgan), a company incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at Farm Couwenburg, located in Delmas district, Mpumalanga.

C. Background

6. Morgan Beef conducts qualifying farming activities in terms of the Act. These include operating a feedlot and an agronomy department where maize and soya beans are planted and harvested. The feedlot activities include purchasing cattle, feeding and catering for the wellbeing of cattle, and marketing. It is said that on average, the feedlot holds in excess of 25 000 cattle at any given moment. Morgan Beef is registered as a vendor in terms of value added tax (VAT) and a diesel refund user[3] for purposes of the Act. As a registered diesel refund user, Morgan Beef has certain responsibilities. Broadly, and pertinent in the context of this application, is the duty to keep records. The records include: particulars of purchase, use, storage of fuel, invoices and books of accounts. The Act further mandates Morgan to furnish such records as may be requested by the Commissioner[4].

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[3] Section 75 (1C) (b) provides: ...
(i) "user" shall mean, according to the context and subject to any note in the said Schedule No. 6, the person registered for a diesel refund as contemplated in subsection (1A);
[4] Section 75 (4A) (a)....(c)

7. At the heart of the dispute between the parties is a letter of demand and rejection (letter of demand) sent by SARS to Morgan Beef, dated 5 October 2018. The letter can be traced back to events that began in 2015. They are: On 29 July 2015, SARS issued a Letter of Engagement to Morgan Beef. This letter was followed by the Letter of Intent to Assess, issued by SARS on 7 August 2018. In this letter and pursuant to an audit conducted by SARS to satisfy itself of Morgan's compliance with the provisions of Act, SARS recorded its *prima facie* findings and invited Morgan Beef, as a user of diesel refund, to provide information and make any submission it wished to rely on, to demonstrate compliance with the requirements of the Act. Following two requests for extension, with the last extension agreed between SARS and Morgan being 3 October, SARS issued the letter of demand on 5 October 2018, on the basis that Morgan had failed to provide the information.

(d) Any user shall complete and keep such books, accounts and documents and furnish to the Commissioner at such times such particulars of the purchase, use or storage of such fuel or any other particulars as may be prescribed in the notes to item 670.04.

(e) (i) Notwithstanding anything to the contrary contained, in this Act, any user of distillate fuel who has been granted such refund and who fails to-
(aa) keep any such invoice;
(bb) complete and keep such books, accounts and documents; or
(cc) forthwith furnish any officer at such officer's request with such invoice and the books, accounts and documents required to be completed and kept, shall, in addition to any other liability incurred in terms of this Act in respect of the fuel to which such failure relates, be liable, as the Commissioner may determine, for payment of an amount not exceeding the levies refunded on such fuel, unless it is shown by the user within 30 days of the date of any demand for payment of such amount, in terms of this section, that the fuel has been used in accordance with the provisions of the said item of Schedule No. 6.

8. According to SARS, this is the date when Morgan Beef's right of action first arose. By SARS' reckoning, Morgan Beef's right to institute legal proceedings against SARS, arising from the letter of demand, became prescribed by 5 October 2019[5].

9. It is necessary to record that Morgan Beef denies receiving or that the letter of demand came to its attention on 5 October 2018. It explains why the letter did not come to its attention on 5 October 2018. Morgan Beef says that the first time it became aware of the letter of demand was on 20 March 2020, following its investigation as to the reasons SARS was not honouring Morgan's claims for employee tax incentives (ETI). From that point onwards, Morgan Beef took its first steps towards challenging SARS by lodging an internal appeal on 23 March 2020. The appeal was rejected by SARS on 5 August 2020. On 28 September 2020, Morgan Beef issued a notice to commence legal action against SARS; this notice is required in terms of section 96 of the Act. The notice was followed by Morgan's institution of legal proceedings on 15 December 2020. In defending the action, SARS raised the point that Morgan's right to institute any legal proceedings against it — arising from the letter of demand —- had prescribed. That, in a nutshell, is how the issue of prescription arises.

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[5] Section 96 (b) (b) Subject to the provisions of section 89, the period of extinctive prescription in respect of legal proceedings against ... the Commissioner or an officer on a cause of action arising out of the provisions of this Act shall be one year and shall begin to run on the date when the right of action first arose

D. Law

10. In the course of scrutinising this application and ensuring that it meets the objects of Rule 33 (4), this court must observe certain principles. They are set out in the Constitutional Court case of *Makate* v *Vodacom (Pty) Ltd,* where Jafta J, writing for the majority noted:

> 'Since the coming into force of the Constitution in February 1997, every court that interprets legislation is bound to read a legislative provision through the prism of the Constitution. In *Fraser*, Van der Westhuizen J explained the role of section 39(2) in these terms:
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> > "When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation."
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> It is apparent from *Fraser* that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question....'It cannot be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution. Therefore, in construing those provisions, the High Court was obliged to follow section 39(2), irrespective of whether the parties had asked for it or not. This is so because the operation of section 39(2) does not depend on the wishes of litigants. The Constitution in plain terms mandates courts to invoke the section when discharging their judicial function of interpreting legislation. That duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights.'[6]

(CCT52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) (26 April 2016), at paragraph 87 to 90

11. In addition to promoting the spirit and objects of the Constitution, this court has a duty to carefully scrutinise an application for separation and satisfy itself that the separation will result in an expeditious resolution of the issues in the case. In such evaluation, this court must anticipate how litigation going forward might unfold. This means taking into account the possibility that an aggrieved party may, instead of living with the outcome, pursue an appeal, which will further delay the resolution of the case. In *Denel (Pty) Ltd* v *Vorster* the Supreme Court of Appeal admonishes:

> '... it is appropriate to make a few remarks about separating issues. Rule 33(4) of the Uniform Rules – which entitles a court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though at first sight they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately...'[7]

12. The word convenience is not to be understood only in the sense of facilitation of expeditious resolution of litigation, it includes fairness to both parties. In *Copperzone 108 (Pty) Ltd and Another v Gold Port Estates (Pty) Ltd and O,* the court said:

> 'It follows that a court seized with such an application has a duty to carefully consider the application to determine whether...will facilitate the proper, convenient and expeditious disposal of litigation. The notion of convenience is much broader than mere facility or ease or expedience. Such a court should also take due cognisance of whether separation is

[7] 2004 (4) SA 481 (SCA) at para [3]

appropriate and fair to all the parties. In addition, the court, considering an application for separation, is also obliged in the interests of fairness to consider the advantages and disadvantages which might flow from such separation. Where there is a likelihood that such separation might cause the other party some prejudice, the court may, in the exercise of its discretion, refuse to order separation. Crucially, in deciding whether to grant the order or not, the court has a discretion which must be exercised judiciously.'[8] [See also *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association*[9]]

E. Separation Arguments

(i) Alleged contradictions in Morgan's case on the question of the letter of demand

13. In laying the foundations of his case, the applicant began by tracing the common cause background facts. These are: (i) the letter of engagement issued by SARS to Morgan Beef on 29 July 2015; (ii) the letter of intent to assess of 7 August 2018, wherein SARS laid bare its *prima facie* findings and invited Morgan Beef, as a user of diesel refund, to provide information and make any submission it wished to rely on, to demonstrate compliance with the requirements of the Act; (iii) the two requests for extension of 12 and 21 September 2018, granted by SARS at the of Morgan Beef. In terms of the last request of 21 September, Morgan Beef was to provide its information by 3 October 2018; (iv) and finally, the issuing of the letter of demand on 5 October 2018.

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[8] (7234/2013) [2019] ZAWCHC 34 (27 March 2019), at paragraph 23
[9] (106/2018) [2018] ZASCA 176 (3 December 2018), paragraph 2

14. The applicant then sets out what he labels contradictions in Morgan's version with regard to the letter of demand. It is necessary to look at these before going any further with the matter.

14.1 Firstly, the applicant refers to Morgan's statement during the process of pursuing its internal appeal, wherein Morgan stated that its IT specialists, Techfusion, confirmed that an email from SARS came through but they could not determine whether it was treated as spam mail.

14.2. The applicant also refers to Morgan's answering affidavit, wherein it disputed that the e-mail and the letter of demand came to the attention of Pretorius.

14.3 Finally, the applicant refers to Morgan's replication wherein Techfusion stated that they could not find any evidence that the letter of demand was received by Pretorius.

15. At the beginning of this case and in the course of setting out the background detail, I had mentioned that it was necessary to highlight that Morgan Beef denies that the letter of 5 October 2018 came to Pretorius' attention on that same date. SARS had been communicating with Morgan through emails with Morgan's Chief Financial Officer, Pretorius. Morgan Beef filed an affidavit deposed to by Pretorius, in which the latter traces the background of how he and his colleague, one Colyn, came into contact with the letter for the very first time in 2020. When one reads the parties' papers, it is clear there is a dispute of fact in this regard. Nonetheless, in developing this point, the applicant states that the letter of demand was sent to the email address used by Pretorius in previous communication to SARS, and Techfusion confirmed that the email

from SARS had been received, all of which is not in dispute. The applicant then goes a step further and contends that the letter of demand was received by Morgan Beef on 5 October 2018; however, due to reasons unknown to SARS, Morgan Beef chose not to take any further action at that stage and only acted proactively for the first time in 2020. The applicant adds that Morgan's institution of the internal appeal in 2020 was nothing more than a belated attempt at interrupting prescription.

16. The part that the applicant leaves out is the fact that although Techfusion confirmed that such an email came through, they could not confirm whether the mail was treated as email spam and landed in junk mail[10]. Be that as it may, other than highlighting the principle that motion proceedings are not suitable to resolve disputes of fact[11], it is unclear what value the applicant's latter statement adds to his case for separation. Morgan is on record stating how and why the letter only came to the attention of its employee, Pretorius, for the first time on 11 March 2020. Whether there is merit in Morgan's statement, that dispute cannot be overcome in these proceedings. To do so, this court must find that Morgan's defence is so unmeritorious, so far-fetched, untenable, and palpably impossible such that the court would be justified in rejecting its version on paper[12]. In the circumstances of this case, this court is not in a position to come to that conclusion. After all, it is not unusual for people to not receive emails sent to them by legitimate sources or senders. The ICT industry is abounded by academic

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[11] National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1 (12 Jan 2009) at paragraph 26; Fakie NO v CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) at paragraph 56
[12] Fakie No: note 10 supra

research[13] along with research by ICT industry practitioners themselves on how managing spam mail may cause legitimate mail to end up in either junk or spam boxes, depending on the type of filter, software, and how sensitive the thresholds have been set to manage spam in a given institution. Neither is it this court's function to decide the issue of prescription. The point therefore adds nothing to the applicant's case for separation.

(ii) Prescription is a point of law and it will be convenient to dispose of it separately

17. The applicant contends that it will be convenient to dispose of the special plea whilst the remainder of the issues in the case are stayed because prescription is a point of law coupled that involves argument and interpretation. The respondent challenges the applicant on this point. It states that to decide the special plea, the court will be required to determine, *inter alia*:

(i) Whether litigation was instituted within the one-year period provided for in the Act. This, according to the respondent, is a factual and legal enquiry.

(ii) In the event the court finds that it was not instituted within the prescribed period, the court must determine whether the facts of the case justify an extension of the one-year period in the interests of justice. This is a question of condonation. The respondent asserts that this too is a factual enquiry and an exercise of the court's discretion, which will take into account, *inter alia*, whether the internal appeal was submitted within 30 days from the date the appellant became aware of the decision

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[13] Dr Leslie Haddon, '*Managing email: the UK experience*', Oxford Internet Institute, Research Report No. 9, November 2005, https://deliverypdf.ssrn.com/delivery.php: accessed on 21 March 2022:

as contemplated in Rule 77 H 04 (2) (a) (i) of the Customs and Excise Rules; prejudice to the respondent in the event it is non-suited; and more.

17. Nowhere is the point — regarding the nature of enquiry that is involved in determining prescription — made more clearer than by the SCA in *Jugwanth* v *MTN,* in the process of upholding an appeal, in circumstances where the respondent's plea in the court a quo had merely pleaded that the plaintiff's claim had prescribed, without adding the necessary factual detail. The court reasoned thus:

> '...In *De Jager and Others* v *ABSA Bank Beperk*, this Court held that an agreement not to invoke prescription, even if made after a debt had been extinguished by prescription, was competent and could successfully resist a defence of prescription.
> [8] All of this means that prescription is fact driven. The fact that a debt appears to have become due on a certain date is not the only relevant fact required to determine whether it has prescribed. The particulars of claim do not necessarily show when the debt became due, whether the creditor was prevented from coming to know of the existence of the debt, when the creditor became aware of the identity of the debtor, whether the completion of prescription was delayed, whether the running of prescription was interrupted or whether there was an agreement not to invoke prescription.'[14]

18. Note that the court in Jugwanth draws no distinction between an extension before or after the right of a litigant to sue is extinguished by prescription. I return to this aspect of the applicant's case later in this judgment.

19. Although the court in *Minister of Finance* v *Gore NO* was concerned with evaluating the defence of prescription based on an argument that the real litigant, (one of the

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[14] (Case no 529/2020)[2021] ZASCA 114, (9 September 2021); paragraphs 7-8

directors of the defunct company, represented by the liquidator, Gore) had delayed the commencement of litigation, notwithstanding that it had the minimum and necessary facts, the *dicta* is highly relevant to the issue under consideration, and that is, prescription is fact driven. I highlight that the question of prescription arose against the background of fraud and manipulation of a government procurement system:

> '...The defendants' argument seems to us to mistake the nature of 'knowledge' that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief on its own is insufficient. Belief that happens to be true (as Rabie had) is also insufficient. For there to be knowledge, the belief must be justified [19]. It is well established in our law that:
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> (a)Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them;
>
> (b)It extends to a conviction or belief that is engendered by or inferred from attendant circumstances;
>
> (c)On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge.
>
> It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less is vehemently controverted allegation or subjective conviction.'[15]

20. It is therefore incorrect to argue that prescription is a legal issue that requires only legal argument and interpretation. On the contrary, the cases referred to are authority to the effect that to draw the legal conclusion that the right to sue has prescribed, one is required to lead factual evidence. [See also *Claasen* v *Bester*[16]:]

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[15] [2006] SCA 97 (RSA), at paragraphs 17 and 18

[16] (872/10) [2011] 197 ZASCA (23 November 2011) at paragraph 13:
In *Truter v Deysel 2006* (4) SA 168 (SCA) para 16 this court said that:
'A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor

prescribed, something that was not envisaged by the legislature. That it is not in the interests of justice to grant condonation in that condonation is not sought, but a revival. The applicant states that for this court to exercise its discretion in favour of Morgan, it has to be satisfied that the claim has not prescribed. The respondent states SARS' contentions are legally flawed. According to the respondent, the provisions of section 96 do not result in the taxpayers' rights being automatically extinguished after the lapse of the one-year period. Contrary to the position under the Prescription act, the court has a discretion to condone the late institution of proceedings under section 96 (1) (c) (ii). The extension, according to the respondent, may be granted even after the lapse of the one-year period where the interests of justice so require. The respondent refers to *Glencore Operations* v *CSARS*[17] as an example of a case where the court granted condonation for the late institution of an appeal against SARS. In this case, the respondent submits that the evidence relevant to the exercise of the court's discretion, is inextricably linked to the merits remaining issues, thus, the respondent submits, it is neither convenient nor appropriate to separate issues in this case.

22. I find myself in disagreement with the applicant's contentions, in so far as evaluating the case for separation — because that is all that is before this court, and not whether condonation should or should not to be granted — that this court should take cognisance of the dichotomy between extension and revival. The standard on whether an application for condonation is to be granted is the interests of justice. That, on its own, is a broad enquiry that cannot be confined to the distinction underscored by

[17] (11696/18) ZAGPPHC (24 October 2019)

the applicant. In *Aurecon South Africa (Pty) Ltd* v *City of Cape Town*, the court reasoned the issue of condonation as follows:

> 'The question then is whether the City made out a case for such an extension. Whether it is in the interests of justice to condone a delay depends entirely on the facts and circumstances of each case. The relevant factors in that enquiry generally include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the reasonableness of the explanation for the delay which must cover the whole period of delay, the importance of the issue to be raised and the prospects of success.'[18]

23. I note that the court in Aurecon was seized with an appeal where the background facts pointed to a delay in excess of 300 days, contrary to the provisions of PAJA, for launching legal proceedings for review. [See also *Van Wyk* v *Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*[19]]

(iv) Peremptory language used in section 96

24. The applicant refers to the peremptory language used in section 96 (1) (b) and quotes from a textbook by Wiechers[20], published in 1985, and argues that based on the peremptory language of the provision, non-compliance results in the claim prescribing. The applicant further states that, whilst the provisions of section 96 make provision for the court to grant extension of one year, this presumption presupposes that the claim has not prescribed. SARS then immediately notes that Morgan Beef has

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[18] (20384/2014) [2015] ZASCA 209 (9 December 2015) at paragraph 17; *BCE Food Service Equipment (Pty) Limited v Commissioner for the South African Revenue Service* (27898/2015) [2017] ZAGPJHC 243 (12 September 2017), paragraph 2;

[19] [2007] ZACC 24; 2008 (2) SA 472 (CC) at para 20

[20] Marius Wiechers, Administrative Law, Publisher, Butterworths, 1985. ISBN, 0409067059' page not provided.

admitted that the letter of demand was received in Pretorius' inbox when it was sent by the Commissioner in 2018.

25. I have already dealt with the material dispute of fact that polarises the parties in this regard. In my view, it is incorrect to leap from the fact that an email was sent by SARS to the conclusion that it came to Pretorius' knowledge or attention. In *Signature Real Estate (Pty) Ltd* v *Charles Edwards Properties and Others*[21], the court made the statement that even peremptory provisions must yield to two interpretive imperatives. These are, the injunction that every legislation be interpreted through the prism of the Constitution and in so doing, the purport, spirit and objects of the constitution must take centre stage. Importantly, the right implicated in this case is that enshrined in section 34 of the Constitution. It cannot be easily be forsaken at the altar of peremptory language. The second imperative, which is not gemaine to the present proceedings, is captured in *Endumeni Municipality* v *Natal Joint Pension Fund*[22].

26. It is thus incorrect to conclude that because section 96 uses mandatory language, the right of the respondent to institute legal proceedings is thus expunged.

F. Conclusion

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[21] (415/2019) [2020] ZASCA 63 (10 June 2020) at paragraph 17
[22]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)

27. In conclusion, I deal with the last of the applicant's submissions. In the first instance, the applicant submits that Morgan Beef is deemed to have known of the letter of demand from the date upon which he could have acquired it by exercising reasonable care and continually checking his mail box, as he had been communicating with SARS via the same email. The applicant further charges that Pretorius was aware, having failed to submit the required document, that the Commissioner would issue a letter of demand but it failed to make follow ups. It is further said that SARS had long rejected Morgan's diesel refund claims since early as April/May 2009 and used it to offset the outstanding diesel liability. This, according to the applicant, ought to have served as a trigger, but Pretorius never made any concerted effort to deal with the diesel rebate. Finally, the applicant adds that were this court to dismiss the special plea, it will set out an unhealthy precedent for litigants who laggardly pursue legal recourse in direct contravention of the provisions of the Act.

28. The statement made by the applicant that of deemed knowledge on the part of Morgan must be dealt with first. In this regard, the applicant contends that Morgan Beef is deemed to have known of the letter of demand from the date upon which he could have acquired it by exercising reasonable care and continually checking his mail box, as he had been communicating with SARS via the same email. The respondent has raised the issue of SARS' failure to simply upload the letter on e-filing. SARS has still not explained why it could not upload the letter on e-filing. As to Morgan's failure to continually check its box, this requires one to look at the history of the matter between the parties. Firstly SARS issued a letter of engagement in July 2015. Three years later,

it issued the letter of intent to assess. Given this massive lapse of time at the start of the communication between the parties, I am not certain that it is in the circumstances of this case, fair to point a finger at Morgan's or rather Pretorius for failing to continually check his inbox. In the second instance, the applicant points to Morgan's failure to submit the necessary records to SARS; however, this court cannot of its own accord reach that conclusion. There is no positive statement to that effect anywhere in the record. The applicant further points to SARS' denial of fuel refunds since 2009 and states that that, on its own, should have served as a trigger in 2018 and impelled Pretorius to investigate. I cannot agree with this statement that an event that has allegedly endured for more than seven years should have served as a trigger in 2018. Pretorius is on record stating that he was employed in 2017.

29. In short, and as I had earlier mentioned, this court is enjoined to keep in mind a plethora of factors in the process of evaluating an application for separation, including anticipating the course litigation might take. Those factors are captured in the cases of *Denel*[23] and *Copperzone*[24], *to mention a few,* including the question of fairness. There is no need to rehash all of the factors in this paragraph. Based on the reasons set out in this judgement, the applicant has not demonstrated any of those factors. Thus, ordering a separation will not achieve anything meaningful. On the contrary, it would result in piecemeal litigation, increase costs, and delay finalisation of the matter. Accordingly, the applicant's application cannot succeed.

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[23] see paragraph 10 of this judgement
[24] paragraph 11 of this judgement

G. Order

30. The application for separation is dismissed with costs.

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JUDGE OF THE HIGH COURT,

PRETORIA

Appearances:

For Applicant:	Adv Kollapen
	Adv L Kalipa
Instructed by:	Maponya Attorneys
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