

SARS agency appointments found to be questionable

By Johan Kotze

SARS, as all are aware, has extremely wide powers to collect outstanding tax, one of the strategies of which is to appoint an agent to collect tax on its behalf.

Section 99 of the Income Tax Act provides that SARS may declare any person to be an agent of another.

The agent may be required to pay to SARS any tax, interest or penalty due from any funds it holds on behalf of the agent. Thus:

- Because banks hold its clients' funds, SARS appoints banks as its agents; while
- Employers are normally appointed to pay SARS from salaries they pay to their employees.

Section 99 has certain limits, of which agents should be aware when accepting a SARS appointment. In particular, an agent should ensure that it is able to fulfil the requirements of the appointment, since it may be taken to task if it acts beyond section 99's ambit.

By way of illustration, section 99 was recently considered in two cases in court. Instructively, the agents lost both cases.

In the Supreme Court of Appeal (SCA) case of *Nedbank Ltd v Pestana*, Pestana owed SARS some R340 million. SARS appointed Nedbank as Pestana's agent, in terms of which it was required to pay to SARS what Nedbank held in Pestana's account. This instruction was given to Nedbank's head office in Rivonia on the morning of 4 February 2004.

During the course of that morning, Pestana went to his Nedbank branch in Carltonville and transferred R480 000 of the R496 546,40 in his account to another account at the branch. This account belonged to another person, both incidentally having the same surname.

Later that day, after it had already transferred the R480 000, Nedbank's Carltonville branch was notified by its head office of the bank's section 99 appointment. The branch thereupon reversed the transfer to the original Pestana's account and, still on the same day, paid an amount of R496 000 to SARS from this Pestana's account.

Nedbank did not request Pestana's authority to reverse the R480 000 and no authority to do so was given by Pestana.

In a Stated Case the parties asked the court whether Nedbank was, in terms of its section 99 appointment, entitled to reverse the payment of R480 000 without authority.

The matter originally came before Judge Matopo of the Johannesburg High Court, who held that Nedbank was indeed entitled to reverse the payment.

On appeal to a full court of the Witwatersrand Local Division, Judge Schwartzman ruled that Nedbank was not entitled to reverse the payment.

The SCA's Judge Griesel was perturbed at the involvement of a Stated Case, since this meant that the court was precluded from discovering the true state of affairs and, indeed, was bound by the agreed facts between Nedbank and Pestana. He believed that the instructions given by Pestana to Nedbank's Carltonville branch "have a decidedly suspicious ring to them" and may have been "tainted with fraud".

Judge Griesel, nonetheless, held that section 99 had limited powers to the extent that it did not confer the authority to freeze bank accounts; nor did it confer the power to transfer funds. Nedbank was therefore not entitled to reverse the payment.

In another case, *Goldblatt v Liebenberg* in the Western Cape High Court, Liebenberg's employer was Clade Investments, which, having never withheld employees' tax from Liebenberg, was then appointed as Liebenberg's agent in terms of section 99.

Judge Louw held that the employees' tax was exclusively Clade Investments' personal liability and section 99 was only applicable in respect of Liebenberg's tax liability. Section 99 was therefore not an assessment of Liebenberg and the creator of a debt due to SARS.

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