

Dispute between SARS, Julius Malema continues

By [Mareli Treurnicht](#)

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The High Court (Gauteng Division, Pretoria) recently handed down judgment in the case of *Malema v Commissioner for SARS*, on whether SARS was bound to a compromise agreement entered into between Malema (Applicant) and SARS because of alleged non-disclosures and misstatements made by the Applicant, who expressly warranted the truth of the facts furnished by him. The compromise agreement was concluded in accordance with the provisions of the Tax Administration Act.



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Facts

The dispute mainly pertains to assessments raised by SARS against the Applicant for the 2005 to 2011 years of assessment, totalling the amount of R18,192,295.36 including interest. The Applicant objected to the assessments and alleged that the amounts in question constituted donations or dividends in respect of which the Applicant could not be assessed for tax.

The Applicant requested a compromise from SARS on four occasions. Following three failed attempts to conclude a compromise agreement, the Applicant and SARS finally concluded such an agreement on 21 May 2014 (Agreement). The final date to comply with the Agreement was 30 November 2014. By 1 December 2014, the Applicant had paid the amount stipulated in the Agreement and thus complied with his payment obligations.

On 13 March 2015, SARS contended that it was no longer bound by the Agreement as the Applicant had not, as was required by the Agreement, made full, verifiable and complete disclosure of all material facts nor kept his tax affairs current. It is also important to note that the Applicant was provisionally sequestered on 11 February 2014 - between his second and third attempts to conclude a compromise agreement.

Judgment

Section 205 of the TAA states that SARS is not bound by a compromise if:

- a. the debtor fails to disclose a material fact to which the compromise relates;
- b. the debtor supplies materially incorrect information to which the compromise relates;
- c. the debtor fails to comply with a provision or condition contained in the compromise agreement; or
- d. the debtor is liquidated or the debtor's estate is sequestrated before the debtor has fully complied with the conditions contained in the compromise agreement.

With these considerations in mind, SARS argued that it was no longer bound by the Agreement, as the Applicant had failed to:

- identify the donor who offered to donate R4 million to the Applicant to use as payment towards the amount in the Agreement and to ensure that donations tax was declared and paid on this amount; and
- Keep his tax affairs current and paid up to date. Among other things, he failed to ensure that donations tax was paid on the part of the compromise amount being paid by way of donation and failed to make payment of the previously acknowledged liability for the (additional) 2011 and 2012 assessments and subsequently proceeded to object to the assessments and failed to declare donations received by his attorney, Brian Khan.

The Applicant further made misstatements in the request for the compromise, for instance that he was the beneficiary of the JSM Trust which had failed to keep its tax affairs in order. In addition, he failed to disclose an alleged interest in a certain property (Bendor property).

SARS further argued that the Applicant had unequivocally accepted liability for the 2011 and 2012 assessments. The Applicant disputed this, stating that the amounts were not taxable as income in his hands as they were dividends or donations.

Main arguments

The Applicant's main arguments can be summarised as follows:

- SARS's decision to no longer be bound by the Agreement was unlawful;
- the Applicant could have treated the matter as unlawful administrative action but elected to treat it as a matter of private law and not public law;
- SARS had to conform to the provisions of the Constitution and the Applicant's rights to human dignity, freedom of trade, occupation and profession, and property, and administrative action had to be complied with by SARS; and
- the issue whether the JSM Trust's tax affairs were regularised or otherwise had nothing to do with the Applicant's rights and obligations under the Agreement.

The court stated that the real dispute between the parties was how the dividends and donations received should be classified. The Applicant argued that the donations were made out of generosity or disinterested benevolence and that the dividends were not taxable, whereas SARS argued that the donations and dividends were income. The dispute appeared to

be a purely factual one and it was difficult to assess whether the Applicant had not made a full and frank disclosure as alleged by SARS.

The court made the following observations regarding applicable provisions in the TAA and their interpretation:

- in terms of s192 of the TAA, a compromise of a debt can only take place when the liability to pay the debt is not disputed by the debtor;
- the effect of s192 is that, under a compromise, the taxpayer loses his right to object and appeal against an assessment, meaning that SARS cannot be allowed to enter into a compromise with a taxpayer only to later deny its validity based on unwarranted grounds;
- SARS is obliged to secure the highest net income from a tax debt and to enter into compromises on an informed basis, which is why s100(4) of the TAA entitles senior SARS officials to require that an application for compromise be supplemented by further information;
- in terms of s200(4) of the TAA, once a senior SARS official and a debtor have signed a compromise agreement, SARS must give an undertaking that it will not pursue recovery of the balance of the tax debt;
- only if any of the circumstances in s205 of the TAA referred to above are present will SARS not be bound to the agreement; and
- in order to determine whether a term is 'material' to a contract, one must assess whether it was a vital term, as decided in *O'Connell v Flischman* 1948 (4) SA 191 (T).

Matter referred to trial

The court accepted SARS's argument that the alleged non-disclosure regarding the Bendor property was intentional and that such fraud is material, but questioned why SARS had still entered into the Agreement even though it was aware of the Applicant's interest in the property. The court appeared to disagree with SARS's argument that any misstatement or failure to make a disclosure would automatically be material.

The court finally held that, because of the factual disputes, the necessity for SARS to justify its argument regarding materiality by proving the facts that were attendant when the Agreement was entered into and because of the fact that one cannot decide the issue of fraud on affidavit, the matter should be referred to trial. The court indicated that it did not wish to express an opinion on which interpretation of s205 is correct.

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