IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

Case No: 5493/2017

In the matter between:

MANISHA RAMPERSADH	**1ST APPLICANT**
HEMANTRA RAMPERSADH	**2ND APPLICANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**1ST RESPONDENT**
JAYASTHRI PADAYACHEE NO	**2ND RESPONDENT**
PRINESHA GOVENDER NO	**3RD RESPONDENT**

ORDER

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1. By consent, the application against the second and third respondents is dismissed with costs.

2. The application against the first respondent is dismissed with costs, such costs to include those consequent on the employment of two counsel where this was done.

JUDGMENT

Delivered on: 27 August 2018

Gorven J

[1] The recent tax affairs of the applicants, and of the Close Corporation of which they are the members, has a turbid history. At its heart are the loan accounts of the applicants in the Close Corporation. The Close Corporation was audited for tax purposes for the tax periods 2011 to 2013. The second and third respondents, employees of the first respondent (SARS), dealt with the matter. Due to the loan accounts, the audit was extended to the applicants. The applicants made representations. They furnished revised loan accounts in doing so. Revised assessments for income tax were issued to the applicants on 23 March 2015. They lodged an objection dated 15 May 2015. SARS requested further information arising from the loan accounts. This provoked further revised loan accounts. Another objection, dated 20 July 2015, was lodged. In all, no less than three different versions of the loan accounts were submitted by the applicants. In addition to the correspondence, SARS met with the applicants and their tax advisors a number of times.

[2] This finally resulted in SARS sending a response on 1 December 2015 disallowing some of the objections. This amounted to a revised assessment for each of them (the revised assessments). The applicants were told that, if they were not satisfied, they could appeal within 30 days, failing which the revised assessments would become final.

[3] The applicants did not appeal. Nor did they request clarity on the disallowance of certain of their objections. On 6 June 2016, they gave notice

that they intended to appeal and would seek condonation for not having appealed in time. SARS informed them that its power to condone a late appeal did not extend beyond 75 days. On 30 August 2016, the applicants requested assistance on how to lodge an appeal. They still did not do so or approach the tax court for condonation. Nor did they seek to otherwise resolve their dispute with SARS under the Tax Administration Act (the Act).[1]

[4] Instead, the applicants made three requests under s 93(1)*(d)* of the Act. These were dated 13 July 2016, 19 October 2016 and 17 January 2017. This section provides:

'(1) SARS may make a reduced assessment if-

(d) SARS is satisfied that there is a readily apparent undisputed error in the assessment by-

(i) SARS; or

(ii) the taxpayer in a return . . .'.

In each request, the applicants wanted SARS to reduce the revised assessments. They claimed that the revised assessments contained 'readily apparent undisputed error(s)'. SARS disagreed. It refused all three requests. The last of these three requests (the third request) was refused on 10 March 2017. This prompted the present application, brought in terms of the Promotion of Administrative Justice Act (PAJA),[2] to review certain of the decisions of SARS.

[5] At the hearing, the applicants readily conceded that the second and third respondents should not have been joined. They consented to an order dismissing the application against them with costs. This was entirely appropriate.

[6] Before the hearing, the applicants had amended the relief sought twice. The amended relief included the reviewing and setting aside of the revised assessments. At the hearing, their counsel informed me that the applicants did

[1] Tax Administration Act 28 of 2011.
[2] Promotion of Administrative Justice Act 3 of 2000.

not persist in seeking this relief. The only relief sought was against the decision of SARS on 10 March 2017 to refuse the third request.

[7] SARS opposes this relief. Apart from dealing with the merits, SARS has raised a number of initial points. One is to the effect that, under PAJA, a party seeking judicial review is obliged to exhaust any available internal remedies.[3] In support of this point, it was submitted that the applicants had a right of appeal under the Act against the decision to refuse the third request. Another relates to whether this court has jurisdiction to deal with a review of matters arising under the Act. A third was whether this application was brought within the 180 day period of the impugned decision as required by s 7(1) of PAJA. The applicants no longer persist in seeking to review decisions earlier than the refusal of the third request on 10 March 2017. This application was brought some 45 days after that decision and was thus brought timeously. This third point therefore falls away.

[8] The first point concerns the exhaustion of internal remedies. It is based on s 7(2) of PAJA. This provides:

'*(a)* Subject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph *(c)*, a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph *(a)* has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

[3] Section 7(2)*(a)* of PAJA.

There are thus only two bases on which a court may consider such a review application. First, if available internal remedies have been exhausted. Secondly, if there are exceptional circumstances warranting the grant of an exemption from doing so in the interest of justice.

[9] The initial question under this head is whether s 7(2)*(a)* of PAJA applies. This would be so if an objection or appeal under the Act was available to the applicants. It is common ground that, in the present matter, SARS took a decision to refuse the third request. The crisp issue is: Does the Act allow for an objection or appeal to lie from such a decision? I have found no case law on this issue and neither party referred to any. The provisions of the Act must be interpreted in order to yield an answer.

[10] An interpretation must be arrived at according to the following approach: 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself",

read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[4]

[11] Section 93(1)*(d)* forms part of Chapter 8 of the Act, which deals with assessments. There are four kinds of assessments which SARS can make. These are termed original assessments,[5] additional assessments,[6] reduced assessments[7] and jeopardy assessments.[8] The mechanism for arriving at these is specified. In certain circumstances, SARS is entitled to make all four kinds of assessments based in whole or in part on an estimate.[9] As regards jeopardy assessments, these can be made before the due date of submission of a return by the taxpayer.[10] The Commissioner may only do so if satisfied that the collection of tax would otherwise be jeopardised. A decision to make a jeopardy assessment can be taken on review to the High Court on certain grounds.[11] The reason for this is self-evident. As far as I can establish, this is the only specific provision in the Act allowing for a review application to the High Court of a decision taken under the Act.

[12] There are five bases on which SARS may make a reduced assessment. Since SARS is, itself, a creature of statute, it may not do so unless authorised under the Act. Section 93 reads:

'(1) SARS may make a reduced assessment if-

(a) the taxpayer successfully disputed the assessment under Chapter 9;

(b) necessary to give effect to a settlement under Part F of Chapter 9;

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[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18 (references omitted). Cited with approval in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) para 52.

[5] Section 91 of the Act.

[6] Section 92 of the Act.

[7] Section 93 of the Act.

[8] Section 94 of the Act.

[9] Section 95 of the Act.

[10] Section 94(1) of the Act.

[11] Section 94(2) of the Act.

(c) necessary to give effect to a judgment pursuant to an appeal under Part E of Chapter 9 and there is no right of further appeal;

(d) SARS is satisfied that there is a readily apparent undisputed error in the assessment by-

(i) SARS; or

(ii) the taxpayer in a return; or

(e) a senior SARS official is satisfied that an assessment was based on-

(i) the failure to submit a return or submission of an incorrect return by a third party under section 26 or by an employer under a tax Act;

(ii) a processing error by SARS; or

(iii) a return fraudulently submitted by a person not authorised by the taxpayer.

(2) SARS may reduce an assessment despite the fact that no objection has been lodged or appeal noted.'

[13] The first three arise from invoking the mechanisms for dispute resolution in Chapter 9. The last two require SARS to be 'satisfied' on various scores. It seems, therefore, that there are four procedures by which an assessment can be reduced by SARS. The first two are by way of objection or appeal. The next by way of SARS *mero motu* deciding to do so without the taxpayer having objected or appealed. The fourth and final one is by the taxpayer requesting a reduction. Section 91(5)*(b)* of the Act provides:

'[T]he taxpayer in respect of whom the assessment has been issued may, within 30 business days from the date of assessment, request SARS to issue a reduced assessment or additional assessment by submitting a complete and correct return'.

This relates to an assessment arising from an estimate. It does not specifically cover a request where the assessment is based on a return or an audit such as in the present matter. However, the basis on which a taxpayer can have a matter considered under s 93(1)*(d)* is clearly not by way of objection to, or appeal against, an assessment. A separate procedure is available for these. Neither does it envisage a formal application. It seems to me that it is simply by way of a request.

[14] The question which arises is whether the refusal of such a request gives rise to a right of objection or appeal under the Act. Chapter 9 of the Act deals with dispute resolution. Part B of that Chapter provides for objections and appeals in certain circumstances. Parts C and D set up machinery to deal with objections and appeals. This includes the establishment of a tax board and the constitution of a tax court. The tax court is a creature of statute. The ambit of its jurisdiction, including whether any appeal lies to it, is determined by the Act.[12] An appeal against a decision of the tax court lies to a Division of the High Court or, on leave being granted, to the Supreme Court of Appeal.[13]

[15] The procedure for dispute resolution is governed by Part B of Chapter 9. Section 104(1) to (3) provide:

'(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".'

From this it is clear that objections precede any appeal. They may be lodged against assessments and certain decisions. The decisions referred to in sections 104(2)*(a)* and *(b)* clearly do not apply to the present matter. The question is whether a decision to refuse a request under s 93(1)*(d)* falls within

[12] *Wingate-Pearse v Commissioner, South African Revenue Service* 2017 (1) SA 542 (SCA) para 6. Any appeal under the Act in the present matter would lie to the tax court, rather than the tax board, because the amount in dispute exceeds R1 million. This amount was determined by the Minister in Gen N 1196 in *GG* 39490 of 17 December 2015, pursuant to the provisions of s 109(1)*(a)* of the Act. If below this amount, any appeal would lie to the board.

[13] Sections 133 and 135 of the Act. There are certain exceptions to leave being required to appeal to the Supreme Court of Appeal but these are not germane to this matter.

the ambit of s 104(2)*(c)*. In other words, does such a decision amount to 'any other decision that may be objected to or appealed against under a tax Act.'?

[16] Chapter 9 has a definitions section. This defines a 'decision' as 'a decision referred to in section 104(2)'.[14] This is circular and unhelpful because it simply refers back to the section where the word is used. The question resolves itself into whether a tax Act makes such a decision subject to objection or appeal. The words 'tax Act' are defined to mean 'this Act or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding customs and excise legislation'. As far as I can make out, the only possible Act which may apply is 'this Act'. It does not appear as if the SARS Act[15] applies.

[17] Clearly, if an assessment is reduced, it qualifies under s 104(1) for the dispute resolution procedure. All assessments qualify. The question is whether a refusal to reduce an assessment qualifies. There are at least three refusals where the Act makes it plain that the dispute resolution procedure in Chapter 9 applies. SARS is empowered in certain circumstances to remit a penalty imposed under the Act for administrative non-compliance. Section 220 provides that: 'A decision by SARS not to remit a "penalty" in whole or in part is subject to objection and appeal under Chapter 9.' Likewise, SARS is empowered to impose a penalty if a tax liability is understated. Section 224 of the Act provides that the imposition of such a penalty, as well as a decision not to remit such a penalty, is subject to objection and appeal under Chapter 9. A similar provision exists in s 231(2) of the Act where a senior SARS official decides to withdraw relief granted under a voluntary disclosure programme as well as to pursue

[14] Section 101 of the Act.
[15] The SARS Act is defined in s 1 of the Act as the South African Revenue Service Act 34 of 1997.

criminal prosecution for a tax offence. These decisions are 'subject to objection and appeal.'[16]

[18] It is clear, therefore, that certain decisions refusing relief are made subject to the objection and appeal procedure in Chapter 9. They each accordingly fall within the provisions of s 104(2)*(c)* of the Act as being a 'decision that may be objected to or appealed against under a tax Act.' There is no similar provision for a decision to refuse relief under s 93(1)*(d)* of the Act. The inclusion of one provision may indicate that the legislature intended to exclude other provisions. However, for this principle of *expressio unius est exclusio alterius* to apply, it must be concluded that the legislature formed this specific intention.[17]

[19] To assist in determining whether this is the case, recourse must be had to the approach to interpretation set out above. The language of s 104(2)*(c)* indicates that a tax Act must make a decision subject to objection or appeal. Section 105 of the Act reads:

'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.'

This ousts the jurisdiction of the High Court to deal with assessments or decisions unless the High Court directs otherwise. There is a strong presumption against the ouster of the High Court's jurisdiction.[18] As was held in *Minister of Law and Order & others v Hurley & another*:[19]

'The Court will, therefore, closely examine any provision which appears to curtail or oust the jurisdiction of courts of law.'

Section 105 ousts it only where an assessment or '"decision" as described in section 104' is disputed. The range of decisions which can and must be dealt with under Chapter 9, absent a High Court order, is circumscribed. If the

[16] Section 231(2) of the Act.
[17] *Da Silva & another v Coutinho* 1971 (3) SA 123 (A) at 136B-C.
[18] *De Bruin v Director of Education* 1934 AD 252 at 258.
[19] *Minister of Law and Order & others v Hurley & another* 1986 (3) SA 568 (A) at 584A-B.

legislature had intended to make all decisions subject to the dispute resolution procedures in Chapter 9, it would have been a simple matter to do so. The three categories of decisions mentioned in s 104(2) would not have been mentioned. The Act does not make a decision to refuse a request under s 93(1)*(d)* subject to objection or appeal. It is therefore not a decision referred to in s 104(2)*(c)*. This means that the objection and appeal provisions in Chapter 9 were not available to the applicants. The language and context of the provision supports this interpretation.

[20] Would this in any way undermine or run counter to the apparent purpose of Chapter 9? The answer is no. Clearly decisions which change the tax liability of a taxpayer are made subject to the machinery of the Act for dispute resolution. The tax board and tax court have specific expertise in this area. So too, where a penalty has been imposed, the refusal to reduce or do away with it has an impact additional to the assessment. This, too, is an area where the internal machinery would be more adept at resolving the dispute. As I have mentioned, a decision to refuse a request under s 93(1)*(d)* does not change the tax liability of a taxpayer. The taxpayer can object to the assessment and invoke the appeal machinery. The interpretation that a refusal of a request to reduce an assessment under s 93(1)*(d)* does not fall within the third category of decisions mentioned in s 104(2)*(c)* would also not lead to unbusinesslike results.

[21] I accordingly find that the decision of SARS to refuse the third request under s 93(1)*(d)* is not subject to the machinery set up in Chapter 9 of the Act. This, then, means that internal objection and appeal remedies under the Act were not available to the applicants. No other jurisdiction is given to either the tax board or tax court to deal with any issues arising from such a refusal. The applicants had no internal remedies available to them. They are accordingly not disqualified from bringing an application for judicial review under PAJA.

[22] It therefore becomes necessary to determine whether this court has jurisdiction to entertain a review of decisions made under the Act and, in particular, a decision to refuse a request under s 93(1)*(d)*. I have found that the specialist machinery set up under the Act does not apply. The jurisdiction of the High Court to deal with such an application is not ousted by s 105. Section 6(1) of PAJA allows any person to institute proceedings in a court for the judicial review of administrative action. It was not disputed that the decision in question amounts to administrative action under PAJA.[20] The High Court therefore has jurisdiction to deal with this application.

[23] Having dealt with the initial points relied on by SARS, the substantive issue comes into focus. In this, the applicants must make out a case for a review of the refusal of the third request. They call in aid certain provisions of s 6 of PAJA. The relevant sections read:

'(2) A court or tribunal has the power to judicially review an administrative action if —

. . .

(d) the action was materially influenced by an error of law;

. . .

(e) the action was taken —

. . .

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

. . .

(vi) arbitrarily or capriciously;

. . .

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function . . .'.

[20] Section 1 of PAJA, definition of administrative action.

[24] The first basis relied on by the applicants is s 6(2)*(d)* of PAJA. They claim that the decision was 'materially influenced by an error of law'. This can readily be disposed of. No error of law was pointed to in the papers or in argument. The claimed errors related to calculations. The next is s 6(2)*(e)*(iii), that 'irrelevant considerations were taken into account or relevant considerations were not considered'. The third was that the action was taken 'arbitrarily or capriciously' and thus falls foul of s 6(2)*(e)*(vi). The last is based on s 6(2)*(h)*. The applicants claim that the exercise of the power by SARS in refusing the third request was so 'unreasonable that no reasonable person could have so exercised' it. These shall each be dealt with after analysing the third request and the response of SARS.

[25] Section 93(1)*(d)* says that SARS 'may' reduce an assessment if it is 'satisfied that there is a readily apparent undisputed error' in the assessment. However, the word 'may' does not necessarily give rise to a general discretion. Sometimes it denotes the grant of a power along with a corresponding duty to exercise that power.[21] *Van Rooyen* approved the approach in a line of cases beginning with *Schwartz v Schwartz*,[22] which held:

'A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, *inter alia*, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised.'

[21] *Van Rooyen & others v The State & others (General Council of the Bar of South Africa Intervening*) 2002 (5) SA 246 (CC) (2002 (2) SACR 222; 2002 (8) BCLR 810) paras 180-182 .
[22] *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 473I-474B. Cited with approval in *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 15.

It seems to me that if SARS is satisfied that a readily apparent undisputed error has been made, it would be obliged to reduce the resultant assessment. It is unlikely that it has a discretion to refuse to do so. However, in the view I take of the matter, it is not necessary to pronounce finally on this issue.

[26] Only if SARS is satisfied that there is a readily apparent undisputed error may it reduce the assessment. The first hurdle for the applicants to surmount is to show that the claimed errors were in fact readily apparent and undisputed. Only then can it be contended that SARS should have been so satisfied. It was readily conceded by counsel for the applicants that, in the third request, the applicants did not identify specific items which they say constituted the readily apparent undisputed errors relied on by them. They instead raised four issues.

[27] In the first place, they contended that SARS duplicated drawings from the Close Corporation reckoned as lifestyle expenditure and items in their personal bank statements. They did not say which specific items had been duplicated. SARS averred in its answering affidavit that the applicants had themselves submitted the bank payments reflected in SARS documents as lifestyle expenditure. It averred further that many of the expenses claimed by the applicants were not supported by documentation as is required under the Act. These two averments were admitted by the applicants in reply.

[28] Secondly, the applicants raised an issue concerning the treatment of a property. In answer, SARS pointed out that the applicants had included conveyancing fees as part of the cost of the property which was impermissible. Again, it said, no source documents were provided to support any such claim. These averments were not dealt with by the applicants in reply and thus stand uncontested.

[29] Thirdly, the applicants raised an issue about bond transfers. SARS pointed out that this issue had never been raised in all of the communication resulting in the revised assessments. Nor were any source documents provided. In addition, more bond transfers were depicted in the loan accounts of the applicants and not the one or two suggested by the applicants in the request. These averments were also not challenged by the applicants in reply.

[30] Fourthly and finally, the applicants claimed that insurance payments had been duplicated by SARS in the accounting of their personal effects. SARS answered that the applicants had misunderstood the capital reconciliation exercise. They had believed that they could freely draw money from the Close Corporation to offset their personal debts without these being regarded as lifestyle expenses. This is what led to the multiple amendments to the loan accounts of the applicants mentioned above. These averments were likewise not dealt with by the applicants in reply. They are therefore uncontested.

[31] It cannot by any stretch of the imagination be held that the applicants showed that the claimed errors were in fact errors. They certainly did not show that the claimed errors were not disputed on reasonable grounds. None of the claimed errors was specifically identified in the third request. None were even clearly pointed to in this application. The 'errors' contended for by the applicants were disputed to be errors by SARS in the answering affidavit. The basis of the disputes was not challenged in reply.

[32] Reverting, then, to the grounds under PAJA relied on by the applicants. It is clear that they failed to show that SARS took into account irrelevant considerations or failed to consider relevant ones.[23] They failed to show that the

[23] Under s 6(2)*(e)*(iii) of PAJA.

actions of SARS were arbitrary or capricious.[24] They failed to show that the refusal of the third request by SARS was so unreasonable that no reasonable person could have refused it.[25] The applicants have accordingly failed to make out a case that the refusal of the third request to reduce the assessment should be reviewed and set aside.

[33] The application must therefore be dismissed with costs. Counsel for SARS submitted that, in view of the voluminous papers, running to some 943 pages, and the novelty and complexity of the matter, costs of two counsel should be awarded. Counsel for the applicants did not seek to counter this submission. In the circumstances of the application, it appears to me that such an order is warranted.

[34] In the result:

1. By consent, the application against the second and third respondents is dismissed with costs.
2. The application against the first respondent is dismissed with costs, such costs to include those consequent on the employment of two counsel where this was done.

Gorven J

[24] Under s 6(2)*(e)*(vi) of PAJA.
[25] Under s 6(2)*(h)* of PAJA.

Date of Hearing: 13 August 2018

Date of Judgment: 27 August 2018

Appearances

For the Applicants: CJ Snyman SC
Instructed by Nagesh Maharaj Attorneys

For the Respondents: AA Gabriel SC, with her R Athmaram
Instructed by Tembe Kheswa Nxumalo Inc.,
locally represented by Kunene Attorneys