IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

REPORTABLE: OF INTEREST TO OTHER JUDGES: REVISED: Date Signature:

CASE NO: 2016/31842

In the matter between:

GOLD KID TRADING CC **Applicant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **Respondent**

Summary: The jurisdiction of the High Court to entertain ordinary review applications not ousted by the legislative powers given to the Tax Court. The Tax Court has no power to entertain reviews under the Protection of Administration of Justice Act (PAJA). Principles governing failure to exhaust internal remedies envisaged in section 7(2) of PAJA. The court decline to review the decision of SARS pending the outcome of the appeal that the applicant has lodge with the High Court.

JUDGMENT

MOLAHLEHI J:

Introduction

[1] This is an application in which the applicant, Gold Kid Trading CC (Gold Kid), seeks an order to review and set aside the decision of the respondent, the Commissioner for South African Revenue Services (SARS) in reversing the VAT tax assessment it had previously made.

[2] In addition to the current matter, which is considered under the above case number, the applicant instituted two other applications against SARS. The first matter served before Mokose AJ on 17 November 2016 as an unopposed urgent application. The order made arising from that application is the subject of interpretation later in this judgment. The second matter was filed under case number 2017/40732.

[3] The current application is in two parts. The first part concerns the refund for the Value Added Tax (VAT Act)[1] for the periods which Gold Kid refers to as "the disputed refund tax period" and relate to the periods 2014/08, 2014/09, 2014/10, 2014/11, 2014/12, 2015/01, 2015/02 and 2015/03. The second part concerns the periods 2015/12, 2016/02 and 2016/03, the period referred to as "the interest reversal tax period."

[4] The dispute between the parties under the first part of the claim arose after SARS paid VAT refund to Gold Kid. SARS subsequently reversed these payments by means of an additional assessment, issued on 7 March 2017. In other words, SARS disallowed the VAT refunds that it had paid to Gold Kid relating to the disputed refund periods which was after some years it had allowed the refund.

[5] In reversing the payment it had made SARS disallowed the input tax that Gold Kid had claimed in its VAT returns for the disputed tax periods on the basis that it was "not satisfied" that the suppliers which Gold Kid listed in its tax returns "probably" did not exist.

[6] It is common cause that Gold Kid lodged an objection and appeal against the additional assessment concerning the disputed period.

[7] The second part of the application concerns the VAT refund for the periods; 2015/12, 2016/02, and 2016/03 and has to do with what is referred to as "the interest reversal tax periods". The interest paid by SARS was consequent the order made by Mokose AJ (the order) which is discussed later in this judgment. After making the payment SARS reversed the payment on the ground of an error made in the calculation

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[1] Act 89 of 1991.

of the input tax.

[8] SARS application for the condonation of the late filing of the answering affidavit was granted at the beginning of the hearing.

The parties

[9] Gold Kid is a close corporation duly incorporated in terms of the Close Corporation Act.[2] It is involved in the business of refining, trading and assaying of gold and other precious metals to the wholesale industry. It has since 2014 exported gold that it had refined and sold offshore entities, mostly in Dubai. It is also a registered as a vendor with SARS.

[10] The respondent is the Commissioner for SARS who in these proceedings is cited in his official capacity.

The background facts

[11] As stated above Gold Kid is involved in the business of exporting and selling gold off-shore. In terms of section 11 of the VAT Act, the Dubai buyer of its gold is exempted from paying VAT on the supply it receives.

[12] The gold which Gold Kid exported and sold offshore was before refining bought mainly from two local suppliers. The price for the suppliers was according to Gold Kid sold on the spot gold prize of the day of the transaction. The same principle applied to the price paid by the offshore clients.

[13] In terms of invoicing for the gold sourced from the suppliers, Gold Kid used what it referred to as “recipient created tax invoices.” This practice according to it has the approval of SARS.

[14] The two main suppliers of gold to Gold Kid for the period between December 2014 and February 2015 were Glowing Gold CC (Glowing Gold) and Cosmic Gold Trading 390 CC (Cosmic Gold). Before this dispute SARS paid for the self-assessment VAT returns submitted by Gold Kid.

[15] The issue for the payment of the VAT arose in 2016. On 2 June 2016 SARS raised the assessment concerning the December 2015 VAT period for Gold Kid. The returns reflected that SARS had to refund Gold Kid in the sum of approximately R70 million.

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[2] Act number 69 of 1984.

[16] After submitting its VAT returns and waiting for a response from SARS for some considerable period Gold Kid instituted urgent proceedings to compel SARS to pay the amount together with interest thereon. The interest was claimed on the bases of s 45 of the Tax Administration Act (TAA).[3]

[17] The application was unopposed, and accordingly, the Court granted the order prayed for on 17 November 2017. The essence of the order was that SARS was directed to pay the VAT refund to Gold Kid for the periods stipulated in the order including interest calculated from twenty-one (21) days from the finalisation of the audit and the submission of the documents requested for verification.

[18] SARS complied with the above order by paying the judgment amount, together with interest. The refund paid related to the VAT that had been paid in respect of the suppliers; Glowing Gold for December 2014 to February 2015 and Cosmic Gold for 2014 to 2015.

[19] After that payment and towards the end of 2016 SARS commenced auditing of the refunds that had been paid to Gold Kid for the above periods. The reason for the auditing are stated in the letter dated 7 March 2017, the relevant parts of which reads as follows:

> "The South African Revenue Services (SARS) has finalised the value-added-tax (VAT) audit and adjustment has been made. These will be reflected in a notice of assessment (VAT217) that will be issued to you shortly."

[20] About the issue of fringe benefits SARS stated the reason for the reversal in the same letter as follows:

> "9.1 The facts (audit finding)
>
> An audit was conducted on the output tax declared by the vendor and SARS found that the vendor did not declare deemed output tax on the fringe benefit."

Grounds for review

[21] Gold Kid contends that SARS decision to raise the assessments was not rationally connected to the purpose for which the decision was taken. The decision was also criticized for being unreasonable in that no reasonable person exercising power and the function of SARS could have made such a decision.

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[3] Act 28 of 2011.

[22] About the facts upon which the decision was based, Gold Kid contended that SARS failed to take into consideration the relevant information provided by both Cosmic Gold and Glowing Gold. It contended that SARS failed to take into account that the two entities traded in the course of 2014 and 2015.

[23] The other complaint of Gold Kid is that SARS failed to accept the self -invoicing used by the applicant which is in line with the binding tax ruling and interpretation note issued by it (SARS)

[24] In adopting the approach it did, SARS according to Gold Kid committed the breach of the principle of legality and was thus unlawful and unconstitutional.

[25] The above grounds equally apply to the issue of the interest reversal tax. The other complaint in this regard is also that SARS could never have reasonably concluded that the fringe benefits issues are material to warrant the reversal of the interest payment.

[26] As indicated earlier, it is common cause that as SARS did not oppose the urgent application which resulted in the order made. The consequence of this order according to Gold Kid is that SARS lost its right to audit it for the periods in dispute. In other words, by not opposing the application it had implicitly accepted as correct the order made concerning the issues which were before the Court.

The defendant's case

[27] SARS states in the answering affidavit that it commenced the audit on Gold Kid on 5 May 2016 and finalised it on 2 June 2016. The audit was done following the notice, which had been sent to Gold Kid notifying it that it had been selected for audit as part of the respondent's compliance process in terms of the TAA. The notice was sent by the Compliance Audit Division (CAD).

[28] In addition to notifying the applicant that it had been selected for the audit, it was further requested to make available all material relating to its VAT declaration for 2014/08 to 2016/03 tax periods.

[29] Gold Kid responded by indicating that the material was available at its office and invited SARS to attend there to conduct its verification process.

[30] This investigation was led by Mr Vilakazi (Vilakazi) the specialist working in the investigation unit. After his appointment, he issued Gold Kid with notification of the audit dated 24 August 2016.

[31] According to SARS the field audit which commenced on 10 October 2016 revealed to Vilakazi, who had visited Gold Kid's premises that all the tax invoices supplied by Gold Kid, were in the same format. It was for this reason that it concluded that the tax invoices were internally generated by Gold Kid who created and was the recipient of the corresponding tax invoices.

[32] On 18 July 2016 Gold Kid requested progress report relating to the audit. The report was provided on 18 July 2016 for the VAT periods, 2016/02, 2016/03, 2016/04 and 2016/05.

[33] As concerning verification of input tax claims with the suppliers SARS testified in its answering affidavit as follows:

Glowing Gold

[34] On 28 October 2016 Vilakazi with his team visited Glowing Gold at its business address. The team found that although the entity never submitted VAT return for the period 08/14 to 05/15, Gold Kid claimed input tax in the sum of R3 706 188,000 in respect of the purchases it had made.

[35] They also found that Glowing Gold did not operate from the address indicated in its business address. At that address, they found a domestic worker who gave them the contact details of the business owner's telephone number. Attempts at reaching the owner at that number were unsuccessful. The messages left on the phone were also not returned.

[36] It was from the above that the investigating team concluded that the invoices issued by Glowing Gold were fictitious and the possibility existed that Gold Kid and the suppliers were involved in a VAT scam.

[37] Following the above Vilakazi addressed the letter dated 7 March 2017 to Gold Kid and advised it that SARS had finalised the VAT audit and that adjustments had been made to its tax return. The relevant parts of the letter are quoted above.

[38] According to SARS, Gold Kid sought to convince it to decide otherwise by providing information regarding the alternative contact details of its suppliers.

[39] Based on the above and the invoices submitted by Glowing Gold SARS disallowed Gold Kid's claim.

Cosmic Gold Trading CC

[40] As part of the auditing, Vlikazi and his team visited the premises of Cosmic Gold on 31 October 2016. The owner informed him that the company was not trading during the periods indicated to him by SARS.

[41] The telephone conversation between Vilikazi and owner of Cosmic Gold was confirmed in an email dated 20 October 2016 wherein he requested Cosmic Gold to confirm the invoice attached and whether it was still trading.

[42] The owner of Cosmic Gold failed to respond to the above email, including various messages left for him on his cell phone. It was for this reason that the respondent concluded that the tax invoices issued by Cosmic Gold could not be verified.

[43] Based on the above, SARS issued the letter of intent to disallow the input claim of Gold Kid based on the invoices from Cosmic Gold.

Lifestyle Gold Palace CC and Bhekusifiso Metal and Alloy CC

[44] There seem to have been no problem with these two companies relating to their business dealings with Gold Kid.

[45] In brief, SARS disallowed Gold Kid's VAT claim for the period in question for the following reasons:

a. Glow Gold Trading and Cosmic Gold did not conduct business with the applicant during the tax periods in question.

b. The tax invoices were submitted to the respondent suppliers in which they declared output text.

c. The tax invoices relied on by Gold Kid were not valid.

d. There was serious doubt as to the existence of the suppliers during the period in issue.

e. The applicant issued a receipt from self-created tax invoices.

Res judicata

[46] Gold Kid contended that SARS was not entitled to do a further assessment of its VAT because of the determination made by the order of the court.

[47] SARS, on the other hand, contended that at the time the order was made Gold Kid was already under audit investigation. It further stated that it opted not to authorise the VAT refund in terms of section 190(2) of the TAA. It declined to release the sum of

R78 million to the applicant because the applicant is indebted to it in the amount of R72 1324 823.54.

[48] In my view, the issue of whether SARS was barred from continuing with the audit which it had commenced with before the order was made and doing the further assessment on the returns of Gold Kid turns on the interpretation of the order.

[49] It is common cause that the order was made, arising from the unopposed urgent application which Gold Kid had instituted to compel payment of its VAT refund by SARS. The application was based on the provisions of section 190(1) of TAA read with section 45 of the VAT Act. Section 190(1)(*a*) of TAA provides:

> "(1) A person is entitled to a refund of— (*a*) an amount properly refundable under a tax Act and if so reflected in an assessment."

[50] Section 45 of the VAT Act provides:

> "(1) Where the Commissioner does not within the period of 21 business days after the date on which the vendor's return in respect of a tax period is received by an office of the South African Revenue Service refund any amount refundable in terms of section 44(1), interest shall be paid on such amount at the prescribed rate (but subject to the provisions of section 45A) and calculated for the period commencing at the end of the first-mentioned period to the date of payment of the amount so refundable."

[51] The case of Gold Kid, in that case, was that SARS having issued an assessment for the VAT period 2015/12 was obliged to refund the amount reflected in the assessment in terms of section 190(1) of the TAA.

[52] It seems not in dispute that more than twenty-one (21) days after receipt of the tax returns having lapsed without SARS indicating where it stood with the matter, Gold Kid was in law entitled to the refund, including interest thereon. While not disputing this, however, SARS contended that the order did not restrain it from exercising powers given to it in terms of the provisions of s 98 of TAA. Section 98 provides as follows:

> "(1) SARS may, despite the fact that no objection has been lodged or appeal noted, withdraw an assessment which—
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> (*a*) was issued to the incorrect taxpayer;
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> (*b*) was issued in respect of the incorrect tax period; or 35
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> (*c*) was issued as a result of an incorrect payment allocation.
>
> (2) An assessment withdrawn under this section is regarded not to have been issued."

[53] Interpretation of the order

[54] In its heads of argument Gold Kid in attacking the approach adopted by SARS relied primarily on two points- the reversal of the refund is *res judicata* because the Court already determined the issue and secondly the conduct of SARS in that regard was subversive of the order and thus illegal. The second point has to do with the merits of the review application.

[55] In my view, reading of the order in its context, it is quite clear that the Court was not concerned with the merits of the dispute between the parties. In other words, it was not concerned with whether or not the assessment was correctly conducted. If that was the case then that would have fallen within the jurisdiction of the Tax Court.

[56] The court in considering the urgent application was faced with having to deal with the procedural requirement as provided for in s 190 of TAA read with s 45 of the VAT Act. It is also clear from the reading of Gold Kid's papers in that matter that the issue of the assessment did not feature in the application. The essence of the application was to compel SARS to do what it was supposed to do once it had issued the assessment- pay for the VAT returns. That, however, did not mean that it could not in terms of s 98 of the TAA withdraw the assessment it had made.

[57] It was not disputed that SARS could, having withdrawn the earlier assessment, do another assessment. The contention of Gold Kid as I understand it is that the conclusion made regarding the outcome of that assessment was reviewable because it was never invited to comment on its finding regarding the status of the suppliers before the decision was made.

[58] I agree with Counsel that the order sought and granted in favour of Gold Kid in the unopposed application did not interdict SARS from exercising power vested in it, in terms of s 98 of TAA. It is also important to note that at the time that the order was made SARS had commenced with the audit of the VAT returns submitted by Gold Kid.

[59] The principles governing *res judicata* in our law are well established and thus there is no need to repeat them in this judgment. It follows from the above analysis that the issue of res judicata as raised by Gold Kid cannot be sustained.

Points *in limine*

[60] In its answering affidavit SARS contended that this court did not have jurisdiction to entertain the dispute raised by Gold Kid because the dispute falls within the powers of the Tax Court and the Appeal Court. However, its Counsel correctly conceded during the debate that based on the cause of action, this Court does have jurisdiction to

entertain the dispute.

[61] Briefly, the jurisdiction of the Tax Court is provided for under s 117 of the TAA, which provides as follows:

> (1) The tax court for purposes of this Chapter has jurisdiction over tax appeals lodged under section 107.
>
> (2) The place where an appeal is heard is determined by the 'rules'.
>
> (3) The court may hear an interlocutory application relating to an objection or appeal and may decide on a procedural matter as provided for in the 'rules'."

[62] An appeal against an assessment decision made by SARS is provided for in section 107 of the TAA. A taxpayer aggrieved by disallowance of a refund is entitled to object, or an appeal against such a decision in terms section 106(4) read with 107 of the TAA.

[63] The powers of the Tax Court are set out in s 129(2) of the TAA in the following terms:

> "(1) The tax court, after hearing the 'appellant's' appeal lodged under section 107 against an assessment or 'decision', must decide the matter on the basis that the burden of proof as described in section 102 is upon the taxpayer.
>
> (2) In the case of an assessment or 'decision' under appeal, the tax court may—
>
> (*a*) confirm the assessment or 'decision';
>
> (*b*) order the assessment or 'decision' to be altered, or
>
> (*c*) refer the assessment back to SARS for further examination and assessment.
>
> (3) In the case of an appeal against an understatement penalty imposed by SARS under a tax Act, the tax court must decide the matter on the basis that the burden of proof is upon SARS and may reduce, confirm or increase the understatement penalty so imposed.
>
> (4) If SARS alters an assessment as a result of a referral under subsection (2)(*c*), the assessment is subject to objection and appeal."

[64] It is clear from the above that the Tax Court does not have the power to consider whether an assessment made by SARS, is reviewable on the basis of abuse of power, and illegality, or any reviewable grounds envisaged under the Promotion of Administration of Justice Act (PAJA)[4] or the common law. It follows that the powers given to the Tax Court do not oust the powers of the High Court to hear review

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4 Act 3 of 2000.

applications related to the exercise of power by SARS.[5]

[65] After conceding that this Court does have jurisdiction to entertain the applicant's review application, Counsel for SARS raised the point that Gold Kid failed in its duty to exhaust internal remedies provided for in legislation.

[66] It is common cause that the decision of SARS to do a further assessment on Gold Kid's tax returns was an administrative act which is accordingly reviewable. The issue that this Court is now confronted with is whether it should exercise power to review despite the pending appeal which I was made to understand is at a stage where the parties have already exchanged their statements.

[67] The issue that this court had to deal with as a preliminary point is whether it should decline to exercise review power because Gold Kid has failed to exhaust internal remedies.

[68] The duty to exhaust internal in remedies is governed by s 7(2) of PAJA which provides that:

> ". . . 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."

[69] The Constitutional Court in dealing with the provisions of s 7(2) of PAJA in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd*,[6] explained the duty to exhaust internal remedies as follows:

> "[119] In clear and peremptory terms, section 7(2) prohibits courts from reviewing 'an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted'. Where, as in this case, there is a provision for internal remedies, the section imposes an obligation on the court to satisfy itself that such remedies have been exhausted. If the court is not satisfied, it must decline to adjudicate the matter until the applicant has either exhausted internal remedies or is granted an exemption. Since PAJA applies to every administrative action, this means that there can be no review of an administrative action by any court where internal remedies have not been exhausted, unless an exemption has been granted in terms of section 7(2)(c)."

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5 See *Ackerman, Ltd v CSARS*, *Peolwane Properties (Pty) Ltd v The Commission for South African Revenue Services*, Case number 34483/2015 and *Metcash Trading v The Commissioner for the South African Services and Another* 2001 (1) SA 1109 (CC), where the Constitutional Court stated that judicial review in the ordinary sense is not ousted by the powers given to the Tax Court.

6 2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC)) [2013] ZACC 52; [2013] ZACC 48.

[70] The Constitutional Court quoting further from its decision in *Koyabe v Minister for Home Affairs*,[7] said:

> "Under the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it had been exhausted. However, PAJA significantly transformed the relationship between internal administrative remedies and the judicial review of administrative decisions. . . . Thus, unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action." (Footnotes omitted.)

[71] In Nichol and Another v Registrar of Pensions and Others,[8] the Supreme Court of Appeal held that:

> "It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7(2)(*c*). Moreover, the person seeking exemption must satisfy the Court of two matters: first that there are exceptional circumstances, and second, that it is in the interest of justice that the exemption be given."

The Constitutional Court in dealing with what may constitute exceptional circumstances in Koyabe said:

> "What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."

[72] In DDP Valuers (Pty) Ltd v Madibeng Local Municipality,[9] Makgoka J cautioned against the rigid use of the defence of failure to exhaust internal remedies. In this respect the learned Judge said:

> "[18] The duty to exhaust internal remedies is a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognised this need for flexibility, acknowledging in section 7(2)(*c*) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Such condonation can only be granted upon

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7 ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC).

8 2008 1 SA 383 (SCA) at [15].

9 2015 JDR 0208 (GP).

application by the party seeking judicial review."

[73] In the present matter SARS having conducted an audit into the VAT returns it withdrew the earlier assessment it had made on the basis that it was not satisfied that the suppliers whose claims Gold Kid relied on in its returns were in existence. It was not disputed that it had the power to do that in terms of s 98 of TAA. The essence of Gold Kid's contention was however that in exercising that power, of being satisfied that there was non-compliance, it was not afforded a fair hearing. It is not its case that the relief that the Appeal Court may provide on appeal will be ineffective in addressing its legal interest.

[74] In my view, neither exceptional circumstances nor any prejudice has been shown as to why the appeal proceedings which Gold Kid has instituted in this matter should not be exhausted before the review can be considered. Accordingly the point regarding failure to exhaust internal remedies by Gold Kid stands to succeed. It is thus not necessary to consider the metis of the review application at this stage.

Order

[75] In the circumstances the Applicant's application is struck of the roll with costs.

E MOLAHLEHI
Judge of the High Court
Gauteng Local Division,
Johannesburg

HEARD ON:	26 March 2018
JUDGMENT DATE:	19 July 2018
FOR THE APPLICANTS:	Adv PF Louw SC with Adv CJ Dreyer
INSTRUCTED BY:	Pierre Retief Attorneys & Conveyancers
FOR THE RESPONDENT:	Adv AT Ncongwane SC with Adv CM Masilo
INSTRUCTED BY:	State Attorneys