IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 16112/2021

In the matter between:

L'AVENIR WINE ESTATE (PTY) LTD Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Coram: Justice J Cloete

Heard: 2 December 2021, supplementary notes delivered on 21 and 28 January 2022

Delivered electronically: 11 March 2022

JUDGMENT

CLOETE J:

[1] On 17 September 2021 the applicant approached this court on an urgent basis for orders permitting it to submit an income tax return for the period

1 April 2009 to 31 December 2009 (“the disputed period”) and for the respondent (“SARS”) to thereafter assess it for that period (“the main relief”).

[2] Coupled with the main relief were prayers that, pending the envisaged assessment, SARS was to provide the applicant with a tax clearance certificate and to cease all collection steps against it in respect of the applicant’s 2018 tax year (“the interim relief”).

[3] On 30 September 2021 the application was postponed by agreement to 29 October 2021. On 2 November 2021 a further order was granted by agreement, which resolved the interim relief pending determination of the main relief, and also postponed the matter again (with a timetable for filing further papers) until 2 December 2021, when it came before me in the Third Division “fast lane”.

[4] It is common cause that the applicant’s appeal against its 2018 assessment is currently pending in the tax court. One of the central issues in that appeal is whether or not SARS must take into account the applicant’s alleged loss for the disputed period. To provide context it is necessary to briefly sketch the relevant background facts.

[5] The applicant is a wine producer. It was previously registered as Laroche South Africa – Wine Estates (Pty) Ltd (it is unclear from the papers when it underwent a name change). The applicant commenced business on 11 April 2005.

[6] On 23 February 2006 it applied to the Registrar of Companies to change the end of its *'current financial year'* to March, which was duly approved on 3 March 2006. Thereafter on 8 March 2010 it again applied to the Registrar of Companies to change the end of its *'current financial year'* to December, and this too was duly approved on 25 March 2010.

[7] The applicant maintains that the latter approval took effect retrospectively for its 2009 tax year. On the other hand SARS maintains that the approval applies to the applicant's 2010 tax year. This was the genesis of the dispute, with the applicant adopting the position that SARS is obliged to assess the disputed period in the 2009 tax year, and SARS maintaining that the disputed period should have been included in the 2010 tax year.

[8] What is common cause however is that, as a fact, a return has not been submitted (whether it be in respect of 2009 or 2010) for the disputed period; SARS assessed the applicant for both these years without that period being included; and SARS, for various reasons, is not prepared to permit the applicant to either submit a separate return for the disputed period or agree to issuing reduced assessments for the 2009 and/or 2010 years.

[9] In adopting this position, SARS has rejected the applicant's contention that it is obliged to do so based on a *'readily apparent undisputed error in the assessment'* (by either SARS or the applicant) or a *'processing error'* (by

SARS) as envisaged in s 93(1)(d)(i) and s 93(1)(a)(ii) respectively of the TAA[1].

[10] The crux of the applicant's complaint in the dispute before me is thus the "refusal" by SARS to assess it for the disputed period. The applicant asks for what its counsel described as a two-fold *mandamus* (it does not seek a finding on the merits of its return, only that it be received and assessed by SARS).

[11] In its answering affidavit SARS raised *inter alia* what it submits are fatal defects in the procedure adopted by the applicant in approaching this court for a final, mandatory interdict. Three of these submissions are directly relevant for present purposes, although all of them are interlinked. First, SARS contends, the main relief sought seeks to sidestep the dispute resolution process contained in Chapter 9 of the TAA in which the applicant is presently engaged in the tax court.

[12] Second, s 105 of the TAA provides that a taxpayer can only dispute an *'assessment'* in terms of that process *'unless a High Court otherwise directs'*. Third, since the decision to decline the s 93 request(s) for reduced assessments is not subject to objection or appeal (as envisaged in s 104 as read with s 105 of the TAA), and the dispute resolution process in Chapter 9

[1] Tax Administration Act 28 of 2011.

of the TAA therefore does not apply, the appropriate avenue for the taxpayer to have followed is a review of an administrative decision under PAJA.[2]

[13] In its replying affidavit the applicant agreed that the dispute resolution process in Chapter 9 cannot be followed, but contended that *'it is not enough [for SARS] to simply point to the tax court procedure and claim that the applicant must be non-suited for its failure for not doing so… (t)he applicant cannot be expected to endure the refusal of SARS to do something that would allow it to enter into the dispute resolution procedure'.*

[14] As far as SARS' reliance on s 105 of the TAA is concerned, more particularly that portion which reads *'unless a High Court otherwise directs'*, the applicant maintained that if SARS was suggesting a two-stage application (i.e. for leave to approach the High Court and thereafter to apply for the main relief), this was without merit since it would result in *'an unnecessary proliferation of legal costs and squandering of the court's resources'.*

[15] However the applicant overlooked the PAJA point which SARS had raised, and it also overlooked the decision in *Absa Bank Limited and Another v CSARS*[3] where Sutherland ADJP dealt with the interpretation of s 105 in the context of a taxpayer's direct approach to the High Court for a legality review prior to any appeal proceedings in the tax court:

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2 Promotion of Administrative Justice Act 3 of 2000.
3 2021 (3) SA 513 (GP).

> *'[25] It was contended that the provisions of section 105 indicate a confined arena in which to conduct any disputations over a tax liability. However, plainly, if a court* [i.e. a High Court] *may '…otherwise direct…' that results in an environment for dispute resolution in which there is more than one process. A court plainly has a discretion to approve a deviation from what might fairly be called the default route. In as much as the section is couched in terms which imply permission needs to be procured to do so, there is no sound reason why such approval cannot be sought simultaneously in the proceedings seeking a review, where an appropriate case is made out. It was common cause that such appropriate circumstances should be labelled "exceptional circumstances". The court would require a justification to depart from the usual procedure and, this, by definition, would be "exceptional". However, the quality of exceptionality need not be exotic or rare or bizarre; rather it needs simply be, properly construed, circumstances which sensibly justify an alternative route...'*

[16] There is no suggestion that, given the absence of a Chapter 9 remedy in respect of the impugned decision, this would not qualify as *'exceptional circumstances'*. During argument the debate thus centred around whether or not the applicant had correctly approached court for a *mandamus* instead of a review. Counsel for the applicant appeared to accept that it should indeed have approached this court for a review of SARS' administrative decision. The parties were then granted the opportunity to file supplementary notes dealing *inter alia* with whether or not the papers as they currently stand, duly supplemented if necessary, could form the basis for a review (a "conversion").

[17] In its supplementary note the applicant confirmed that it *'does not join issue with the view that a review is apposite'.* However the applicant submitted that such a conversion would be competent for the following reasons.

[18] First, the papers as they stand are detailed and no more need be said or placed before the court to facilitate the determination of the main relief, save for an amendment of the notice of motion to provide for the setting aside of the impugned decision.

[19] Second, if the court is of the view that the review should be dealt with in the *'customary fashion'* with the rule 53 record and reasons being provided, this too can be dealt with by way of an amendment to the notice of motion, with an opportunity afforded to the parties to amplify their papers thereafter.

[20] Third, SARS' view that the application should be dismissed on *'form'* as opposed to its merits, is overly formalistic and does not serve the interests of justice. A conversion will also avoid an unnecessary proliferation of costs. If however it is found that there is any duplication of work, this is something which can be effectively addressed by a costs order, although the applicant does not concede that this will be the case.

[21] On the other hand SARS argues against a conversion for the following reasons. First, the parties are obliged to define the nature of the dispute in their papers, and the court is duty bound to determine that dispute alone.[4] Although SARS pertinently raised the PAJA point in its answering affidavit the applicant nonetheless persisted with its case premised on final mandatory relief.

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[4] *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) at para [13]; *Tau v Mashaba and Others* 2020 (5) SA 135 (SCA) at para [19].

[22] Second, since review relief did not form part of the applicant's notice of motion, it could only potentially be accommodated under the rubric *'further and/or alternative relief'*. However it is well established that relief cannot be granted under a prayer of this nature if it is substantially different to that specifically claimed, unless the basis therefor has already been fully canvassed in the papers and the opposing party thus given the opportunity to deal with it.[5] In the instant matter SARS was not called upon to meet a case based on a review; and no factual foundation was laid by the applicant for a review, with the result that neither party dealt with it in their papers. On the contrary, the relief sought and the factual foundation laid by the applicant is substantially dissimilar to that of a review.

[23] The argument advanced by SARS is compelling. The reasons it provided for opposing a conversion are supported by ample authority. In any event, as a starting point, if the applicant were permitted at this stage to make out a case under PAJA, it would have to overcome the hurdle of the 180 day period referred to in s 7(1) or apply for condonation in terms of s 9 thereof. The applicant states in its supplementary note that the impugned decision upon which it will rely was communicated to it on 13 March 2020. The present application was only launched on 17 September 2021, some 18 months later.

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[5] *Rooibokoord Sitrus (Edms) Bpk v Louw's Creek Sitrus Koöperatiewe Maatskappy Bpk* 1964 (3) SA 601 (T) at 607H-608A; *Port Nolloth Municipality v Xhalisa* 1991 (3) SA 98 (C) at 112D-F; *Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (1) SA 265 (C) at para [12].

[24] Were the applicant instead to adopt the course of a legality review[6] it will have to demonstrate that it has been brought within a reasonable time, which will depend upon the circumstances, or it will have to ask for condonation.[7] But irrespective of the course it chooses to pursue the applicant will have to make out a fresh case to explain its delay and SARS will require the opportunity to deal with it.

[25] Secondly, the applicant will be required to set out the specific grounds upon which it relies for a review (whether under s 6(2) of PAJA or the common law if it chooses to pursue a legality review) and SARS will similarly need to deal with those grounds before the matter can be considered ripe for hearing. Allied to this is the requirement that the record of the impugned decision should be placed before the court (under rule 53) so that it has all the relevant facts against which to consider the lawfulness of the decision.[8]

[26] Thirdly, it is settled law that even if the impugned decision is unlawful, it remains valid and binding, since it continues to have legally valid consequences until set aside.[9] What in truth the applicant now seeks to do, by way of a conversion, is to introduce fundamentally different relief (the review and setting aside of the impugned decision) when the case presently made out is effectively to compel SARS to change the decision it has (rightly or

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6 In *Hunter v Financial Sector Conduct Authority and Others* (*infra*) at para [49] it was stated that as a general rule PAJA applies unless the review is brought by a public functionary in respect of its own unlawful decision.

7 *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A); *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA); *Lion Match Co Ltd v Paper Printing Wood & Allied Workers Union* 2001 (4) SA 149 (SCA) at para [25].

8 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at paras [65] and [67].

9 *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para [31].

wrongly) already made. There is no reasonable possibility that the two can simultaneously co-exist on the same set of papers, whether or not they are supplemented.

[27] In *Swart v Starbuck and Others*[10] the Constitutional Court put it thus:

> *'[35] It is common cause that no attempt has been made by Mr Swart to set aside this authorisation. To validly set it aside would require rigorous engagement with principles of administrative law…*
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> *[37] The process required to be followed in order for the Master's decision to be set aside is set out in rule 53 of the Uniform Rules of Court. Where this rule has not been complied with, it would be inappropriate and unfair to the respondents for a court to consider the lawfulness of the Master's decision…*
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> *[38] To require Mr Swart to adhere to the process prescribed in rule 53 is not undue formalism. Indeed, as this Court held in Kirland, the procedural safeguards applicable to mounting a review application perform an important role in ensuring that interested parties are given proper notice of the review application, and an adequate opportunity to be heard on whether the decision should be set aside. Further, they ensure that the full record of the relevant decision is placed before the Court, so that the Court has all the relevant facts against which to consider the lawfulness of the decision.*
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> *[39] The notice of motion in this application makes no reference to an intended review of the Master's decision. Further, the founding affidavit does not set out any grounds of review. In these circumstances, it would not be fair to the respondent for this Court, at this stage in the litigation… to entertain a challenge to the Master's decision…'*
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> [See also *Hunter v Financial Sector Conduct Authority and Others* at paras [50] – [51]].[11]

[10] 2017 (5) SA 370 (CC).
[11] 2018 (6) SA 348 (CC).

[28] Finally, the applicant's reliance on my finding when sitting as a tax court in *The Commissioner for the South African Revenue Service v FP (Pty) Ltd*[12] is misplaced. In that matter there was a pending appeal in the tax court and the taxpayer brought a "stand alone" review application in that court (in the sense that no relief was sought to have it heard *in limine* by the tax court ultimately seized with the appeal, nor that it be heard simultaneously therewith or dealt with as a separated issue).

[29] According to the taxpayer, the rationale for this approach was that determination of the review in the tax court in its favour would dispose of the appeal as a whole. It was in response to this review application that SARS launched a rule 30 application in the tax court to have it set aside as an irregular step.

[30] Although I found in favour of SARS, I also granted the alternative relief sought by the taxpayer, namely that the appeal proceedings be stayed pending the determination of a review application in the High Court. I reasoned *inter alia* that it made no sense to refuse the alternative relief, since all that would happen is that the taxpayer would be forced to bring another application before another court for the same relief on essentially the same facts. This could hardly be to the benefit of the *fiscus* and moreover the Supreme Court of Appeal had very recently reiterated that litigation is not a game.[13] I also reasoned that SARS had been well aware of the alternative relief sought by

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[12] Case nos 25330, 25331 and 25256 SATC. Tax Court judgments bind the parties to the particular dispute, but do not create binding legal precedent: *ABC CC v CSARS* IT 4036 (14 August 2017) at para [23].

[13] *McGrane v Cape Royale The Residence (Pty) Ltd* (831/2020) [2021] ZASCA 139 6 October 2021.

the taxpayer before the matter was argued. In the present matter the position is materially different.

[31] **The following order is made:**

'The application is dismissed with costs, including all reserved costs orders.'

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JUSTICE J CLOETE