CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 94/23

In the matter between:

UNITED MANGANESE OF KALAHARI (PTY) LIMITED Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Case CCT 98/23

And in the matter between:

RAPPA RESOURCES (PTY) LIMITED Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Case CCT 66/23

And in the matter between:

FORGE PACKAGING (PTY) LIMITED Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Case CCT 72/24

And in the matter between:

ABSA BANK LIMITED First Applicant

UNITED TOWERS (PTY) LIMITED Second Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Case CCT 320/23

And in the matter between:

LUEVEN METALS (PTY) LIMITED Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Neutral citation:	*United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and four other cases* [2025] ZACC 2
Coram:	Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mhlantla J, Rogers J, Theron J, Tolmay AJ and Tshiqi J
Judgment:	Rogers J (unanimous)
Heard on:	15 and 16 August 2024
Decided on:	31 March 2025
Summary:	Section 105 of Tax Administration Act 28 of 2011 — test for granting a direction — relevant considerations in granting or

refusing direction — discretionary nature of power to grant direction — production of rule 53 record pending direction

Peremption of appeal — relevant factors in overlooking

ORDER

In Case CCT 94/23 *United Manganese of Kalahari (Pty) Limited v Commissioner for the South African Revenue Service*:

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant must pay 50% of the respondent's costs in this Court, including the costs of two counsel.

In Case CCT 98/23 *Rappa Resources (Pty) Limited v Commissioner for the South African Revenue Service*:

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court, Gauteng Division, Johannesburg):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The parties are to pay their own costs in this Court.

In Case CCT 66/23 *Forge Packaging (Pty) Limited v Commissioner for the South African Revenue Service*:

On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Condonation is granted for the late filing of the record and the applicant's submissions.

2. Condonation for the late filing of the application for leave to appeal is refused.
3. The applicant must pay the respondent's costs in this Court, including the costs of two counsel.

In Case CCT 72/24 *Absa Bank Limited and United Towers (Pty) Limited v Commissioner for the South African Revenue Service*:

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave is granted to the applicants to file a replying affidavit.
2. Condonation is granted for the late filing of the application for leave to appeal.
3. Leave to appeal is granted, the peremption of the appeal being excused.
4. On the question whether a direction should be granted in terms of section 105 of the Tax Administration Act 28 of 2011, the appeal succeeds and the High Court's decision to grant such a direction is confirmed.
5. The remaining issues in the appeal stand over for later determination in accordance with directions to be issued.
6. The applicants, jointly and severally, the one paying the other to be absolved, must pay the respondent's costs of opposing the overlooking of peremption and of opposing condonation, including the costs of two counsel.
7. The remaining costs incurred to date in this Court stand over for later determination.

In Case CCT 320/23 *Lueven Metals (Pty) Limited v Commissioner for the South African Revenue Service*:

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. The late filing of the respondent's answering affidavit is condoned.

2. The applicant is granted leave to appeal.
3. The respondent is granted leave to withdraw its application for leave to cross-appeal.
4. On the question whether the High Court should have entertained the applicant's application for declaratory relief in light of the provisions of section 105 of the Tax Administration Act 28 of 2011, the appeal succeeds and the High Court's decision to entertain the application on its merits is confirmed.
5. The remaining issues in the appeal stand over for later determination in accordance with directions to be issued.
6. The respondent must bear its own costs in respect of its application for condonation.
7. The respondent must pay the applicant's costs of opposing the application for leave to cross-appeal, including the costs of two counsel.
8. The remaining costs incurred in this Court to date stand over for later determination.

JUDGMENT

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ROGERS J (Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mhlantla J, Theron J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] These five cases were heard together because they raise overlapping questions about the interpretation and application of section 105 of the Tax Administration Act[1] (TAA). The TAA came into force on 1 October 2012. Among other things, it introduced a uniform regime for objecting to assessments and decisions of the Commissioner for the South African Revenue Service (SARS) and appealing such assessments and decisions to the Tax Court. At the same time, provisions in other tax legislation for objection and appeal were repealed. The only other tax legislation with which we are concerned in these cases are the Income Tax Act[2] (ITA) and the Value-Added Tax Act[3] (VAT Act).

[2] I shall refer to the five cases before us by the relevant taxpayers' abbreviated names, as follows (taking them in the order set out in the heading of this judgment): *United Manganese*, *Rappa*, *Forge*, *Absa* and *Lueven.* I shall refer to the High Court and Supreme Court of Appeal judgments in these cases as *United Manganese HC*, *United Manganese SCA* and so forth. In these cases, the taxpayers sought review or declaratory relief or both. The question in each case is whether the taxpayer was entitled to pursue that relief in the High Court, having regard to section 105 of the TAA.

[3] With the exception of *Absa*, the cases were initially enrolled for hearing on 23 May 2024. They had to be postponed owing to election applications that demanded the Court's urgent attention. All five cases were then heard on 15 and 16 August 2024. They were argued in the order set out in the heading to this judgment. At the Court's direction, argument was confined to the questions (a) whether the taxpayer in each case

[1] 28 of 2011.

[2] 58 of 1962.

[3] 89 of 1991.

was entitled to pursue relief in the High Court; and (b) if so, what order should be made for the further adjudication of such relief, in particular whether the matter should be adjudicated on its merits by this Court or remitted for hearing by the High Court or the Supreme Court of Appeal.

[4] The Court's jurisdiction to entertain these cases has not been contested. The interpretation of section 105 raises an arguable point of law of general public importance that this Court ought to consider. Because section 105 is said by SARS to affect the jurisdiction of the High Court to entertain review proceedings, these cases are also constitutional matters. And as shall appear presently, at least some of the cases on their merits raise arguable points of law of general public importance concerning the interpretation and application of provisions of the ITA and VAT Act. When dealing with the individual cases, I shall discuss whether leave to appeal should be granted.

Relevant provisions governing objections and appeals

[5] It is convenient to start by setting out the relevant provisions of the TAA and the rules promulgated under section 103(1) governing the procedures for lodging objections and appeals and for the conduct of tax appeals (Rules).[4] The relevant provisions of the TAA are contained in Chapter 9 which is headed "Dispute Resolution".

[6] The TAA defines "assessment" as "the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS".[5] The TAA identifies four different types of assessments: original, additional, reduced and jeopardy assessments. I need only deal with the first two. In terms of section 91, an original assessment is either the taxpayer's self-assessment, if the tax legislation

[4] In terms of section 103, the Minister of Finance, after consultation with the Minister of Justice and Constitutional Development, may make rules "governing the procedures to lodge an objection and appeal against an assessment or 'decision', and the conduct and hearing of an appeal before a tax board or tax court". The rules in force at the time relevant to the five cases before this Court were the rules promulgated on 11 July 2014 by way of GN 550 in *GG* 37819 (Rules or 2014 Rules). The 2014 Rules have since been replaced by those promulgated on 10 March 2023 by way of R. 3146 in *GG* 48188 (2023 Rules). For present purposes, there are no material differences between the 2014 and 2023 Rules. All references in this judgment to the Rules are to the 2014 Rules unless otherwise stated.

[5] Section 1.

requires a tax return that incorporates a self-assessment (the VAT Act is an example), or a first assessment by SARS, if the tax legislation requires a tax return that does not incorporate a self-assessment (the ITA is an example). As to additional assessments, section 92 provides:

> "If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice."

[7] Where SARS makes an assessment, it must in terms of section 96(1) issue a notice of assessment to the taxpayer. If the assessment "is not fully based on a return submitted by the taxpayer", section 96(2) requires SARS to include "a statement of the grounds for the assessment".

[8] Before making an assessment, SARS may follow a process of information-gathering as regulated by Chapter 5 of the TAA. More particularly, SARS may in terms of section 40 select a taxpayer "for inspection, verification or audit". The process of "verification" is not further regulated by the TAA. The remainder of Chapter 5 deals with procedures for audits and criminal investigations. If the taxpayer is selected for audit, the taxpayer must be given a notice of commencement of the audit and a progress report (section 42(1)). In terms of section 42(2)(b), if the audit or criminal investigation has identified "potential adjustments of a material nature", SARS must within a prescribed time "provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104(2)".[6] Section 42(3) entitles a taxpayer to respond in writing within a prescribed time.[7] If an assessment is thereafter issued, section 96(2) requires the grounds of the assessment to be stated.

[6] See [9] below for the relevant provisions of section 104.

[7] If a senior SARS official has a reasonable belief that compliance with these procedures would impede or prejudice the purpose, progress or outcome of the audit, section 42(5) exempts SARS from compliance. In that event, if an assessment is issued, the grounds must in terms of section 42(6) be furnished within a specified period after the assessment.

[9] Subsections (1) to (3) of section 104 read thus:

> "(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;[8]
>
> (b) a decision under section 107(2) not to extend the period for lodging an appeal;[9] and
>
> (c) any other decision that may be objected to or appealed against under a tax Act."[10]

[10] Before lodging an objection, the taxpayer is permitted by rule 6 of the Rules[11] to request reasons for the assessment. The request must be made within 30 days of the assessment and SARS must provide the reasons within 45 days of the request.[12]

[11] Rule 7 requires an objection in terms of section 104 to be lodged within 30 days after the assessment or, if reasons were requested, within 30 days after the reasons have

[8] Section 104(4) states that a senior SARS official may extend the period prescribed in the Rules within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection.

[9] Section 107(2) provides that a senior SARS official may extend the period within which an appeal must be lodged to the Tax Court for 21 business days if satisfied that reasonable grounds exist for the delay or for up to 45 business days if exceptional circumstances justify an extension beyond 21 business days.

[10] The TAA defines a "tax Act" as meaning the TAA "or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding customs and excise legislation". The "SARS Act" is the South African Revenue Service Act 34 of 1997. Section 4(1)(a) of the SARS Act refers to the national legislation listed in Schedule 1 of that Act and "any other legislation concerning the collection of revenue or the control over the import, export, manufacture, movement, storage or use of certain goods that may be assigned to SARS in terms of either legislation or an agreement between SARS and the organ of state or institution concerned". Schedule 1 lists a number of Acts. Among others, and in addition to the ITA and VAT Act, these include, for example, the Transfer Duty Act 40 of 1949, the Estate Duty Act 45 of 1955, the Securities Transfer Tax Act 25 of 2007 and the Mineral and Petroleum Resources Royalty Act 28 of 2008.

[11] The 2014 Rules referred to in above n 4.

[12] See rule 6 of the Rules.

been provided. The objection must be in the prescribed form and must "specify the grounds of the objection in detail".[13]

[12] In terms of rule 8, SARS may, within 30 days after delivery of the objection, require the taxpayer to produce additional substantiating documents necessary for deciding the objection. The taxpayer must deliver the documents within 30 days after the request.

[13] In terms of section 106(2) read with rule 9, SARS must notify the taxpayer of the allowance or disallowance of the objection and the basis of such disallowance. This must be done within 60 days after delivery of the objection or, if SARS requested supporting documents, 45 days after delivery of those documents. An objection may be disallowed or allowed in whole or in part. If the objection is allowed in whole or in part, the assessment or decision must be altered accordingly. The notice must also give a summary of the appeal procedures.

[14] In terms of section 107 read with rule 10, the taxpayer may appeal against the assessment or decision to the Tax Board or Tax Court. This must be done within 30 days after the notice of disallowance of the objection. The notice of appeal must be in the prescribed form and must—

> "specify in detail—
>
> (i) in respect of which grounds of the objection referred to in rule 7 the taxpayer is appealing;
>
> (ii) the grounds for disputing the basis of the decision to disallow the objection referred to in section 106(5); and
>
> (iii) any new ground on which the taxpayer is appealing."[14]

[13] Rule 7(2)(b).

[14] Rule 10(2)(c). If the taxpayer relies on a ground not raised in its rule 7 objection, SARS may require the taxpayer, within 15 days after delivery of the notice of appeal, to produce the substantiating documents necessary to decide on the further progress of the appeal (rule 10(4)). Those documents must be delivered within 15 days after the request (rule 10(5)).

The taxpayer may not appeal "on a ground that constitutes a new objection against a part or amount of the disputed assessment not objected to under rule 7".[15]

[15] Disputes concerning tax not exceeding a threshold determined by the Minister may, if the parties have agreed, be determined by the Tax Board (sections 108-111). The Tax Board is presided over by a legal practitioner selected from a panel of practitioners appointed by the Minister in consultation with the relevant Judge President.[16] A party dissatisfied with the Tax Board's decision may require that the appeal be referred to the Tax Court for hearing afresh.[17] The five cases before us do not concern matters that were or could have been referred to the Tax Board.

[16] Unless a dispute is referred to the Tax Board, the appeal lies to the Tax Court established in terms of section 116. In terms of section 118(1) the Tax Court consists of a Judge or Acting Judge as President,[18] and an accountant and representative of the commercial community selected from panels appointed in terms of section 120. Section 118(3) provides that if the appeal "involves a matter of law only" or is "an interlocutory application or application in a procedural matter under the rules", the President sitting alone must decide the appeal. Sittings of the Tax Court are not public.[19]

[17] In an appeal to the Tax Court, rule 31 requires SARS to deliver a "statement of the grounds of assessment and opposing the appeal" (rule 31 statement). This must be done within 45 days after the rule 10 notice of appeal or, if SARS requested documents under rule 10(4), within 45 days after those documents have been delivered.[20] The rule 31 statement must—

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[15] Rule 10(3).

[16] Section 110(1)(a) read with section 111.

[17] Section 115.

[18] In terms of section 119, the Judge-President of the relevant Division must nominate and second the Judge or Acting Judge to preside over the Tax Court.

[19] Section 124(1).

[20] The trigger date for the 45 days might be different if the parties first followed alternative dispute resolution procedures or if the dispute was initially referred to the Tax Board.

"set out a clear and concise statement of—

(a) the consolidated grounds of the disputed assessment;

(b) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and

(c) the material facts and legal grounds upon which SARS relies in opposing the appeal."[21]

In terms of rule 31(3), SARS may not include in its rule 31 statement "a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment".

[18] Rule 36(1) contemplates that a rule 31 statement might include a ground of assessment or a ground for opposing the appeal that was not among the grounds identified in SARS' section 96(2) notice or in any other notice requiring SARS to identify grounds of assessment.[22] In that event, the taxpayer may, within ten days after delivery of the rule 31 statement, deliver a notice requiring SARS to make discovery on oath of documents material to the new ground to the extent that such documents are required by the taxpayer to formulate its grounds of appeal under rule 32. Such discovery must be made within 20 days after delivery of the notice.[23]

[19] In terms of rule 32, the taxpayer must deliver a "statement of grounds of appeal" (rule 32 statement). This must be done within 45 days after the delivery of SARS' rule 31 statement or, if the taxpayer requested discovery under rule 36(1), within 45 days after SARS has made discovery. The rule 32 statement must—

[21] Rule 31(2).

[22] The expression "grounds of assessment" is defined as including grounds of assessment referred to in section 42(6) or section 96(2), or grounds for a decision by SARS not to remit administrative or understatement penalties, grounds for a decision referred to in section 104(2) or reasons for assessment provided by SARS under rule 6(5).

[23] Rule 36(4).

"set out clearly and concisely—

(a) the grounds upon which the appellant appeals;

(b) which of the facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and

(c) the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31."[24]

In terms of rule 32(3), the taxpayer may not include in its rule 32 statement "a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7".

[20] Rule 36(2) contemplates that a rule 32 statement might include a ground of appeal that was not set out in SARS' grounds of assessment. In that event, SARS may, within ten days after delivery of the rule 32 statement, deliver a notice requiring the taxpayer to make discovery on oath of documents material to such ground of appeal to the extent that such documents are required by SARS to formulate its reply under rule 33. Such discovery must be made within 20 days after delivery of the notice.[25]

[21] In terms of rule 33, SARS may deliver a reply to the taxpayer's rule 32 statement. This must be done within 20 days after delivery of the rule 32 statement or, if SARS requested discovery in terms of rule 36(2), within 15 days after discovery has been made. The reply must "set out a clear and concise reply to any new grounds, material facts or applicable law set out in the statement".[26]

[24] Rule 32(2).

[25] Rule 36(4).

[26] Rule 33(2).

[22] The statements in terms of rules 31, 32 and 33 constitute the pleadings in the Tax Court, and the issues for decision are those contained in the statements.[27]

[23] In terms of rule 36(3) each party may request the other to make discovery on oath of all documents relating to the issues in the appeal. This is to be done within 15 days after delivery of a rule 32 or rule 33 statement, as the case may be. Such discovery must be made within 20 days thereafter. Rule 37 regulates the calling of expert witnesses. In terms of section 126 of the TAA read with rule 43, SARS, the taxpayer or the President of the Tax Court may subpoena witnesses to testify.

[24] The hearing of a tax appeal is governed by rule 44. Save in certain specified circumstances, the taxpayer presents its case first, followed by SARS. Both sides must present all the evidence, including the leading of witnesses, on which they rely and must adhere to the rules of evidence. Upon the conclusion of the evidence, the parties may be heard in argument.

[25] Section 129(1) states that the Tax Court must decide the matter "on the basis that the burden of proof as described in section 102 is upon the taxpayer". Section 102(1) states that the taxpayer bears the burden of proof in respect of the following matters: that an amount, transaction, event or item is exempt or otherwise not taxable; that an amount or item is deductible or may be set off; the rate of tax applicable to a transaction, event, item or class of taxpayer; that an amount qualifies as a reduction of tax payable; that a valuation is correct; and that a decision which is subject to objection and appeal under a tax Act is incorrect. Although section 129(1) does not mention that the burden of proof may rest on SARS, section 102(2) states that SARS bears the burden of proof on the following two matters: whether an estimate under section 95 is reasonable; and the facts on which SARS based the imposition of an understatement penalty under Chapter 16.

[27] See rule 34: "The issues in an appeal to the tax court will be those contained in the statement of the grounds of assessment and opposing the appeal read with the statement of the grounds of appeal and, if any, the reply to the grounds of appeal." Rule 35 deals with amendments to the statements.

[26] It will be apparent from what has been set out above that an appeal to the Tax Court is not an appeal in the conventional sense. The Tax Court is not bound by any record that may have come into existence before the noting of the appeal. The parties may present new evidence and make new arguments, provided they are relevant to the issues arising from the rules 31, 32 and 33 statements. Except in relation to matters that are within the Commissioner's discretion and are not expressly made subject to appeal, the Tax Court gives its own decision on the merits of the case in place of SARS' decision.

[27] The tax appeal is thus a wide appeal involving a hearing afresh. That was not in dispute before us. As this Court said in *Metcash*[28] with reference to the Special Court created by the ITA, the predecessor to the Tax Court created by the TAA, the decisions of the Commissioner, who is not a judicial officer, are administrative, not judicial actions, from which it followed that challenges before the Special Court were "not appeals in the forensic sense of the word" but involved a reconsideration of the decision by a specialist tribunal[29] with the right "to adduce evidence and to challenge or rebut adverse evidence in a full-blown trial".[30] More recently, and with reference to the TAA, the Supreme Court of Appeal in *Africa Cash and Carry*[31] correctly stated that the Tax Court rehears the matter and decides the issues afresh, and that it may substitute its own decision for that of the Commissioner.[32]

[28] Section 129(2) lists the decisions that the Tax Court may make when deciding a tax appeal. The Tax Court may—

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[28] *Metcash Trading Ltd v Commissioner South African Revenue Service* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC).

[29] Id at para 32.

[30] Id at para 47.

[31] *Africa Cash and Carry (Pty) Ltd v Commissioner for the South African Revenue Service* [2019] ZASCA 148; [2020] 1 All SA 1 (SCA); 2020 (2) SA 19 (SCA); 82 SATC 73.

[32] Id at para 52. See also *Commissioner, South African Revenue Service v Pretoria East Motors (Pty) Ltd* [2014] ZASCA 91; [2014] 3 All SA 266 (SCA); 2014 (5) SA 231 (SCA) at para 2 and the cases there cited.

"(a) confirm the assessment or decision;

(b) order the assessment or decision to be altered;

(c) refer the assessment back to SARS for further examination and assessment."[33]

It is puzzling that section 129(2) does not state that the Tax Court may set an assessment aside. If the taxpayer successfully appeals against the whole of an additional assessment, the usual order would be for the additional assessment to be set aside. This power must be taken to be encompassed by the power of alteration in section 129(2)(b).

[29] When deciding the merits of a tax appeal, the Tax Court may only award costs against the losing party if the grounds of assessment (in the case of SARS) or the grounds of appeal (in the case of the taxpayer) are held to be unreasonable (section 130(1)).[34]

[30] In terms of section 133, the losing party in the Tax Court may appeal as of right either to a Full Court or, if the President of the Tax Court so orders under section 135, to the Supreme Court of Appeal.[35]

[31] In terms of section 100 of the TAA, an assessment becomes "final" if (I summarise) there has been no objection or appeal or once any appeal has been finally determined by the Tax Court or a higher court.

Section 105

[32] Section 105 of the TAA, which is headed "Forum for dispute of assessment or decision", was initially in the following terms:

[33] In a procedural matter, section 129(2)(d) empowers the Tax Court to "make an appropriate order in a procedural matter".

[34] In addition to these two instances, the Tax Court may also in terms of section 130(1) award costs if it substantially confirms the decision of the Tax Board or in cases where a hearing is postponed or an appeal is withdrawn or conceded after the allocation of a date of hearing.

[35] Section 135(1) states that the President of the Tax Court must decide whether or not to grant leave to appeal to the Supreme Court of Appeal "having regard to the grounds of the intended appeal as indicated in the notice [of intention to appeal]".

> "A taxpayer may not dispute an assessment or decision as described in section 104 in any court or other proceedings, except in proceedings under this Chapter or by application to the High Court for review."

[33] With effect from 8 January 2016, section 105 was amended[36] to read as follows:

> "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."

[34] I shall refer to a direction by the High Court permitting an assessment or decision to be disputed otherwise than in proceedings under Chapter 9 as a section 105 direction.

[35] The cases before us raise the following questions about the interpretation and application of section 105:

(a) Is a section 105 direction needed when a taxpayer applies to the High Court to have an appealable[37] assessment or decision set aside on review, whether in terms of the Promotion of Administrative Justice Act[38] (PAJA) or the principle of legality?

(b) Is a section 105 direction needed when a taxpayer applies to the High Court for a declaratory order on a question which, if answered in favour of the taxpayer, would show that an appealable assessment or decision is wrong?

(c) What is the effect of section 105 on the High Court's jurisdiction prior to the granting of a direction?

(d) When and how should a section 105 direction be sought and adjudicated?

(e) What test should the High Court apply when deciding whether to give a section 105 direction? In particular, is the test one of "exceptional circumstances"?

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[36] By way of section 52 of the Tax Administration Laws Amendment Act 23 of 2015.

[37] By "appealable", I mean appealable to the Tax Court.

[38] 3 of 2000.

(f) What factors should the High Court take into account when deciding whether to give a section 105 direction?

(g) What effect, if any, should section 105 have where a review or declaratory application is brought before an assessment is issued?

(h) What is the nature of the High Court's power to grant or withhold a section 105 direction? In particular, does it involve the exercise of a true discretion, in which case the grounds of appellate interference would be more limited than otherwise?

[36] It is convenient to address these questions generally before turning to the facts of the five cases. To avoid unduly burdening this judgment, I shall not first set out all the arguments advanced by the taxpayers and SARS before undertaking the analysis. Instead, I shall deal with the relevant arguments in the context of the questions arising. Save where necessary, I shall not identify which taxpayers made which arguments. Unsurprisingly, there was much overlap.

Does section 105 apply to review and declaratory applications?

[37] In order for section 105 to apply, there must be in existence an assessment or decision as contemplated in section 104. For the sake of brevity, I shall refer only to assessments. Section 105 envisages that a taxpayer could notionally dispute an assessment in the High Court. Since there is no right of appeal from an assessment to the High Court, the phrase "dispute an assessment" in section 105 cannot, in relation to potential High Court proceedings, mean to dispute by way of an appeal.

[38] What then are the ways in which a taxpayer could dispute an assessment in the High Court? The only two that occur to mind are review and declaratory applications. A taxpayer that seeks to have an assessment set aside on review can properly be said to be disputing the assessment. The same is true where the taxpayer seeks a declaratory order on a question going to the correctness of an assessment.

[39] This is confirmed by the initial wording of section 105, which provided that a taxpayer could not dispute an assessment or decision as described in section 104 "in any court or other proceedings", except in proceedings under Chapter 9 "or by application to the High Court for review". Two things can be discerned from the initial formulation. First, the lawmaker regarded a High Court review as a way in which the taxpayer might dispute an assessment, and the right to do so was preserved. Second, the lawmaker envisaged that there were proceedings, apart from review, by which an assessment might be disputed in a court other than the Tax Court, and the lawmaker wished to preclude recourse to such other proceedings.

[40] New Zealand tax legislation is not dissimilar to our section 105, save that there is no discretion to permit proceedings outside of the special statutory machinery. The current exclusion[39] provides that, save by way of the prescribed objection procedure, "no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever". Judicial review has always been regarded as falling within the exclusionary scope of this provision and its predecessor, which was in similar terms.[40] These provisions and the case law relating to them were surveyed by the New Zealand Supreme Court in *Tannadyce*.[41]

[41] Apart from review and an appeal to the Tax Court, by what proceedings might an assessment be disputed other than a High Court declaratory application?[42] The lawmaker can be assumed to have been aware that applications for declaratory relief on

[39] Section 109 of the Tax Administration Act 166 of 1994.

[40] Section 27 of the Income Tax Act 65 of 1976.

[41] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158; [2012] 2 NZLR 153.

[42] An application which in substance requires a declaration of the rights of the parties may be framed as a claim for consequential relief, for example an interdict. For present purposes I include such an application within the concept of a declaratory application.

tax matters were occasionally brought in the High Court[43] and that in some instances assessments had already been issued.[44]

[42] In *Metcash*,[45] decided some years before the TAA was enacted, this Court said that "it has for many years been settled law that the Supreme Court has jurisdiction to hear and determine income tax cases turning on legal issues". This Court cited[46] *Friedman I*,[47] where McCreath J had referenced various cases in which such jurisdiction was accepted,[48] and quoted with approval a passage from *Friedman I* to the effect that where a dispute involved no dispute of fact and was simply one of law, the Commissioner and the Special Court were not the only competent authorities to decide the issue.[49] This Court noted[50] that *Friedman I* had been confirmed on appeal.[51]

[43] Whether or not the taxpayer explicitly says so, it may appear from the papers that the purpose of a declaratory application is to attack an assessment. Unless the declaratory relief were purely academic (in which case it might be objectionable for that

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[43] See, for instance, *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* 1984 (1) SA 672 (A); *Chancellor, Masters and Scholars of the University of Oxford v Commissioner for Inland Revenue* 1996 (1) SA 1196 (A); and *Shell's Annandale Farm (Pty) Ltd v Commissioner, South African Revenue Service* 2000 (3) SA 564 (C).

[44] See, for example, *Friedman N.O. v Commissioner for Inland Revenue: In re Phillip Frame Will Trust v Commissioner for Inland Revenue* 1991 (2) SA 340 (W) (*Friedman I*), confirmed on appeal as *Commissioner for Inland Revenue v Friedman N.O.* [1992] ZASCA 190; 1993 (1) SA 353 (A) (*Friedman II*); and *Van Zyl N.O. v Commissioner for Inland Revenue* 1997 (1) SA 883 (C). In *Van Zyl N.O.* SARS disputed the High Court's jurisdiction in respect of the three years for which there were assessments but not in respect of the subsequent year for which there was yet no assessment. In the event, the High Court dismissed the taxpayer's application on the merits and did not find it necessary to decide the question of jurisdiction.

[45] Above n 28.

[46] Id at para 44.

[47] Above n 44.

[48] The cases cited by McCreath J in *Friedman I* were *Shell Southern Africa Pension Fund v Commissioner for Inland Revenue* 1982 (2) SA 541 (C), *Thorne and Another N.N.O. v Receiver of Revenue* 1976 (2) SA 50 (C), *Commissioner for Inland Revenue v Jacobson's Estate* 1961 (3) SA 841 (A), *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 (3) SA 833 (A), *Commissioner for Inland Revenue v Emary NO* 1961 (2) SA 621 (A) and *Estate Smith v Commissioner for Inland Revenue* 1960 (3) SA 375 (A), where declaratory jurisdiction was accepted without discussion, and *Emary N.O. v CIR* 1959 (2) PH T 16 (D), where the point was specifically considered.

[49] *Metcash* above n 28 at para 44, quoting *Friedman I* at 341I-J above n 44.

[50] Id at para 44.

[51] *Friedman II* above n 44.

reason), the taxpayer would be seeking to deploy a favourable declaratory order either to compel SARS to amend the assessment or to bind the Tax Court. A court would look to the substance to see what the declaratory application is really about. In *Barnard Labuschagne*[52] this Court considered declaratory applications to be encompassed by section 105,[53] even though that was not the focus of the case and the Court did not hear oral argument.

[44] In the English tax legislation considered by the House of Lords in *Autologic*,[54] provision was made for an aggrieved taxpayer to appeal an adverse decision by Inland Revenue to appeal commissioners. Their findings of fact were final but there could be a further appeal to the High Court on a point of law. Six groups of companies sought declaratory orders in the High Court relating to group relief flowing from decisions of the European Court of Justice. The question arose whether, in view of the statutory scheme, the issues were justiciable by the High Court.

[45] Lord Nicholls, who delivered the main opinion for the majority, said that the elaborate statutory appeal scheme would be defeated if a taxpayer, without appealing the assessment, were to adopt the expedient of applying to the High Court for a declaration of how much tax he owed. In substance, although not in form, that would be an appeal against an assessment. The effect of the relief sought from the High Court "would be to negative an assessment otherwise than in accordance with the statutory code". If the court was satisfied that taxpayer's application was an indirect way of

[52] *Barnard Labuschagne Inc v Commissioner, South African Revenue Service* [2022] ZACC 8; 2022 (5) SA 1 (CC); 2022 (10) BCLR 1185 (CC); 84 SATC 351.

[53] Id at para 41:

> "If the taxpayer's grievance concerns an 'assessment' or 'decision', section 105 stipulates that the taxpayer may only dispute such assessment or decision 'in proceedings under this Chapter, unless a High Court otherwise directs'. The 'unless' proviso caters for those relatively rare situations where a High Court regards it appropriate to grant declaratory relief on legal questions relating to assessments."

[54] *Autologic Holdings plc v Inland Revenue Commissioners* [2005] UKHL 54; [2006] 1 AC 118, [2005] 4 All ER 1141.

seeking to achieve the same result as could be achieved directly by a statutory appeal, the application would be struck out as an abuse of process.[55]

[46] It is unnecessary, in the context of section 105, to invoke the concept of abuse of process emphasised in *Autologic*, but the reasoning in that case accords with my view that a declaratory application may in substance be an attack on an assessment. Where that is so, the taxpayer will require a section 105 direction.

[47] Some of the taxpayers argue that section 105 applies only to disputes that are within the remit of the Tax Court. Section 105 was, they said, "designed to give preference to the Tax Court over matters where it and the High Court share concurrent jurisdiction". They submit that the Tax Court does not have jurisdiction to entertain PAJA or legality reviews or grant declaratory orders. On the second of these propositions, the taxpayers are right. The Tax Court is not a superior court with inherent jurisdiction.[56] It is not a "court" as contemplated in section 33(3)(a) of the Constitution read with the definition of "court"[57] in PAJA, because it is not a court of similar status to the High Court; and it is not a "tribunal" as contemplated in section 33(3)(a) of the

[55] Id at paras 12-13. Lord Nicholls said that his approach accorded with the views expressed in authorities such as *Argosam Finance Co Ltd v Oxby (Inspector of Taxes)* [1965] Ch 390; *Vandervell Trustees Ltd v White* [1970] 3 All ER 16; [1971] AC 912 and, more widely, *Barraclough v Brown* [1897] AC 615. Lord Nicholls observed (at para 14) that in *Vandervell* Lord Wilberforce had sought to clarify the limits of the "exclusivity" principle. The principle did not exclude the jurisdiction of the courts where the taxpayer and revenue so agreed, provided the assessment had not become final and provided that the question, "in [a] form suitable for decision by the court", was not "so close to the question of the assessment itself" that the court should decline to entertain it. This approach showed, said Lord Nicholls (at para 15) that, apart from cases of straightforward abuse of process, there was an area where the court had a discretion. As to the dividing line, Lord Nicholls approved the statement in *Glaxo Group Ltd v Inland Revenue Commissioners* [1995] STC 1075 at 1083-4 that there is an "absolute exclusion" only when the proceedings seek relief which is "more or less co-extensive with adjudicating on an existing open assessment", but that the more closely the High Court proceedings approximated to this in their substantial effect, the more ready the High Court would be as a matter of discretion to decline jurisdiction.

[56] If, constitutionally, the Tax Court is a "court", it is a court contemplated in section 166(e) read with section 170 of the Constitution. I say "if" in view of a recent judgment of the Full Court of the Western Cape Division, *Poulter v CSARS* [2024] ZAWCHC 97; [2024] 2 All SA 876 (WCC); 86 SATC 415, where it was held that the Tax Court is not a "court of law" for purposes of section 33 of the Legal Practice Act 28 of 2014. In the course of its reasoning, the Full Court concluded (at para 52) that the Tax Court was an administrative tribunal falling outside the judicial system contemplated in section 166 of the Constitution. The judgment is criticised by the editor of *The Taxpayer* in his note on the case: (2024) 73 *The Taxpayer* 90 at 92-6. These are not waters into which it is necessary to step for purposes of the matters before us.

[57] PAJA defines "court" as meaning the Constitutional Court acting in terms of section 167(6)(a) of the Constitution or "a High Court or another court of similar status" or, under certain conditions, a Magistrate's Court.

Constitution read with the definition of "tribunal"[58] in PAJA, because it has not been established "for the purpose of judicially reviewing an administrative action in terms of this Act". Being a creature of statute, the Tax Court can only exercise the powers conferred upon it by statute. Those powers include neither the review of administrative action or the exercise of public power nor the making of declaratory orders.

[48] However, it does not follow from this that review and declaratory applications are not hit by section 105. If the taxpayers were right, section 105 would never operate, because (a) only the Tax Court can hear appeals under Chapter 9; and (b) the Tax Court cannot entertain any of the tax-related proceedings in which the High Court would ordinarily have jurisdiction, such as reviews and declaratory applications. The purpose of section 105 is that challenges to assessments that the High Court, but not the Tax Court, could entertain should ordinarily be excluded in favour of Chapter 9 appeals that only the Tax Court may entertain.

[49] The fact that the Tax Court does not have jurisdiction to entertain PAJA and legality reviews or grant declaratory orders may be relevant in assessing whether a section 105 direction should be given, but section 105 is applicable to such High Court proceedings.

Effect of section 105 on the High Court's jurisdiction

[50] There was a debate about the effect of section 105 on the jurisdiction of the High Court to entertain review and declaratory applications. The issue arose in relation to *Rappa*, where one of the questions is whether the High Court could order production of a rule 53 record[59] without first deciding whether a section 105 direction should be

[58] PAJA defines "tribunal" as meaning "any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act".

[59] The notice of motion in a High Court review is usually framed in terms of rule 53 of the Uniform Rules of Court. In terms of rule 53(1)(b) the notice of motion calls upon the decision-maker to despatch to the Registrar, within 15 days after receipt of the notice of motion, the record of the proceedings sought to be corrected or set aside, together with such reasons as the decision-maker is by law required or desires to give or make. In terms of rule 53(4), the applicant may, within 10 days after the Registrar has made the record available, amend or add to the terms of its notice of motion and supplement its founding papers.

given. The question of principle is whether, in the absence of a section 105 direction, the jurisdiction of the High Court to entertain review or declaratory proceedings falling within the scope of that section is an unimpaired jurisdiction concurrent with that of the Tax Court or whether such jurisdiction is absent until a section 105 direction is given.

[51] Counsel for the taxpayer in *Rappa* argues that section 105 is not a jurisdiction-conferring provision. The High Court has and continues to have review jurisdiction. If section 105 applies to reviews (as I have held it does), the taxpayer's submission is that a section 105 direction is needed only in order for the High Court to entertain the review on its merits. The High Court has jurisdiction both before and after the giving of such a direction, with the result that procedural powers such as ordering the production of the rule 53 record can be exercised even though the Court has not yet decided to entertain the merits by giving a section 105 direction.

[52] Counsel for SARS argues to the contrary. Counsel was reluctant to use the language of ouster, because the history of statutory ousters before the advent of democracy was one of excluding the jurisdiction of the ordinary courts without providing any adequate alternative redress. According to SARS, that is not the case with section 105, because an appeal to the Tax Court is an adequate alternative remedy. Indeed, the alternative remedy is better, so SARS argues, because the Tax Court can conduct a hearing afresh and substitute its view on the merits for that of SARS. Nevertheless, SARS' argument is that, absent a section 105 direction, the High Court does not have jurisdiction.

[53] I agree with the taxpayers that section 105 does not confer review or declaratory jurisdiction on the High Court. That is a pre-existing jurisdiction. However, and with the coming into force of section 105 in its amended form, that jurisdiction has been conditionally suspended – conditionally, because the suspension may fall away if the High Court gives a section 105 direction. If the section had ended before the "unless" clause, there would have been a complete and unconditional ouster in relation to any High Court proceedings in which an assessment or decision is disputed. The addition

of the "unless" clause enables the High Court to lift the suspension by giving a direction. That is the plain and unambiguous meaning of the section.

[54] The High Court thus cannot, in matters falling within the scope of section 105, exercise the review or declaratory jurisdiction it has unless and until in a particular case it has given a section 105 direction. It follows that the High Court cannot order production of a rule 53 record until the question of its jurisdiction is resolved.

[55] A similar question arose in *Standard Bank*.[60] In that case, a bank brought an application in the Competition Appeal Court (CAC) to review conduct of the Competition Commission. The Commission disputed the CAC's jurisdiction to entertain the review and refused to deliver the rule 53 record. In terms of section 38(2A)(e) of the Competition Act,[61] a single Judge of Appeal of the CAC was designated to deal with the disputed obligation to deliver the record. The Judge of Appeal ordered production of the record without resolving the disputed question of jurisdiction.

[56] This Court held that the Judge of Appeal had erred. In the majority judgment authored by Jafta J and Khampepe J, the majority concurred with this part of Theron J's judgment,[62] stating that "[w]here the jurisdiction of the court for which a review application is brought is contested, a ruling on this issue must precede all other orders". The reason for this is that a court must be competent to make whatever orders it issues; if the court lacks such competence, its order is a nullity.[63] Rule 53 only finds application

[60] *Competition Commission of South Africa v Standard Bank of South Africa Limited and related matters* [2020] ZACC 2; 2020 (4) BCLR 429 (CC).

[61] 89 of 1998. In terms of section 38(2A), the Judge President or another Judge of the CAC designated by the Judge President may sit alone to consider, among others, an "application for procedural directions". This Court left open the question whether ordering production of the record fell within the procedural competence conferred by section 38(2A).

[62] On this aspect Madlanga J concurred in both these judgments (see at para 225), giving an overall majority of eight on this part of the case.

[63] Id at para 201.

where review proceedings are instituted before a competent court.[64] The rule facilitates the raising of grounds of review and the proper performance by the court of its review function, but in order for the court to perform its review function it has to have the necessary authority. The object of rule 53 cannot be achieved if the court lacked jurisdiction.[65]

[57] In the course of her reasoning on this subject, Theron J said that jurisdiction needs to be established "up front", based on the founding papers. Where no facts are alleged in the founding papers upon which jurisdiction can be founded, the applicant is not entitled to the production of the rule 53 record in the hope that it will help clothe the court with the necessary jurisdiction.[66] The potential downside of delay in the production of the record did not imply that a court should order such production "without first determining its competence to hear the review application".[67]

[58] Counsel for the taxpayer in *Rappa* argues that *Standard Bank* is distinguishable, because there the dispute was whether a review of the kind in question fell within the competence of the CAC at all. Here, by contrast, the High Court undoubtedly has review jurisdiction, the only question being whether it should be exercised. However, in view of my conclusion that section 105 is a conditional suspension of jurisdiction, the distinction does not strike at the principle. Until a section 105 direction is given, the High Court's jurisdiction is suspended. Since a court may not order the production of a rule 53 record until the contested question of its jurisdiction is resolved, the High Court must first determine whether a section 105 direction should be given. If the direction is given, the Court may then order production of the record. If a direction is refused, the Court can plainly not order production of the record.

[64] Id at para 202.

[65] Id at para 203.

[66] Id at para 119.

[67] Id at para 121.

[59] Counsel for the taxpayer in *Rappa* also invoked this Court's decision in *SAHRC*,[68] where a distinction was drawn between the assumption of jurisdiction and the exercise of the jurisdiction. A court, it was held in *SAHRC*, does not have a discretion to decline to assume jurisdiction – the jurisdiction is conferred by statute. There might, however, be exceptional circumstances which entitle a court in the exercise of its discretion to decline to exercise the jurisdiction, "for example, abuse of process or the stay of proceedings pending some other form of dispute resolution, or on grounds of comity".[69] On this basis, so the taxpayer's argument went, the High Court has review jurisdiction, the only question being whether in the exercise of a discretion the High Court should exercise it.

[60] *SAHRC* is, however, plainly distinguishable. In that case this Court was dealing with the concurrent jurisdiction of the Magistrates' Courts and the High Court to entertain claims for monetary judgments. In respect of claims falling within the jurisdiction of the Magistrates' Courts, there is no statutory fetter on the High Court's jurisdiction to entertain such claims. In the case of tax-related review applications, by contrast, section 105 places a fetter on the High Court's jurisdiction; such jurisdiction is suspended unless and until a section 105 direction is given.

[61] Counsel for the taxpayer in *Rappa* submits that the effect of section 105 on the High Court's jurisdiction is the same as non-compliance with the time-limit in section 7(1) of PAJA or failure to exhaust an internal remedy contemplated in section 7(2) of PAJA.[70] In the latter instances, so it is argued, the High Court has and

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[68] *South African Human Rights Commission v Standard Bank of South Africa Ltd* [2022] ZACC 43; 2023 (3) BCLR 296 (CC); 2023 (3) SA 36 (CC).

[69] Id at para 29.

[70] Subsections (1) and (2) of section 7 of PAJA read thus:

> "(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection 2(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it

continues to have jurisdiction, but may decline to exercise it. This is so, because in terms of section 9(1)(b)[71] the High Court may extend the time-limit imposed in section 7(1) and because in terms of section 7(2)(c) the High Court may exempt an applicant from the obligation to exhaust the internal remedy. The implication of the argument is that the High Court may order production of a rule 53 record even though it has not yet granted a section 7(1) extension or a section 7(2) exemption.

[62] Whether comparing section 105 of the TAA with subsections 7(1) and (2) of PAJA helps the taxpayer's case is doubtful. In *Dengetenge*[72] this Court said that the effect of a failure to exhaust internal remedies is to "defer the exercise of the court's review jurisdiction for as long as that duty is not discharged".[73] A similar view has been expressed by the Supreme Court of Appeal in relation to non-compliance with the time-limit in section 7(1).[74]

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or might reasonably have been expected to have become aware of the action and the reasons.

(2) (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 interests of justice."

[71] Section 9 of PAJA provides in relevant part:

"(1) The period of—

(a) . . .;

(b) . . . 180 days referred to in [section] 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

[72] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* [2013] ZACC 48; 2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC).

[73] Id at para 116.

[74] *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) at para 26 and *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* [2017] ZASCA 23; [2017] 2 All SA 677 (SCA); 2017 (6) SA 360 (SCA) at para 13.

[63] It is unnecessary to decide whether these pronouncements on subsections 7(1) and (2) of PAJA impair the High Court's jurisdiction to order production of a rule 53 record pending the granting of an extension or exemption, since the wording and context differ. Subsections 7(1) and (2) of PAJA are part of a statutory regime that confers and regulates the jurisdiction to review administrative action. Section 7(2) is dilatory in effect: what the court or tribunal may not do is "review" the administrative action in question until the internal remedy has been exhausted. Section 105 of the TAA, by contrast, is part of a statutory regime that, among other things, creates and regulates the jurisdiction of the Tax Court. Section 105 prohibits an approach to the High Court unless a section 105 direction has been given. If a direction is refused, the effect is not merely dilatory.

When and how should the question of a section 105 direction be adjudicated?

[64] In light of the immediately preceding part of this judgment, it will be apparent that a section 105 direction needs to be sought and adjudicated at the threshold. This does not mean that a preliminary stand-alone application is needed. The claim for a direction can be included in the notice of motion. However, if the coercive power of the High Court is needed before the main case is ready for hearing, the applicant would need to set the case down for a preliminary hearing on the claim for a direction. That would typically be the case if SARS declined to produce a rule 53 record or refused to file papers on the merits in a review or declaratory application in the absence of a section 105 direction. Because this is in the nature of an interlocutory matter, the preliminary hearing should be expedited as far as possible, subject of course to the way in which rolls are organised in the different Divisions of the High Court.

What is the test when a section 105 direction is sought?

[65] SARS contends that a taxpayer seeking a section 105 direction must show that there are exceptional circumstances justifying its grant. The taxpayers submit that this heightened standard is not justified.

[66] The exceptional circumstances test appears to have first found expression in *Absa HC,*[75] and there it had what counsel for the taxpayer in *United Manganese* described as the "worst possible source", a concession by counsel.[76] Whether Sutherland DJP in *Absa HC* in truth envisaged a significantly heightened test is doubtful in the light of the following passage in his judgment:

> "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. When a dispute is entirely a dispute about a point of law, that attribute, in my view, would satisfy [exceptionality]."[77]

[67] The exceptional circumstances test has subsequently been adopted by the Supreme Court of Appeal in four of the cases before us: *Rappa SCA*[78] (where, apart from finding support in *Absa HC,*[79] the Court said that the exceptional circumstances test was "clear from the language, context, history and purpose of the section");[80]

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[75] *Absa Bank Limited v Commissioner for the South African Revenue Service* [2021] ZAGPPHC 127; 2021 (3) SA 513 (GP).

[76] Counsel based this on para 27 of *Absa HC,* where Sutherland DJP said that it was "common cause" that the circumstances warranting a section 105 direction should be labelled as "exceptional circumstances".

[77] Id at para 27. In the judgment the last word in this extract is given as "exceptionably", but that seems to be a typographical error.

[78] *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* [2023] ZASCA 28; 2023 (4) SA 488 (SCA); 85 SATC 517.

[79] Id at para 21.

[80] Id at para 17.

United Manganese SCA[81] (where reliance was placed on *Rappa SCA*);[82] *Absa SCA*[83] (where reliance was placed on *Absa HC* and *Rappa SCA*);[84] and *Lueven SCA.*[85] There was no judgment of the Supreme Court of Appeal in the remaining case, *Forge*, leave to appeal having been refused.

[68] In *Rappa SCA* the Court endorsed the proposition that it was "neither desirable nor possible to lay down a precise rule or definition" of exceptional circumstances. The Court quoted from *MV Ais Mamas*[86] where Thring J said that (a) what is ordinarily contemplated by "exceptional circumstances" is "something out of the ordinary and of an unusual nature", something to which "the general rule does not apply", "something uncommon, rare or different"; (b) the expression has two shades of meaning, the primary one being "unusual or different", the secondary one being "markedly unusual or specially different"; and (c) where a statute directs that a fixed rule should only be departed from under "exceptional circumstances", a strict meaning will generally give effect to the lawmaker's intention.[87]

[69] In *MV Ais Mamas*, from which the Supreme Court of Appeal quoted in *Rappa SCA*, the High Court was dealing with the meaning of the words "exceptional circumstances" in section 5(5)(a)(iv) of the Admiralty Jurisdiction Regulation Act.[88] Those words do not appear in section 105 of the TAA.

[70] The "exceptional circumstances" test is expressly used in section 7(2)(c) of PAJA in relation to exempting a review applicant from exhausting internal remedies.

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[81] *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* [2023] ZASCA 29; 85 SATC 529.

[82] Id at para 11.

[83] *Commissioner for the South African Revenue Service v Absa Bank Ltd* [2023] ZASCA 125; 2024 (1) SA 361 (SCA); 86 SATC 195.

[84] Id at paras 27-8.

[85] *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* [2023] ZASCA 144 at para 15.

[86] *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas* 2002 (6) SA 150 (C) at 156H-157C.

[87] *Rappa SCA* at para 22.

[88] 105 of 1983.

The meaning of this phrase was discussed in *Nichol*,[89] where the Supreme Court of Appeal approved the proposition that exceptional circumstances were circumstances that required the immediate intervention of the court and where the internal remedy could not give effective redress.[90] The Court said that the fact that the appellant's review grounds included bad faith and a deliberate disregard of an existing court order did not constitute exceptional circumstances – these were matters that could be dealt with in an appeal to the Financial Services Board.[91]

[71] I disagree with the statement in *Rappa SCA* that an exceptional circumstances test is clear from the language, context, history and purpose of section 105. As to the language, the expression "exceptional circumstances" does not appear in the section. It would thus have to be implied. Words cannot be read into a statute by implication unless the implication is "a necessary one in the sense that without it effect cannot be given to the statute as it stands" or is "necessary in order to realise the ostensible legislative intention or to make the [statute] workable".[92] Section 105 is workable and effect can be given to it without adopting a heightened exceptional circumstances test.

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[89] *Nichol v Registrar of Pension Funds* [2005] ZASCA 97; [2006] 1 All SA 589 (C); 2008 (1) SA 383 (SCA). *Nichol* has been cited with approval on several occasions in this Court: *Koyabe v Minister for Home Affairs* [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) (*Koyabe*) at para 73 and fns 28, 29 and 37; *Gavric v Refugee Status Determination Officer, Cape Town* [2018] ZACC 38; 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC) at paras 135-6; and *Dengetenge* above n 72 at paras 117-21.

[90] Id at paras 16 and 18.

[91] Id at paras 25 and 27-9.

[92] *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) (*Masetlha*) at para 192 and cases there cited in fns 58 and 59. See also *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* [2021] ZACC 29; 2022 (5) BCLR 571 (CC) at para 187. I have separated the quoted tests with the disjunctive "or" rather than the conjunctive "and" which appears in *Masethla*. Sitting in the High Court in *Berg River Municipality v Zelpy 2065 (Pty) Ltd* [2013] ZAWCHC 53; 2013 (4) SA 154 (WCC), I considered the various formulations in the case law and offered the following as a synthesis (at para 29):

> "I respectfully suggest that the formulations in the Constitutional Court cases just cited should not be read as imposing cumulative requirements, with the result that a term cannot be implied into a statute unless (a) the implication is necessary in the sense that without it effect cannot be given to the statute as it stands, and (b) the implication is necessary to realise the ostensible legislative intention, and (c) the implication is necessary to make the Act workable. To say that effect cannot be given to a statute as it stands unless something is implied into it seems to me to be indistinguishable from saying that the Act is not workable without the implication. These two formulations (which mean substantially the same thing) are in turn the basis upon which one can deduce that the implication is necessary to achieve the ostensible legislative intention."

It is unnecessary in this case to resolve this aspect, since the implication fails whether the tests are conjunctive or disjunctive.

The purpose of section 105 can likewise be achieved without that test, as appears from what follows.

[72] As to context, there is nothing in the TAA as a whole pointing to an exceptional circumstances test. On the contrary, the lawmaker was familiar with the statutory "exceptional circumstances" test and employed it six times in the TAA, five of those instances being in Chapter 9 itself.[93] Yet the lawmaker chose not to use the same expression in section 105.

[73] In the broader legislative context, section 7(2)(c) of PAJA empowers a court to exempt a party from exhausting an "internal remedy" in "exceptional circumstances". It is unnecessary to decide whether an appeal to the Tax Court would qualify as an "internal remedy" within the meaning of section 7(2) of PAJA.[94] If it did so qualify, and if the lawmaker had intended an exceptional circumstances test to apply, it would have been unnecessary to enact section 105 of the TAA at all. To the extent that section 7(2) of PAJA might otherwise have applied, section 105 of the TAA takes its place, and it is significant that the exceptional circumstances standard of section 7(2)(c) of PAJA has not been adopted.

[74] As to the history of section 105, neither its initial formulation[95] nor the extract quoted in *Rappa SCA* from the explanatory memorandum that accompanied the Tax Administration Laws Amendment Bill of 2015[96] cast light on the test to be applied by the High Court in deciding whether to give a section 105 direction.

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[93] In Chapter 9, see sections 104(5)(a), 107(2)(b), 113(13), 124(2) and 145(a)(ii). See also section 218.

[94] SARS' argument proceeded on the basis that an objection against an assessment is an "internal remedy" for purposes of PAJA but that an appeal to the Tax Court is not. In response to a question from the bench, SARS' counsel submitted that "internal" meant internal to the administrative hierarchy within which the initial decision was taken and that the Tax Court fell outside the SARS administrative hierarchy. See also Emslie "Internal Remedies" (2024) 73 *The Taxpayer* 47, who argues, with reference to *Koyabe* above n 89 at paras 35-8, that while an objection is undoubtedly an internal remedy, an appeal to the Tax Court is not.

[95] See [32] above.

[96] This is the extract quoted in *Rappa SCA* at para 19 (emphasis in the original explanatory memorandum):

> "The current wording of section 105 creates the impression that a dispute arising under Chapter 9 may either be heard by the tax court *or* a High Court for review. This section is intended to ensure that internal remedies, such as the objection and appeal process and the

[75] As to purpose, the lawmaker has ordained that an appeal to the Tax Court should be what may conveniently be called the default forum for resolving disputes about assessments. In other words, such disputes must be dealt with on appeal to the Tax Court unless there is reason to justify a different course. However, there is no need to set the test for determining whether a different course is justified at the level conveyed by the phrase "exceptional circumstances". The High Court's discretion to give a section 105 direction is not fettered in this way. While it is unnecessary to gloss the language of section 105, Judges would remain true to the purpose of section 105 by asking themselves whether recourse to the High Court rather than the Tax Court is appropriate or whether there is good cause to approach the High Court rather than the Tax Court.

[76] There is a final overarching consideration not mentioned in the Supreme Court of Appeal judgments, namely the injunction in section 39(2) of the Constitution. When interpreting any legislation, a court "must promote the spirit, purport and objects of the Bill of Rights". Section 105 of the TAA implicates the right to just administrative action guaranteed by section 33 of the Bill of Rights, because it places a restriction on the right of litigants to pursue the primary remedy for unjust administrative action, namely judicial review. Section 105 also implicates the right of access to courts guaranteed by section 34 of the Bill of Rights, because it places a restriction on the right of litigants to have disputes adjudicated in review and declaratory proceedings. For this reason, an interpretation that minimises rather than maximises the restriction should be preferred.[97]

> resolution thereof by means of alternative dispute resolution or before the tax board or the tax court, be exhausted before a higher court is approached and that the tax court deal with the dispute as court of first instance on a trial basis. This is in line with both domestic and international case law. The proposed amendment makes the intention clear but preserves the right of a High Court to direct otherwise should the specific circumstances of a case require it."

[97] See, for instance, *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 91: the preferred interpretation "is the one that is least intrusive on the right of access to courts".

[77] In summary, the test for granting a section 105 direction is not whether exceptional circumstances are present but whether there is a justification for departing from the default remedy. Such justification could fairly be tested by asking whether the departure is appropriate or whether there is good cause for the departure.

Factors relevant to the exercise of the section 105 power

[78] Section 105 does not specify the factors to which the High Court must have regard when deciding whether to give a direction under that section. The High Court has a wide discretion. It is neither possible nor desirable to lay down hard and fast rules on how Judges should exercise that discretion. Each case will depend on its own facts. We cannot anticipate the infinite variety of circumstances that may present themselves. This said, it would not be amiss to provide some guidance, since the five cases before us raise a range of typical factors.

[79] Since a section 105 direction is only needed if an assessment has already been issued, a factor that will be relevant both to review and declaratory cases is whether the taxpayer has lodged an objection to the assessment and whether the objection has been disallowed. In a review case, the process of objection is an internal remedy for purposes of section 7(2) of PAJA. If the taxpayer has not lodged an objection and there are no exceptional circumstances to exempt the taxpayer from doing so, it is difficult to see how granting a section 105 direction would be appropriate. In a declaratory case, there is no statutory obligation to exhaust internal remedies. Nevertheless, since declaratory relief is a discretionary remedy, the taxpayer seeking a section 105 direction would need to satisfy the High Court that it should not be required to follow the statutory process before invoking the High Court's jurisdiction.

[80] An important factor that may arise both in review and declaratory cases is judicial aversion to piecemeal adjudication because of its potential to cause delay, multiply costs and result in the inefficient use of scarce judicial resources.[98] Where a

[98] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2010 (5) BCLR 457 (CC); 2012 (4) SA 618 (CC) at para 50; *Cloete v S; Sekgala v Nedbank Ltd* [2019] ZACC 6; 2019 (4)

taxpayer wishes to pursue a review or declaratory case in the High Court while also pursuing other grounds of appeal in the Tax Court, there is an obvious danger of piecemeal adjudication. The tax appeal may need to be held in abeyance while the High Court proceedings are finalised, including appeals from the High Court's judgment. If the High Court proceedings are ultimately determined in favour of the taxpayer in the final appellate court, the need to continue with the Tax Court appeal may fall away. But if the taxpayer ultimately fails in the High Court proceedings, the tax appeal will need to resume after a hiatus of several years. The Tax Court's judgment might then itself go through the appellate hierarchy.

[81] If the substance of the point that the taxpayer wishes to pursue in the High Court could be adjudicated in the Tax Court, the avoidance of piecemeal adjudication will be a powerful factor against giving a section 105 direction. If all the issues are before the Tax Court, that Court can decide how best to manage the litigation and whether it should allow any particular point to be adjudicated separately from others.

[82] In *Absa HC*, Sutherland DJP endorsed the taxpayers' contention that they should be entitled to pursue a potentially decisive point of law in the High Court rather than "condemning the parties to a protracted slog through all the internal steps towards the Special Tax Court".[99] During argument in this Court, counsel for the taxpayers in that case prepared a diagram of the steps in Tax Court litigation, illustrating that from the date of assessment to the date of a Tax Court hearing would typically take 490 days, using the time limits contained in the Tax Court Rules.[100]

[83] As I have already said, avoiding all the steps of Tax Court litigation is only achieved if the law point is decided in favour of the taxpayer. If it is decided against the taxpayer, and if the taxpayer challenges the assessment on other grounds as well,

SA 268 (CC); 2019 (5) BCLR 544 (CC) at paras 57-9; and *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37; 2022 (1) BCLR 46 (CC); 2023 (3) SA 329 (CC) at para 32.

[99] *Absa HC* above n 75 at para 19.2.

[100] They did so with reference to the 2023 Rules: see n 4 above.

the "protracted slog" will still have to take place; its commencement would just be delayed, overall the litigation would take longer to be finalised. Moreover, the High Court in *Absa HC* may have overstated the "protracted" nature of Tax Court procedures when compared with High Court litigation. The taxpayers' diagram included some steps (requests for documents) that would not always occur. Other steps are in the hands of the taxpayer itself, so those steps could be completed sooner than the maximum period permitted by the Rules. The facts of the *Absa* case reveal that it took 493 days from the date of the assessments to the date on which the High Court heard argument – practically identical to the "protracted slog" of the taxpayers' diagram.

Relevant factors in review cases

[84] In considering factors that bear on the exercise of the section 105 power in review cases, there is a preliminary question as to the ambit of the grounds of appeal a taxpayer can raise in an appeal to the Tax Court. Can a taxpayer challenge an assessment on a ground other than one going to the correctness of the assessment? What is the position where a component of an assessment is the result of the exercise by the Commissioner of a discretionary power?

[85] In many tax cases there is no question of discretion. The law as applied to the facts determines the tax consequences. Although in such cases SARS may issue an assessment, the tax liability already exists; it is not created by the issuing of an assessment, even though the assessment may be a necessary step in the enforcement of the liability.[101] When section 92 of the TAA states that SARS must make an additional assessment if it is "satisfied that an assessment does not reflect the correct application of the tax Act", it is not conferring on SARS a power to determine tax consequences. The section is an injunction to SARS to issue additional assessments when the law so

[101] *Reed v Warren* 1955 (2) SA 370 (N) at 372E; *Secretary for Finance v Esselmann* 1988 (1) SA 594 (SWA) at 599A-600D; *Namex (Edms) Beperk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) at 289E-G; and *Wiese v CSARS* [2024] ZASCA 111; [2024] 4 All SA 108 (SCA); 2025 (1) SA 127 (SCA); 87 SATC 14 at paras 29-34.

dictates; SARS is not at liberty to overlook a wrong assessment to the prejudice of the fiscus.[102]

[86] What I have just said is equally true where the taxpayer, while not going into the merits of the assessment, contends that it was issued out of time, having regard to the limitation periods in section 99 of the TAA. There is no question of discretion involved.[103] In a tax appeal the Tax Court can determine afresh whether the assessment was time-barred. Although in that instance it is the validity rather than the correctness of the assessment that is in issue, the lateness of an assessment can be the subject of objection and appeal to the Tax Court.

[87] Sometimes, however, a component of an assessment may be the result of the exercise by the Commissioner of a discretionary power. The effect may be brought about positively or negatively: positively, where that component only finds its way into the assessment because of the exercise by the Commissioner of a discretionary power adversely to the taxpayer; negatively, where that component finds its way into the assessment as a matter of law and has not been reversed through the exercise by the Commissioner of a discretionary power favourably to the taxpayer.

[88] The exercise of a discretionary power by the Commissioner may expressly be made subject to objection and appeal.[104] In such a case, the decision itself, as a matter distinct from a resultant assessment, is the subject of an appeal. And in such a case, the Tax Court may substitute its own opinion for that of the Commissioner.[105]

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[102] This is consistent with section 193(1) which states that "[a]s a general rule, it is the duty of SARS to assess and collect all tax debts according to a tax Act and not to forego any tax debts". This section is contained in Chapter 14 dealing with the writing-off and compromising of tax debts.

[103] Section 99 of the TAA differs in this respect from the repealed section 79(1) of the ITA, which was formulated on the basis of the Commissioner being "satisfied" with various matters.

[104] Section 3(4) of the ITA contains a long list of such decisions that are subject to objection and appeal. The list is not exhaustive. Other instances are dealt with *ad hoc*. For example, in terms of section 89*quat*(5) a decision by the Commissioner not to remit interest under section 89*quat*(3) is made subject to objection and appeal. See also section 32 of the VAT Act and sections 104(2), 190(6), 220, 224 and 231(2) of the TAA.

[105] *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1944 AD 142 at 150 and *Commissioner for Inland Revenue v Da Costa* 1985 (3) SA 768 (A) at 774H-775A.

[89] Sometimes, however, the exercise of a discretionary power is not expressly made subject to objection and appeal. Nevertheless, and because the exercise of the power has found expression in a component of the assessment, the taxpayer's right to object to and appeal against the assessment has been held to empower the Tax Court to consider the component resulting from the exercise by the Commissioner of the discretionary power. In such a case, however, the Tax Court's consideration of the exercise of the discretionary power is more limited than where the exercise of the discretionary power is made subject to appeal: the Tax Court is limited to investigating whether the relevant component of the assessment is supported by a lawful exercise of the Commissioner's discretionary power.[106]

[90] Since the lawfulness of the exercise of the discretionary power in cases of the kind just mentioned depends on the same factors as those featuring in judicial review, the Tax Court may appear to be engaged in a judicial review, but in truth – so it seems to me – it is performing a component of its wide appellate function. However, we were not fully addressed on the precise nature of the Tax Court's function in this type of case, so it is preferable not to express a definite opinion. Suffice to say that nobody argued that the Tax Court could not to some extent investigate the Commissioner's exercise of discretionary powers in relation to the content of assessments. I shall proceed on that assumption, since it accords with prevailing case law.[107]

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[106] *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Beperk* 1985 (2) SA 668 (T) (*Suikerkorporasie*) at 673J-676F, approving the analysis in *ITC 936* (1962) 24 SATC 361 (*ICT 936*). See also *South Atlantic Jazz Festival (Pty) Ltd v Commissioner for the South African Revenue Service* 2015 (6) SA 78 (WCC) (*Jazz Festival*) at paras 21-3. In *Jazz Festival*, which was, like *Suikerkorporasie*, a Full Court judgment, the VAT assessment in issue, in particular the availability of an input tax deduction, depended on whether the taxpayer was in possession of documentary proof "acceptable to the Commissioner" substantiating the taxpayer's entitlement to the deduction. The Full Court held that the Commissioner's decision on the acceptability of the documentary proof could be "reviewed". Other examples are *ITC 1731* (2002) 64 SATC 395 and *ITC 1745* (2003) 65 SATC 395. In *ITC 1876* (2014) 77 SATC 175, I spoke of the Tax Court having "assumed to itself" the power to "review" the Commissioner's decisions in such cases.

[107] The jurisdiction of the Tax Court to undertake a quasi-review in this setting has not been without its critics. In *ITC 892* (1961) 23 SATC 358 O'Hagan J criticised and declined to follow earlier Special Court decisions in which this had been done, regarding them as inconsistent with *Irvin & Johnson (SA) Ltd v CIR* 1946 AD 483. A year later Herbstein J rejected this criticism in *ITC 936*, the case approved by the Full Courts in *Suikerkorporasie* and *Jazz Festival* id). The correctness of *ITC 936* and the Special Court decisions it approved were questioned by the then editor of *The Taxpayer*, David Meyerowitz, who nevertheless thought that the Special Court should be given an express review power: (1958) 7 *The Taxpayer* 205 and (1961) 10 *The Taxpayer* 181.

[91] Apart from discretionary powers which affect the content of an assessment, a taxpayer may consider that SARS' conduct preceding the issuing of an assessment was irregular and that an assessment should be set aside on account of such irregularity. One instance is alleged procedural unfairness. An example that features in several of the cases before us has to do with the duties resting on SARS where the taxpayer is selected for audit in terms of Chapter 5 of the TAA. If, pursuant to the audit, SARS is minded to make potential adjustments of a material nature, SARS is obliged by section 42(2)(b) to give notice of these adjustments to the taxpayer together with the grounds of the proposed assessment. In terms of section 42(3), the taxpayer has 21 days within which to respond. In the light of the response, SARS will decide whether to go ahead with the assessment. If SARS adheres to its position, it would in terms of section 96(2) substantially repeat the grounds of assessment foreshadowed in the section 42(2)(b) notice. Section 42 is thus a codified form of procedural fairness.

[92] A further example of a similar nature features in another case before us. Part IIA of Chapter III of the ITA, comprising sections 80A to 80L, contains what is known by the acronym GAAR – the general anti-avoidance rules. In terms of section 80B the Commissioner may determine the consequences of an impermissible tax-avoidance arrangement in any of the ways listed in subsection (1). I shall call this a GAAR assessment. In terms of section 80J, before issuing a GAAR assessment the Commissioner must give the affected party notice and set out the reasons for the proposed assessment. The affected party has 60 days to submit reasons why GAAR should not be applied. In relation to a proposed GAAR assessment, section 80J of the ITA thus performs a similar function to section 42(2)(b) and (3) of the TAA.

[93] Suppose, then, that SARS has issued an assessment without complying, or complying fully, with section 42(2)(b) of the TAA or section 80J of the ITA, as the case may be, or has allegedly failed properly to consider the taxpayer's response. May the taxpayer pursue an appeal to the Tax Court on the basis of such non-compliance? If such a ground of appeal were permissible, it would not matter whether the assessment

was right on the merits. There might be procedural irregularities of a similar kind that could notionally be the basis for attacking a subsequent assessment.

[94] Again, this was not an issue on which we were fully addressed. At times SARS appeared to argue that a taxpayer could pursue any ground of review in the Tax Court that could be advanced in the High Court. Elsewhere, however, SARS said that a hearing afresh in the Tax Court would be "curative" of earlier procedural unfairness, in the sense that in the Tax Court the taxpayer has the fullest opportunity to present argument and evidence, thus "curing" any earlier denial of that opportunity. This proposition is antithetical to a taxpayer's right to ask the Tax Court to set aside an assessment because of earlier procedural unfairness. When asked by a member of the Bench during oral argument whether a taxpayer could impeach an assessment in the Tax Court solely on the basis of procedural non-compliance, SARS' counsel was emphatic that this could not be done: to allow this would be inconsistent, he submitted, with the Tax Court's function of adjudicating the case afresh in a wide appeal.

[95] There are features of Chapter 9 of the TAA that tend to support SARS' counsel's answer:

(a) If the Tax Court can adjudicate the matter afresh, what is the point of allowing a purely procedural objection to the assessment? Procedural fairness is aimed at getting the answer right. A full hearing afresh in the Tax Court ensures that this can happen, regardless of earlier procedural unfairness.

(b) Although by no means decisive, it is not wholly irrelevant that the lawmaker chose to describe the process in the Tax Court as an "appeal".

(c) Then there are the provisions in section 102 dealing with the burden of proof. These relate to the objective correctness of an assessment. There are no statutory onus rules in the TAA dealing with grounds of review.

(d) The composition of the Tax Court militates against a quasi-review jurisdiction. The accounting and commercial members have expertise in matters going to the merits of assessments. They have no special

competence to decide review grounds and the factual disputes that might arise in connection with them.

(e) In the High Court, reviews are brought by way of motion proceedings in terms of rule 53 of the Uniform Rules of Court. Among other things, the decision-maker is required to deliver the record that culminated in the impugned decision. In the Tax Court, there are unsworn pleadings, and evidence is led orally. Tax Court procedures are tailored to ventilating the merits of assessments, not deciding review grounds.

(f) If the Tax Court could adjudicate grounds that were in substance review grounds unrelated to the merits of the assessment, one would expect the Tax Court to have powers to grant just and equitable relief akin to section 8(1) of PAJA and section 172(1)(a) of the Constitution. Such powers are lacking.

(g) Finally, since the Tax Court is not a court of similar status to the High Court and has not been assigned review powers as contemplated in PAJA, one should be wary of attributing to the lawmaker an intention to grant a review power, through the back door as it were, under the guise of a tax appeal.

[96] Once again, it is undesirable to express a definite conclusion on this question. I shall deal with the approach to section 105 in review cases on the assumption that the Tax Court cannot adjudicate review grounds as such. In particular, I shall assume that procedural unfairness, such as non-compliance with section 42(2)(b) of the TAA or section 80J of the ITA, cannot be a ground of appeal in the Tax Court.[108] On this

[108] In its submissions SARS mentioned the judgment of Revelas J in *ITC 1921* (2019) 81 SATC 373, where the Tax Court held that an assessment should, on the principle of legality, be set aside for want of compliance with sections 40 and 42 of the TAA. This decision is not within the line of authority dealt with in n 106 above. The Judge relied on *Sasol Oil (Pty) Ltd v Commissioner for the South African Revenue Service* [2012] ZAGPPHC 312. That case is distinguishable, because there Phatudi J held that SARS had pleaded a particular ground of assessment in violation of the principle of legality and that the ground should thus be struck out. Phatudi J had already concluded along more conventional lines that this ground had been impermissibly pleaded. His brief additional reliance on the principle of legality contained no discussion of the Tax Court's jurisdiction.

SARS also cited *Carte Blanche Marketing CC v Commissioner for the South African Revenue Service* [2020] ZAGPJHC 202; [2020] 4 All SA 434 (GJ); 2020 (6) SA 463 (GJ) where at para 73 Opperman J said that the Tax Court "has jurisdiction to entertain legality issues". The Judge cited, as authority for this: *Wingate-Pearse v Commissioner for the South African Revenue Service* [2019] ZAGPJHC 218; [2019] 4 All SA 601 (GJ); 2019 (6)

assumption, there is a class of complaints that a taxpayer could potentially pursue by way of review in the High Court which it could not pursue by way of an appeal to the Tax Court. This is a consideration that will naturally play a role when the High Court is asked to give a section 105 direction.

[97] Turning then to relevant factors in review cases, I distinguish between cases where the assessment (a) has no discretionary component; (b) has a discretionary component that is expressly subject to appeal; (c) has a discretionary component that is not expressly subject to appeal.

[98] Before dealing with these three categories separately, I should mention the statutory time-limits which section 99 imposes on the issuing of additional assessments. In general terms, where SARS issued an original assessment, it may not issue an additional assessment more than three years after the date of the original assessment. In the case of original assessments in the form of self-assessments, the period is five years from the date of self-assessment (if a return is required) or five years from the date of the last payment of tax for the tax period (if no return is required).

[99] If an additional assessment is set aside on review, section 99 might give the taxpayer a time-bar defence if SARS were to issue a fresh additional assessment. In my view, the possibility of a time-bar defence against a fresh additional assessment should play no part in a court's assessment of whether or not to grant a section 105 direction. The lawmaker could hardly have regarded it as appropriate for a direction to be given to pursue a review merely to take advantage of a time-bar provision. If there are other reasons that make it appropriate to give a section 105 direction, the fact that a successful review may present SARS with a time-bar problem would not be a reason to withhold a direction. But conversely, if there are no other reasons making it appropriate to give

SA 196 (GJ); 82 SATC 21 (*Wingate-Pearse*) at para 47, where Meyer J in turn referred to *Jazz Festival* above n 106. Meyer J spoke in that paragraph of "the legality of an administrative decision, that was integral to the making of the additional estimated assessments". He had earlier commented that the Court hearing the proposed review would "have to evaluate the basis and merits of the assessments" (at para 45). The statement made by Opperman J, which does not seem to have been a material part of her reasoning, is formulated in wider terms than is supported by cases such as *Suikerkorporasie* above n 106, *Jazz Festival*; and *Wingate-Pearse*.

a direction, the fact that a successful review would give the taxpayer a time-bar defence against a fresh additional assessment would not justify granting a direction.

Non-discretionary cases

[100] Where no discretion is involved, the closer a review ground is to a permissible ground of appeal in the Tax Court, the less likely it is that granting a direction will be appropriate. Review grounds of this kind would typically include complaints that (a) the assessment was materially influenced by an error of law or fact; (b) irrelevant considerations were taken into account or that relevant considerations were not considered; (c) the assessment was not authorised by the taxing provisions on which SARS relies; (d) the assessment was not rationally connected to the information before SARS or to the reasons given by SARS for the assessment; or (e) the assessment was so unreasonable that no reasonable person could have exercised the power to issue it. Complaints of this kind in essence assert that the assessment is wrong, and these are matters that the Tax Court can adequately address. The taxpayer's prospects of success in a review of this kind would not carry much weight, because they can be fully vindicated in a hearing before the Tax Court.

[101] Where the taxpayer's proposed grounds of review are not concerned with the merits of the assessment in the above sense, but with prior procedural irregularities, I have assumed that the Tax Court does not have the power to review and set aside the assessment. The High Court should, however, take into account that in a tax appeal the taxpayer will have the fullest opportunity to be heard. To that extent, the failure by SARS to accord the taxpayer the necessary procedural fairness before the assessment was issued can be cured: not only because the taxpayer will receive full procedural fairness in the Tax Court, but because any error on the merits attributable to SARS' lack of procedural fairness can be corrected.

[102] There is no inflexible rule that the unfairness of an initial decision cannot be cured by a full and fair appeal. In *Slagment*[109] the Appellate Division quoted with approval[110] the statement of Lord Wilberforce in *Calvin v Carr*[111] that the situations in which the possibility of "curing" arise are "too diverse, and the rules by which they are governed so various" that no clear and absolute rule could be laid down.[112] In *Slagment* the Court held that an unfair disciplinary hearing could be cured by a fair disciplinary appeal. The Supreme Court of Appeal followed a similar approach in *Scenematic*.[113] The Court said that if the defect in the initial process "is perpetuated so as to taint the appeal process" there could be no question of curing. On the facts of that particular case, however, there was no reason, so the Court held, why the defect in the initial process (if it was established) could not be cured by the appeal.[114]

[103] In *Slagment* reference was made to another English case, the decision of the House of Lords in *Lloyd v McMahon*.[115] That case is illuminating because of the similarities between the statutory setting there and an appeal against an assessment to the Tax Court. In terms of section 20(1) of the English legislation at issue, a district auditor could certify that there was a loss or deficiency recoverable from city councillors due to wilful misconduct. In terms of section 20(3), an appeal lay to the High Court against the auditor's certificate and such an appeal was a wide rehearing similar to an appeal in the Tax Court.

[104] The House of Lords held that procedural unfairness on the part of the district auditor could be cured by the wide appeal. Lord Keith said the relevant rules of court

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[109] *Slagment (Pty) Ltd v Building Construction and Allied Workers Union* [1994] ZASCA 108; [1994] 12 BLLR 1 (A); 1995 (1) SA 742.

[110] Id at 756F-H.

[111] *Calvin v Carr* [1979] UKPC 1; [1980] AC 574; [1979] 2 All ER 440 (PC).

[112] Id at 592.

[113] *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* [2005] ZASCA 11; [2005] 2 All SA 239 (SCA); 2005 (6) SA 182 (SCA).

[114] Id at paras 34-5.

[115] *Lloyd v McMahon* [1987] UKHL 9; [1987] AC 625; [1987] 1 All ER 1118 (HL).

permitted "a rehearing of the broadest possible scope". Evidence could be given under oath, which was not possible before the auditor. The court was not confined to a review of the material available to the auditor. There might be cases where the procedural defect was "so gross, and the prejudice suffered by the appellant so extreme" that it would be appropriate to quash the auditor's decision on that ground. But where the court considered that justice could properly be done by its own investigation of the merits, the court had the discretion to follow that course.[116]

[105] In similar vein, in *Re DR*[117] the English Court of Appeal said, with reference to *Calvin v Carr*, that there might be cases where "the defect is so flagrant [and] the consequences so severe" that even the most perfect of appeals or re-hearings would not be sufficient to produce a just result. Save in those circumstances, however, the Court found it difficult to think of any case where a decision in a fairly conducted appeal by an independent tribunal following a full merits hearing should be impugnable by reference to unfairness at an earlier stage.[118]

[106] The courts in Australia[119] and New Zealand[120] have followed a similar approach, recognising that a hearing afresh on appeal may cure procedural defects at

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[116] Id at 1157. Similar views were expressed by the two other Law Lords who delivered substantive opinions: Lord Bridge at 1166 and Lord Templeman at 1171-2.

[117] *DR, R (on the application of) v Kingsmead School* [2002] EWCA Civ 1822; [2003] ELR 104 (CA).

[118] Id at para 43.

[119] *R v Marks; Ex parte Australian Building Construction Employees Builders Labourers' Federation ("Omega case")* [1981] HCA 33; (1981) 147 CLR 471 at para 32; *Preston v Carmody* [1993] FCA 377; (1993) 44 FCR 1; (1993) 31 ALD 309 at paras 43-53; and *Garde-Wilson v Legal Services Board* [2008] VSCA 43 at paras 5-10.

[120] *Singh v Attorney-General* [1999] NZCA 264; [2000] NZAR 136, particularly at para 9 where the Court of Appeal quoted the High Court's summary of the relevant principles. In regard to whether the court should exercise its review jurisdiction despite a right of appeal, the High Court said:

> "In considering the exercise of discretion, much will depend upon:
> [i] The gravity of the error or breach at first instance.
> [ii] The likelihood that the prejudicial effects of the error may also permeate the appeal hearing.
> [iii] The seriousness of the consequences for the individual.
> [iv] The nature and extent of the powers of the appellant body.
> [v] Whether the appellate decision is reached only on the basis of material before the original decision maker or by way of rehearing de novo. *De Smith, Woolf and Jowell-Judicial Review of Administrative Action* (5th ed) paragraph 10.022."

first instance but that the court in its discretion might nevertheless entertain the review of the first instance proceedings.

[107] In Canada, section 18.5 of the Federal Courts Act[121] states that if an Act of Parliament expressly provides an appeal to, among others, the Tax Court of Canada, a decision, to the extent that it may be so appealed, is not subject to review in the Federal Court. Section 302 of the Excise Tax Act[122] (ETA) provides for an appeal to the Tax Court against an assessment issued by the Minister of National Revenue. The Supreme Court of Canada has recently had occasion, in two cases, to consider these provisions. *Iris Technologies*[123] was concerned with non-discretionary assessments. The taxpayer brought a review in the Federal Court alleging that (a) the Minister had failed to afford the taxpayer procedural fairness; (b) the assessments were made without evidentiary foundation; and (c) the assessments were made for an improper purpose.

[108] In regard to the first two complaints, the Supreme Court of Canada agreed with the Federal Court of Appeal that they were hit by the ouster in section 18.5 of the Federal Courts Act. In the Federal Court of Appeal, Rennie JA had observed that "courts must look beyond the administrative law language used in an application for judicial review", particularly in respect of challenges under the ETA where Parliament had established a specialised court and system for tax appeals and had expressly excluded the judicial review jurisdiction of the Federal Court.[124]

[109] In regard to the complaints of procedural unfairness and absence of evidentiary foundation, the Supreme Court of Canada said this:

> "Iris's procedural fairness claim is grounded in the timing of the Minister's assessment and the consequential failure to provide the taxpayer with an opportunity to respond to

[121] RSC 1985 c F–7.

[122] RSC 1985 c E–15.

[123] *Iris Technologies Inc v Canada (Attorney General)* 2024 SCC 24. The other case, decided on the same day, is *Dow Chemical Canada ULC v Canada* 2024 SCC 23.

[124] *Iris Technologies* id at para 21.

> any of the Minister's proposed adjustments. Iris would have the opportunity to respond in the context of an appeal of the assessment to the Tax Court under section 302 of the ETA. Given the allegations advanced here, an appeal to the Tax Court is thus an 'adequate, curative remedy' (*JP Morgan*, at para 82;[125] . . .)
>
> I further agree with Rennie JA that Iris' allegation that the assessments were made without evidentiary foundation is 'precisely within the legislative mandate of the Tax Court' (para 11). Here again, an appeal to the Tax Court under section 302 of the ETA constitutes an adequate, curative remedy because the court can cure any evidentiary defects in the Minister's assessment as part of the appeal."[126]

[110] Also worthy of notice are the remarks of the New Zealand Court of Appeal in *Westpac*[127] where the Court placed emphasis on the desirability of getting the right answer on the merits rather than litigating about process. After commenting that, by judicial review, the taxpayer seemed to be disputing the assessment in flat defiance of the exclusionary provision contained in section 109 of the Tax Administration Act of 1994,[128] the Court said that an assessment should reflect the correct tax position. If the assessment is correct, "it is hard to see why complaints about process should result in

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[125] This is a reference to *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)* 2013 FCA 250; [2014] 2 FCR 557. In para 82 of that case the Court said:

> "In each of the following situations, an appeal to the Tax Court is available, adequate and effective in giving the taxpayer the relief sought, and so judicial review to the Federal Court is not available:
>
> . . .
>
> – *Inadequate procedures followed by the Minister in making the assessment*. Procedural defects committed by the Minister in making the assessment are not, themselves, grounds for setting aside the assessment: *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597, at paragraph 7; *Webster*, above, at paragraph 20; *Canada v. Consumers' Gas Co.*, 1986 CanLII 6796 (FCA), [1987] 2 F.C. 60 (C.A.), at page 67. To the extent the Minister ignored, disregarded, suppressed or misapprehended evidence, an appeal under the general procedure in the Tax Court is an adequate, curative remedy. In the Tax Court appeal, the parties will have the opportunity to discover and present documentary and oral evidence, and make submissions. Procedural rights available later can cure earlier procedural defects: *Posluns v. Toronto Stock Exchange et al.*, 1968 CanLII 6 (SCC), [1968] S.C.R. 330; *King v. University of Saskatchewan*, 1969 CanLII 89 (SCC), [1969] S.C.R. 678, at page 689; *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, 316 D.L.R. (4th) 719, at paragraph 28; *Histed v. Law Society of Manitoba*, 2006 MBCA 89 (CanLII), 274 D.L.R. (4th) 326; *McNamara v. Ontario (Racing Commission)*, 1998 CanLII 7144, 164 D.L.R. (4th) 99 (Ont. C.A.)."

[126] *Iris Technologies* at paras 37-8.

[127] *Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] NZCA 24; [2009] 2 NZLR 99.

[128] See [40] above.

the taxpayer not paying tax on the correct basis". If the assessment is wrong, it can be corrected in later proceedings.[129]

[111] The Court also cautioned that allowing collateral challenges to assessments through judicial review could "provide scope for gaming and diversionary behaviour"[130] with resultant delay.[131] Resources which might otherwise be devoted to the primary issue between the parties – whether or not the assessment is right – would instead be diverted to an inquiry into the internal processes of the Inland Revenue Department.[132]

[112] To return to section 105, the High Court would need to consider whether in the circumstances it should give preference to the curative remedy in the Tax Court or the review remedy in the High Court. In non-discretionary matters, the curative remedy of the Tax Court might in general be regarded as adequate, if not better than a review.

[113] The High Court could also properly consider the practical utility of a review remedy. If the assessment were set aside and remitted to SARS in order for the latter to comply with procedural requirements, would it be likely to affect the outcome? I say this in full awareness that the no-difference principle has been rejected in other contexts.[133] Here, however, the question arises not in relation to a substantive ruling on lawfulness but in relation to the question whether a discretionary direction should be given to allow the review to proceed. The context is also different from the typical

[129] *Westpac* above n 127 at para 61.

[130] Id at para 62.

[131] Id at para 63.

[132] Id at para 64.

[133] See *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44; 2023 (4) SA 325 (CC); 2023 (5) BCLR 527 (CC) at paras 207-8. In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) this Court distinguished between the constitutional invalidity of administrative action and a just and equitable remedy. The no-difference approach was held to be out of place on the question of constitutional invalidity (paras 25-6), but not in relation to a just and equitable remedy (see at para 29 where the Court said: "[I]t may often be inequitable to require the re-running of the flawed tender process if it can be confidently predicted that the result will be the same").

disciplinary or review case, because of the unique procedures in Chapter 9 of the TAA and the availability of a fresh hearing before the Tax Court. In terms of these procedures, the taxpayer and SARS are not confined to a single opportunity to state their respective positions.

[114] In a case, for example, where there was not adequate compliance with section 42(2)(b) of the TAA, SARS might subsequently have issued an assessment accompanied by a statement of the grounds of assessment as required by section 96(2). The taxpayer might thereafter have had the opportunity, in an objection, to say what it would have said earlier in response to a section 42(2)(b) notice. If SARS disallowed the objection, one has evidence as to how SARS would respond if it were required to go back and issue a section 42(2)(b) notice. SARS might also have given reasons to explain the disallowance. The taxpayer might subsequently have repeated its position in a notice of appeal, and this might have been followed by Tax Court pleadings in terms of rules 31 and 32. If there is evidence of this kind, the High Court might properly take into account that a review would be a hollow remedy.

[115] Nevertheless, insistence on procedural fairness at first instance has value in itself, even though the taxpayer has second and third bites at the cherry through an objection and a tax appeal. If SARS were to come under the impression that procedural irregularities will never be scrutinised in review proceedings, administrative fairness within SARS might become lax. This might tend to give rise to a greater number of wrong decisions. And although a taxpayer with sufficient resources can appeal a wrong decision, not all taxpayers have the resources or energy to pursue an appeal. So the High Court might appropriately in a given case decide that the alleged procedural irregularity should be permitted to be taken on review. The more egregious or wilful the departure from the required procedure, the more likely it is that such a course would be appropriate. Prospects of success may also play a role in cases of this kind.

[116] Where the proposed review is based on serious malfeasance, for example corruption or bad faith, a section 105 direction may well be appropriate, provided that

these grounds of review are properly substantiated in the founding affidavit. A taxpayer should not be encouraged to make flimsy allegations of this kind simply to shoehorn its case into the High Court.

[117] In *Iris Technologies,*[134] one of the taxpayer's grounds of review was an alleged improper purpose. The Supreme Court of Canada recognised that the ouster of the Federal Court's review jurisdiction might not apply to cases involving reprehensible conduct, abuse of power or unfairness. However, the taxpayer had failed to allege facts that could support an allegation that the Minister had acted with an improper purpose.[135] In jurisdictions where recourse to review proceedings in tax matters is controlled by the concept of abuse of process, a recognised exception to the barring of review proceedings is where there is a substantiated case of abuse of power by the revenue authorities.[136]

Discretionary cases expressly subject to appeal

[118] Where the taxpayer has an express entitlement to object to and appeal against a discretionary decision of the Commissioner, the relevant factors are likely to be much the same as those set out above in relation to non-discretionary cases. However, there may be a need to distinguish between a discretion "in the strict sense", a so-called "true" discretion (where there may be more than one permissible outcome on identical facts) and a discretion "in the loose sense" (where there is, in the eyes of the law, only one right answer, even though the decision-maker must have regard to a "number of disparate and incommensurable features" in coming to a decision).[137]

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[134] Above n 123.

[135] Id at paras 39-42.

[136] See *Harley Development Inc v Commissioner of Inland Revenue* [1996] UKPC 67: [1996] STC 440 at 449a-h. And compare *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (PC) at paras 14-18; *Revenue Tannadyce* above n 41 at paras 12, 14, 26 and 42; and *Deputy Federal Commissioner of Taxation v Richard Walter Pty Ltd* [1995] HCA 23; (1995) 183 CLR 168 at para 18 (per Brennan J) and at paras 14 and 18 (per Deane and Gaudron JJ).

[137] For this distinction, see *Giddey N.O. v JC Barnard and Partners* [2006] ZACC 13; 2007 (2) BCLR 125 (CC); 2007 (5) SA 525 (CC) (*Giddey*) at para 19 and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) at paras 83-8.

[119] In the case of a discretion in the loose sense, there is only one right answer, and a full right of appeal to the Tax Court stands essentially on the same footing as an appeal in a non-discretionary case. In the case of a true discretion, however, the Commissioner and the Tax Court could notionally and permissibly reach different outcomes. The taxpayer may say that before it subjects itself to the Tax Court's discretion (which might go against the taxpayer) it wishes to have a proper exercise of the discretion by the Commissioner (since this might go in favour of the taxpayer). If a plausible case for differing outcomes were made out in the founding papers, this might be a reason for the High Court to allow the review to proceed.

Discretionary cases not expressly subject to appeal

[120] I have assumed that where a discretionary component of an assessment is not expressly subject to appeal, the Tax Court may, when hearing an appeal against an assessment, perform a quasi-review function in relation to the discretionary component. Since prevailing case law indicates that the grounds of appeal in this respect are coextensive with review grounds, it may be difficult for the taxpayer to persuade the High Court to grant a section 105 direction. There would need to be some added benefit achievable in a High Court review that could not be achieved in a Tax Court quasi-review. Some of the factors mentioned below in relation to declaratory applications might be relevant here.

Relevant factors in declaratory cases

[121] A declaratory application may be justified where the taxpayer is raising a pure point of law. When a section 105 direction is sought for leave to pursue such an application, the High Court will need to satisfy itself in the first place that the point is indeed a pure point of law. If there are factual disputes, the Tax Court is the obvious forum for dealing with the matter.

[122] Even if the declaratory application concerns a pure point of law, the Tax Court has the power to decide such a point in the course of determining an appeal against the

assessment, even though it cannot grant relief in the form of a declaratory order. A taxpayer seeking to pursue the point in the High Court may thus need to show something more than that the point is one of law. Factors that may (not necessarily will) justify High Court proceedings are that the point of law (a) is one of general importance so that a judgment with precedential value will have public utility; or (b) does not apply only to existing assessments but will affect the tax treatment of the taxpayer on an ongoing basis.

[123] The High Court will also need to take into account that in Tax Court proceedings SARS is protected against adverse costs unless its grounds of assessment are found to be unreasonable. The taxpayer has a like protection. The legislative policy behind this protection might be thwarted if taxpayers were too readily granted permission to pursue declaratory cases in the High Court. This factor could be neutralised if the taxpayer were to forego a request for costs in the High Court or to subject itself to the test that would have been applied by the Tax Court in terms of section 130(1) of the TAA.

[124] In the light of judicial disapproval of piecemeal adjudication, it will be important for the High Court to know whether the point of law is the only basis on which the taxpayer challenges an assessment. If there are other challenges which can only properly be pursued in the Tax Court, it is unlikely to be appropriate to permit a law point, which could be determined by the Tax Court along with the other grounds, to be adjudicated separately in the High Court.

Approach where review or declaratory relief is sought before an assessment is issued

[125] Where an assessment has not yet been issued, section 105 is not directly applicable. However, because review and declaratory remedies are discretionary, the High Court could properly decline to entertain such an application if an assessment were in the offing and if, upon the issuing of the assessment, a section 105 direction would not be appropriate.

[126] If the High Court considered that the taxpayer is "jumping the gun" in order to avoid the direct application of section 105, the High Court might well be justified in declining to entertain the case. SARS' attitude might be a relevant factor. Other relevant factors would include (a) the time likely to elapse before an assessment is issued; (b) the need for a more urgent determination than could be achieved by following the processes of the TAA and the Rules. If a potential assessment will be disputed solely on a point of law, and if that point crystallises sufficiently early, the High Court might consider it unduly burdensome to require the taxpayer to wait for an assessment and then to go through the processes of the TAA and the Rules.

The nature of the section 105 power

[127] The question here is whether the High Court's power to grant or refuse a section 105 direction is a discretion in the true sense or only in the broad sense. This affects the test for appellate interference. If the power is a true discretion, a court may only interfere on appeal if the discretion was not exercised judicially; or was influenced by wrong principles or a misdirection on the facts; or if the court of first instance reached a result that could not reasonably have been reached by a court properly directing itself to all the relevant facts and principles. If the power is a discretion in the broad sense, the court on appeal can substitute its own evaluation for that of the court of first instance, though broader policy considerations may mandate a measure of caution before the appellate court intervenes.[138]

[128] There is no litmus test to determine whether a discretion is of the one kind or the other. In *Giddey*[139] this Court approved the approach of the Full Court in *Bookworks*[140] on the question whether the statutory power to order a company to provide security for costs was a narrow or loose discretion. As appears from *Bookworks* and the authorities there reviewed, factors that point in the direction of a true discretion are that the

[138] *Trencon* above n 137 at paras 87-8.

[139] Above n 137 at para 20.

[140] *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (4) SA 799 (W) at 807-8.

discretion (a) is procedural in nature; (b) is of a kind where legitimate differences of opinion on the appropriate decision may occur; (c) may be exercised at any time during the proceedings, in other words not only at the end as part of a final judgment. Another factor is whether it would be inconsistent with the policy of the law to permit unrestricted appeals against the exercise of the power in question.

[129] In my view, the power to grant or refuse a section 105 direction is a true discretion. It is procedural in nature, since it regulates access to the High Court. At least in some instances, legitimate differences of opinion might be expected as to whether a direction should be granted. Importantly, the direction must be granted or refused at the threshold of proceedings. Although that may also be the end of proceedings if a direction is refused, if the direction is granted it marks only the beginning of proceedings. It is undesirable that such a direction should be subject to unrestricted attack on appeal. One would not want to encourage preliminary appeals which require the main case to be held in abeyance. Nor would one want to find, at the end of a review or declaratory case, that the proceedings are too readily nullified by a successful appeal against the granting of the section 105 direction.

[130] It follows that the test for appellate interference is the test applicable to true discretions.

CCT 94/23 United Manganese of Kalahari (Pty) Limited v CSARS

[131] I now turn to the first of the five cases, where the applicant is United Manganese of Kalahari (Pty) Limited (UMK), a manganese miner.

Background

[132] In October 2016 UMK furnished its transfer pricing report to SARS for the 2011, 2012 and 2013 years of assessment. In March 2017 SARS began an audit into UMK's tax affairs. The audit concerned transactions between UMK and "offshore connected parties". SARS made requests for information which UMK supplied. On 17 April 2019

SARS wrote to UMK in terms of section 42(2)(b) of the TAA identifying transfer pricing adjustments which SARS was minded to raise by way of additional assessments for UMK's 2011, 2012 and 2013 years of assessment. The transactions comprised (a) an ore supply agreement between UMK and Afro Minerals Trading Limited (AMT), a Swiss company; (b) an agency and marketing agreement between UMK and Kalahari Trading AG (KT), also a Swiss company; and (c) a technical services agreement between UMK and Renova Manganese Investments Limited (RMI), a Cypriot company. SARS' view was that UMK was a "connected person" in relation to each of AMT, KT and RMI.

[133] RMI held all the shares in Mineral Mining Consulting Limited (MMC) which held all the shares in Tromata Consultants Ltd (Tromata). Tromata held all the shares in AMT and 51% of the shares in KT. RMI held 49% of the equity shares and 50% of the voting rights in UMK. The balance of the equity shares and voting rights was held by Majestic Silver Trading 40 (Pty) Limited (MST).

[134] The proposed transfer pricing adjustments were to be made in terms of section 31 of the ITA. In simplified terms, this section provides for a pricing adjustment to be made in certain circumstances in transactions between a South African resident and a non-resident if they are connected persons in relation to each other. If the price paid to the South African resident is less, or the price paid by the South African resident is more, than would have existed had they been independent persons dealing at arm's length, the South African resident is regarded as having obtained a tax benefit. The South African resident's taxable income and tax payable must then be calculated on the basis of the price that would have existed had the two persons been independent parties dealing at arm's length. In essence, the section aims to neutralise loss to the fiscus through artificially low prices received by, or artificially high prices paid by, a South African resident to a connected non-resident.

[135] The expression "connected person" is defined in section 1 of the Act. In relevant part, paragraph (d) provides that "connected person" means, in relation to a company—

> "(i) any other company that would be part of the same group of companies as that company if the expression 'at least 70 per cent of the equity shares in' in paragraphs (a) and (b) of the definition of 'group of companies' in this section were replaced by the expression 'more than 50 per cent of the equity shares or voting rights in';
>
> . . .
>
> (v) any other company if at least 20 per cent of the equity shares or voting rights in the company are held by that other company, and no holder of shares holds the majority voting rights in the company;
>
> (vA) any other company if such other company is managed or controlled by—
>
> (aa) any person who or which is a connected person in relation to such company; or
>
> (bb) any person who or which is a connected person in relation to a person contemplated in item (aa)."

[136] It was not in dispute between the parties that RMI, MMC, Tromata, AMT and KT were part of the same group of companies and were thus connected persons in relation to each other (paragraph d(i) of the definition). It was also not in dispute that UMK and RMI were connected persons in relation to each other, because RMI held at least 20% of the shares in UMK and no shareholder in UMK held the majority voting rights (paragraph (d)(v) of the definition).

[137] What was disputed was whether UMK was a connected person in relation to AMT and KT. This depended on paragraph (d)(vA) of the definition. SARS did not contend that RMI "managed or controlled" AMT and KT merely because RMI was, through MMC and Tromata, the indirect holding company of AMT and KT. In the section 42(2)(b) notice, SARS contended that RMI and MMC respectively "managed or controlled" KT and AMT respectively, because a Mr Fabrizio Ferrari was at all material times the sole director of RMI, MMC, AMT and KT. SARS said that this common directorship enabled RMI to manage or control KT, and MMC to manage or control AMT (First Thesis). On the First Thesis, UMK was a connected person in

relation to AMT and KT through the following adaptation of the definition in paragraph (d)(vA), namely that "connected person" means—

> "(d) in relation to a company *[UMK]*—
>
> . . .
>
> (vA) any other company *[KT / AMT]* if such other company *[KT / AMT]* is managed or controlled by—
>
> (aa) *[in the case of KT]* any person *[RMI via Mr Ferrari]* who or which is a connected person in relation to such company *[UMK]*; or
>
> (bb) *[in the case of AMT]* any person *[MMC via Mr Ferrari]* who or which is a connected person in relation to a person contemplated in item (aa) *[RMI]*".

[138] The section 42(2)(b) notice also set out SARS' views about the arm's length pricing that would have prevailed between UMK on the one hand, and AMT, KT and RMI respectively on the other, had they been independent persons. In each case, so SARS provisionally concluded, AMT, KT and RMI had earned higher than arm's length returns, with a resultant tax benefit to UMK through reduced taxable income.

[139] In July 2019 UMK's attorneys, Edward Nathan Sonnenbergs Incorporated (ENS), sought clarification on the section 42(2)(b) notice. SARS was asked to provide the factual basis for the First Thesis. SARS was also asked to provide an analysis of its interpretation of the phrase "managed or controlled" and its application to the facts. SARS responded later in July, setting out further factual and legal contentions.

[140] On 30 August 2019 ENS furnished UMK's response to the section 42(2)(b) notice. UMK gave information as to the persons who were directors of RMI, MMC, AMT and KT during the three years of assessment and the dates on which they were appointed or resigned, as the case may be. This information, if correct, rendered the First Thesis untenable. UMK also disputed SARS' views on arm's length pricing and tax benefit.

[141] On 31 January 2020 SARS issued additional assessments for UMK's 2011, 2012 and 2013 tax years and provided a detailed explanation in accordance with section 96(2)(a) of the TAA. In the section 96(2)(a) notification, SARS advanced a different basis for the conclusion that UMK was a connected person in relation to AMT and KT. As appears from SARS' answering affidavit in the review, SARS changed its stance because it accepted the facts which UMK had provided in contradiction of the First Thesis. SARS now contended that UMK and RMI were not only connected persons in relation to each other but that RMI "managed or controlled" UMK by virtue of the rights conferred on RMI in the technical services agreement read with the UMK shareholders agreement. Because RMI managed or controlled UMK, and because RMI was a connected person in relation to AMT and KT (they belonged to the same group of companies), UMK was also a connected person in relation to AMT and KT (Second Thesis).

[142] On the Second Thesis, UMK was a connected person in relation to AMT and KT through the following adaptation of the definition in paragraph (d)(vA), namely that "connected person" means—

> "(d) in relation to a company *[KT / AMT]*
>
> (vA) any other company *[UMK]* if such other company *[UMK]* is managed or controlled by—
>
> (aa) any person *[RMI]* who or which is a connected person in relation to such company *[KT / AMT]*."

[143] In regard to the conclusion that RMI "managed or controlled" UMK, SARS stated its conclusion in these terms:

> "SARS is of the view that the terms of the technical [services] agreement when read in conjunction with the shareholders agreement provide RMI with the ability to materially influence UMK's decision and policy. Accordingly, the *de facto* control of UMK is conferred on RMI.
>
> Paragraph 21 of the Canadian Income Tax Interpretation Bulletin (IT-64R4) explains that the existence of the influence even if not exercised would be sufficient to result in

> *de facto* control. A judgment from the South African Competition Appeal Court in the case of *Caxton and CTP Publishers and Printers v Media 24 Proprietary Limited and Others* (136/CAC/March 2015) [2015] ZACAC 5 (25 November 2015) . . . concurs with the interpretation of the Canada Customs and Revenue Authority. The Court held that the term 'ability' points to the power to do something and can be viewed as a power sourced in an agreement or similar legal instrument thus concluding that the factual state of affairs of how a company is actually being managed, and whether parties choose to exercise their management rights under an agreement, is not the question.
>
> . . .
>
> Accordingly RMI, whether or not it exercised the powers conferred on it by the technical services agreement, had the ability to materially influence UMK's policy and decisions and consequently had *de facto* control of UMK as contemplated in paragraph (d)(vA) of the connected person definition."

[144] On 10 February 2020 UMK asked SARS for a 30-business day extension to object to the additional assessments. SARS granted the extension.

Litigation history

[145] On 24 March 2020, and having not yet filed an objection, UMK issued a High Court application for declaratory and review relief. In its notice of motion, UMK sought, "insofar as it may be required", a section 7(2) exemption and a section 105 direction. Substantively, UMK sought an order reviewing and setting aside the additional assessments and an order declaring that in paragraph (d)(vA) of the "connected person" definition "'managed or controlled' means the exercise of actual *de facto* management or the exercise of actual *de facto* control". The essence of the case for review was that SARS should have afforded UMK the opportunity of commenting on the Second Thesis before issuing the additional assessments, in other words, that a further section 42(2)(b) notice should have been issued.

[146] SARS opposed the High Court application, including the request for a section 7(2) exemption and section 105 direction. SARS delivered a rule 53 record, UMK filed a supplementary founding affidavit, after which opposing and replying

papers were delivered. In June 2020, and at UMK's request, SARS agreed to extend the period for objection until the finalisation of the High Court application and any ensuing appeals.

[147] The High Court gave judgment on 30 September 2021, dismissing the application with costs, including the costs of two counsel.[141] The judgment is not altogether clear. It appears that the High Court refused to grant a section 7(2) exemption. The High Court stated, incorrectly, that UMK had not sought a section 105 direction.[142] The High Court nevertheless considered the merits. In regard to the review, the High Court considered that SARS had complied with section 42(2)(b) of the TAA. Section 42 did not, in the High Court's opinion, impose on SARS a duty to issue a fresh section 42(2)(b) notice upon receiving the taxpayer's response. In regard to the declaratory relief, the High Court set out at some length the contentions of the parties but did not reach a conclusion. The High Court did hold, however, that the declaratory relief was not competent in view of the fact that UMK had not objected to the assessments. The High Court reached that conclusion on the strength of *Medox*.[143]

[148] The High Court granted UMK leave to appeal to the Supreme Court of Appeal, which delivered judgment on 24 March 2023.[144] The Supreme Court of Appeal quoted two paragraphs from the High Court's judgment in which that Court said that UMK had not sought a section 105 direction and that a proper case needs to be made out for such

[141] *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service,* unreported judgment of the High Court, Gauteng Division, Pretoria, Case No 21563/2020 (30 September 2021) (*United Manganese HC*).

[142] In para 3 of its notice of motion in the High Court, UMK sought, "insofar as it may be required", a section 7(2) exemption and an order that "in terms of section 105 . . . this Court adjudicates all of the relief sought by the applicant in this application". Although UMK's primary case in the founding affidavit was that it did not need a section 7(2) exemption or a section 105 direction, the fact that this relief was being sought out of an abundance of caution was explained in paras 64 and 65. In its answering affidavit SARS contended that section 105 was indeed applicable and that UMK had failed to make out a case of "exceptional circumstances". In paras 7.1 to 7.3 of its replying affidavit, UMK denied that section 105 imposed a test of "exceptional circumstances" and submitted that even if that was the test the High Court could exercise its inherent jurisdiction to entertain the case.

[143] *Medox Ltd v Commissioner for the South African Revenue Service* [2015] ZASCA 74; 2015 (6) SA 310 (SCA).

[144] *United Manganese SCA* above n 81.

a direction. The Supreme Court of Appeal said, with reference to *Rappa SCA*,[145] that the High Court could not be faulted. The Supreme Court of Appeal did not address the merits of the review and declaratory relief. The appeal was dismissed with costs, including the costs of two counsel.

[149] On 27 January 2023, shortly before the appeal was argued in the Supreme Court of Appeal, UMK filed its objection to the assessments. There is no evidence as to whether SARS has ruled on the objection and, if so, what its ruling was or whether there is as yet an appeal pending in the Tax Court and, if so, what stage the appeal has reached. Counsel for SARS made certain statements in that regard from the bar, but since counsel for UMK considered that it was not right for SARS' counsel to have done so, I shall disregard those statements.

Discussion

[150] For reasons stated earlier in my discussion of the general principles applicable to section 105, UMK could only pursue the review application if it obtained a section 105 direction. The declaratory relief was in substance an attack on the additional assessments and thus also required a section 105 direction. In regard to the declaratory relief, the High Court's reliance on *Medox*[146] was misconceived. In *Medox* the disputed assessments had long since become final and could thus no longer be impugned. In the present case, by contrast, the High Court heard the matter at a time when the period for objection had been indefinitely extended. The additional assessments had not become final in terms of section 100 of the TAA.[147] UMK was clearly going to deploy a favourable declaratory order in order to impeach the additional assessments, either by compelling SARS to act on the declaratory order by withdrawing the assessments or by relying on the High Court's order in the Tax Court proceedings.

[145] *Rappa SCA* above n 78.

[146] Above n 143.

[147] As to section 100, see at [31] above.

[151] At the time of the High Court proceedings, UMK also needed a section 7(2) exemption under PAJA. Whether there is still a need for a section 7(2) exemption depends on whether SARS has ruled on UMK's belated objection. Unless SARS was given an extension, it would have ruled on the objection in April or May 2023. If SARS has already ruled on the objection, the dilatory effect of section 7(2) of PAJA has lapsed. I shall thus focus on section 105. If UMK was not entitled to a section 105 direction, it would almost certainly not be entitled to a section 7(2) exemption, given that the latter exemption imposes the heightened standard of exceptional circumstances.

[152] The High Court and Supreme Court of Appeal erred when they said that UMK had not sought a section 105 direction. It thus falls to this Court to decide whether UMK should have been given such a direction. This needs to be considered separately in relation to the review and the declaratory relief.

Section 105 – the review

[153] The basis of the review is SARS' alleged non-compliance with section 42(2)(b) of the TAA. SARS did, of course, comply with its obligation to issue a notice under that subsection and UMK responded fully. The criticism is that SARS then switched from the First Thesis to the Second Thesis without issuing a revised section 42(2)(b) notice. UMK's complaint is thus one of non-compliance with a provision aimed at affording taxpayers procedural fairness.

[154] I accept that the Second Thesis differs materially from the First Thesis. I shall assume in UMK's favour, without finally so deciding, that when SARS intends to assess on a materially different basis to the one set out in a section 42(2)(b) notice, it should give the taxpayer a fresh section 42(2)(b) notice, unless the revised basis accords with the taxpayer's response to the initial notice. Although UMK's response to the section 42(2)(b) notice negatived the First Thesis, the response did not itself provide a basis for the Second Thesis. UMK thus has a plausible case for review based on procedural unfairness.

[155] The question is whether this procedural misstep by SARS needs to be vindicated in review proceedings or whether the curative effect of a tax appeal suffices. In my view, a tax appeal suffices. The question whether UMK is a connected person in relation to AMT and KT is not a discretionary matter. Either the test is satisfied or it is not. UMK will thus not be hamstrung, in a tax appeal, by the fact that its contentions on the Second Thesis were not before the Commissioner when the additional assessments were issued.

[156] Moreover, the right of response in terms of section 42(3) was not the only opportunity for UMK to respond to the Second Thesis. It could do so in an objection to the additional assessments. To the extent that its contentions prevailed (through allowance), UMK would have no cause of complaint. To the extent that its contentions failed (through disallowance), one would have evidence that those same contentions would in all likelihood have failed if they had been put up in response to a fresh section 42(2)(b) notice. At the time of the High Court proceedings, UMK had not yet filed its objection and had thus not yet availed itself of this second opportunity. This failure, and the need for UMK to demonstrate exceptional circumstances for a section 7(2) exemption, counted heavily against UMK. UMK did subsequently file its objection, and we must assume that in its objection it set out its contentions on the Second Thesis. Those contentions have either been accepted or rejected by SARS.

[157] SARS' failure to issue a fresh section 42(2)(b) notice has not been shown to be a deliberate flouting of its procedural obligations. SARS could reasonably have thought that it had done its duty by issuing the first section 42(2)(b) notice and by taking UMK's representations into account when deciding to issue the additional assessments. In a letter to SARS dated 18 September 2019, in which ENS conveyed UMK's reluctant agreement to a further extension of the period of prescription to 31 January 2020, ENS stated that SARS had all the necessary information required to make a final decision in respect of the outcome of the audit.

[158] Furthermore, the assumed non-compliance relates to only one aspect, albeit an important one, of the grounds of assessment. On the other aspects – the existence of a connected-person relationship between UMK and RMI, arm's length pricing and tax benefit – there is no complaint of non-compliance with section 42(2)(b).

Section 105 – the declaratory relief

[159] I doubt that the question raised by the declaratory application is suitable for declaratory relief, at least not in the form claimed by UMK. The word "control" often presents difficulties in statutory interpretation. UMK contends for a narrow interpretation and proposes in effect to substitute the actual words in the definition, "managed or controlled", with other words, "the exercise of actual *de facto* management or the exercise of actual *de facto* control". The substituted words do not necessarily resolve the imprecise boundaries inherent in the expression "managed or controlled". What renders management or control "*de facto*"? How frequent or extensive does the "exercise" of powers of management or control have to be to constitute the "exercise" of such powers for purposes of UMK's substituted wording? Does intervention on one or two occasions during the course of a year amount to "the exercise" of management or control?

[160] This leads to another consideration. One cannot be sure that the section 96(2) notice constitutes SARS' final formulation of its case. It is clear from the notice that SARS takes the view that it is sufficient that RMI had the power to exercise *de facto* management or control of UMK, even if RMI did not actually exercise the power. SARS will not be precluded, however, from alleging in its Tax Court pleadings that RMI actually exercised the power from time to time.[148] It is thus desirable that the interpretation and application of the expression "managed or controlled" should be decided once all the relevant facts are known. The question is not suitable for decision on a premature and abstract basis.

[148] This would not fall foul of rule 31(3), as to which see [17] above.

[161] Quite apart from this, however, there is the question of piecemeal adjudication. The Tax Court is capable of deciding the legal question raised by the declaratory relief. If it were suitable for adjudication in advance of other issues, this could be done.[149] Importantly, UMK's challenge to the additional assessments is not confined to the law point raised by the declaratory application. UMK also takes issue with SARS' case on arm's length pricing and tax benefit, and these are matters that can only be decided in the Tax Court. Moreover, the declaratory relief does not challenge the proposition that RMI and UMK are connected persons in relation to each other, so the transfer pricing adjustments that SARS has made in respect of the technical services agreement between UMK and RMI will have to be decided by the Tax Court in any event.

[162] In those circumstances, it would not be appropriate to hive off one legal question for decision by the High Court. More than three years passed from the date of the additional assessments to the date on which the Supreme Court of Appeal gave judgment, and the case was only heard in this Court more than four and a half years after the date of the additional assessments. If the Supreme Court of Appeal or this Court were to have adjudicated the declaratory application on its merits and dismissed it, the Tax Court appeal would then have to wend its own course to trial, with the potential of further appeals on other issues.

Conclusion

[163] Although leave to appeal should be granted, the appeal must fail because the granting of a section 105 direction is not appropriate. The actual orders granted by the High Court and Supreme Court of Appeal thus stand, but for the reasons stated in this judgment. To the extent that the High Court expressed views on the merits of the case, its judgment will not be binding on the Tax Court.

[149] In terms of rule 42 of the Tax Court Rules, the Tax Court may apply the Uniform Rules to the extent that the Tax Court Rules do not provide for a particular procedure. The Tax Court Rules do not address the separation of issues, but rule 33(4) of the Uniform Rules does. That rule could thus be invoked by the Tax Court. Additionally, section 118(3) of the TAA provides that if an appeal to the Tax Court involves a matter of law only, the President of the Tax Court sitting alone must decide the appeal. On the face of it, section 118(3) does not apply where a point of law is only one of several issues involved in the appeal.

[164] In regard to costs, UMK was in part seeking to pursue a review. Review proceedings generally attract *Biowatch* protection[150] where a private party loses against an organ of state.[151] *Biowatch* should also apply to a request for a section 105 direction to bring a review. Since the interpretation and application of section 105 have only now been clarified by way of this judgment, UMK's application in the High Court cannot be said to have been frivolous, improper, instituted without sufficient ground or otherwise manifestly inappropriate.[152] Taxpayers should be warned, however, that an application such as UMK's might well in the future be so branded, now that this Court has provided clarity on the interpretation and application of section 105.

[165] While UMK's application for review relief benefits from *Biowatch*, its application for declaratory relief does not. In the circumstances, it would be just for UMK to pay 50% of SARS' costs in this Court, including the costs of two counsel.

CCT 93/23 Rappa Resources (Pty) Limited v CSARS

[166] In this case, the applicant is Rappa Resources (Pty) Limited (Rappa), a gold exporter.

Background

[167] In March 2019 SARS obtained an order in terms of sections 50 and 51 of the TAA for an inquiry into suspected tax non-compliance by various players in the gold supply chain. Rappa was not one of the parties to be investigated, but two directors of the company were subpoenaed to give evidence.

[150] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[151] *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance* [2023] ZACC 31; 2023 (12) BCLR 1419 (CC); 2024 (1) SA 567 (CC) at para 149 (majority judgment) and paras 279-84 (minority judgment, where the authorities are reviewed). The majority and minority were in agreement on the question of costs.

[152] See *Biowatch* above n 150 at para 24 and *Limpopo Legal Solutions v Eskom Holdings Soc Ltd* [2017] ZACC 34; 2017 (12) BCLR 1497 (CC) at paras 22-3.

[168] SARS began an audit into Rappa's VAT affairs in March 2020. Information was requested and supplied. On 11 December 2020 SARS sent Rappa a notification in terms of section 42(2)(b) of the TAA. This was a lengthy document running to 268 pages and 672 paragraphs. In essence, SARS' conclusion was that Rappa was complicit in an abuse of the provisions of the VAT Act.

[169] According to SARS, this was the abuse:

(a) Rappa exported gold bars. The export sale was a taxable supply, but it was zero-rated in terms of section 11(1)(a)(i). Rappa could thus deduct the input tax it paid to the vendors which sold the gold to Rappa.

(b) The vendors which sold the gold to Rappa were able to charge Rappa a low price because they claimed bogus input tax deductions from SARS. The input tax deductions were bogus because the vendors generated fictitious invoices reflecting either—

(i) that they had purchased the gold by way of non-taxable supplies of second-hand gold from members of the public, thus supposedly entitling the vendors to a notional input tax deduction in terms of paragraph (b) of the definition of "input tax" read with section 16(3)(a)(ii); or

(ii) that they had purchased the gold by way of taxable supplies of second-hand gold from other vendors, thus supposedly entitling the vendors to an actual input tax deduction.

(c) In truth, the vendors got the gold in the form of Krugerrands, the supply of which to them was zero-rated in terms of section 11(1)(k), or as gold illegally mined in South Africa or illegally smuggled into the country.

[170] In its section 42(2)(b) notice, SARS set out particulars of Rappa's transactions with ten vendors for the VAT tax periods January 2019 to June 2020. SARS proposed to disallow Rappa's input tax deductions of R4 094 169 764 on these transactions. These were the grounds for the proposed disallowance:

(a) The smelted Krugerrands supplied by vendors to Rappa were zero-rated in terms of section 11(1)(k) and could not be converted into standard-rated supplies.

(b) Most of the tax invoices issued by the vendors to Rappa did not contain a full and proper description of the gold. The invoices should have reflected that the gold contained Krugerrands. Instead, the invoices reflected that the gold comprised scrap gold, scrap jewellery and the like. Since the invoices did not comply with section 20(4)(e) of the VAT Act, no deduction was allowable.[153]

(c) In the alternative, Rappa was party to a scheme for obtaining undue tax benefits as contemplated in section 73 of the VAT Act.[154] Smelted Krugerrands would normally be sold at the day's spot price offered by the Reserve Bank plus a premium. The vendors sold the gold to Rappa at less than the spot price, an operation only rendered profitable by the bogus

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[153] In terms of section 20(1), a vendor must issue a tax invoice containing the particulars specified in that section. Section 20(4) lists what a tax invoice must contain. Paragraph (e) of that subsection reads: "full and proper description of the goods (indicating, where applicable, that the goods are second-hand goods) or services supplied". Section 16(2)(a) provides that no deduction of input tax in respect of the supply of goods and services may be made unless "a tax invoice . . . in relation to that supply has been provided in accordance with section 20 or 21 and is held by the vendor making that deduction at the time that any return in respect of that supply is furnished".

[154] Section 73(1) reads:

> "(1) Notwithstanding anything in this Act, whenever the Commissioner is satisfied that any scheme . . . —
>
> (a) has been entered into or carried out which has the effect of granting a tax benefit to any person; and
>
> (b) having regard to the substance of the scheme—
>
> (i) was entered into or carried out by means or in a manner which would not normally be employed for *bona fide* business purposes, other than the obtaining of a tax benefit; or
>
> (ii) has created rights or obligations which would not normally be created between persons dealing at arm's length; and
>
> (c) was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit,
>
> the Commissioner shall determine the liability for any tax imposed by this Act, and the amount thereof, as if the scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such tax benefit."

Section 73(2) defines the expressions "scheme" and "tax benefit". Section 72(3) provides that any decision by the Commissioner under section 73 shall be subject to objection and appeal, on the basis that "whenever in proceedings relating thereto it is proved that the scheme concerned does or would result in a tax benefit, it shall be presumed, until the contrary is proved that such scheme was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit".

input tax deductions. Rappa shared in the margin created by the vendors' fictitious invoices.

[171] Rappa was given an opportunity to respond to the proposed adjustments, to which would be added interest and a 10% penalty in terms of section 39 of the VAT Act. Rappa was also invited to give reasons why SARS should not raise understatement penalties in terms of sections 222 and 223 of the TAA. Rappa provided its response on 29 January 2021.

[172] On 29 March 2021 SARS decided to raise additional assessments and issued a notice in terms of section 96(2). SARS stated that it was limiting the additional assessments to Rappa's transactions with three of the ten vendors mentioned in the section 42(2)(b) notice, adding that there existed evidence or strong suspicions in respect of the other seven vendors as well. The section 96(2) notice was again a lengthy document – 106 pages, 334 paragraphs. It included a lengthy response to Rappa's representations of 29 January 2021. The disallowed input tax deductions totalled R2 848 497 753. SARS also levied understatement penalties at 75%, yielding R2 136 373 314, giving total additional assessments of R4 984 871 067. The grounds of assessment were essentially the same as those foreshadowed in the section 42(2)(b) notice.

Litigation history

The High Court review

[173] On 28 April 2021, and without having filed an objection to the assessments, Rappa launched a High Court application. Part B of the notice of motion sought the review and setting aside of the additional assessments. Rappa did not seek a section 7(2) exemption in terms of PAJA[155] or a section 105 direction in terms of the TAA. Part A of the notice of motion claimed urgent interim relief, namely that, pending the determination of the review, SARS be interdicted from taking any steps arising from

[155] See para [61] and n 70 above.

the assessments, including steps aimed at collecting money or enforcing the assessments.

[174] The review relief was claimed in terms of PAJA, alternatively the principle of legality. In broad summary, the grounds of review were these:

(a) SARS did not apply its mind properly to Rappa's responses. SARS simply copied and pasted statements from the section 42(2)(b) notice into the section 96(2) notice.

(b) Krugerrands are only zero-rated if supplied as such. Rappa did not buy Krugerrands from the vendors, it bought gold bars from them.

(c) By targeting Rappa rather than the vendors, SARS was guilty of a material misdirection in law. On the scheme described by SARS, the input tax deductions claimed by Rappa left it in a tax-neutral position; it was the three vendors who got tax benefits in the alleged scheme.

(d) SARS' conduct in targeting Rappa in this way was also indicative of bad faith, ulterior purpose and irrationality.

(e) SARS' bad faith was also shown by the fact that SARS continued to withhold tax refunds from Rappa in respect of the seven vendors who did not feature in the final assessments.

(f) SARS' bad faith and irrationality were also exposed by its reliance on section 73 of the VAT Act: an anti-avoidance scheme as contemplated in section 73 assumes genuine transactions and so cannot coexist with alleged simulated transactions.

(g) SARS had "abysmally failed" to provide a factual basis for its conclusion that Rappa was a participant in the alleged scheme.

(h) SARS' findings were based on unfounded conjecture, innuendo and suspicion, and were unclear, vague, nonsensical and incoherent. This meant that there was not proper compliance with sections 42(2)(b) and 96(2) of the TAA. Rappa had thereby been deprived of its right to fair administrative action.

(i) SARS' findings could not have been reached pursuant to a *bona fide* audit process. Unless SARS were acting for an ulterior purpose, the result of the audit should have been a finding that no tax adjustments were needed.

[175] On 13 May 2021 SARS filed an answering affidavit in respect of Part A. With a view to disposing of Part A, SARS offered an undertaking that it would not institute collection procedures pending the outcome of the review. SARS nevertheless responded to the whole of the founding affidavit. It pointed out that Rappa had not sought a section 7(2) exemption, and that it needed a section 105 direction in order to pursue the review.

[176] On 20 May 2021 Rappa filed a replying affidavit, limited to Part A. Rappa contended that an objection under the TAA was not an internal remedy in relation to the review, and that the High Court could in any event condone Rappa's failure to exhaust an internal remedy. Rappa alleged that section 105 of the TAA did not preclude a review application, since the review was directed at the lawfulness of the decision to issue the assessments, not the correctness of the assessments. If section 105 were, however, held to be applicable, Rappa asked the High Court to direct that the issues raised in its application, and in particular the urgent relief claimed in Part A, could be pursued. In the event, the Part A relief was resolved in terms of the undertaking by SARS.

Rappa's rule 30A application

[177] On 3 June 2021 Rappa launched an application in terms of rule 30A of the Uniform Rules to compel SARS to deliver the record contemplated in rule 53(1)(b).

[178] SARS' opposition to this application was based on section 105. With regard to the scope of a tax appeal, SARS stated that if the Commissioner had misdirected himself in law or fact, the Tax Court could substitute its findings for those of the Commissioner. The appeal, among other things, constituted a review of the Commissioner's decision. The Tax Court could analyse whether SARS had considered all the relevant facts and

applied its mind, and could "pronounce on the legality of an assessment, and whether the Commissioner properly applied his mind or acted in a *mala fide* and biased manner". The Tax Court was said to possess "not only the powers of [a] court of review in the legal sense, but also the functions of a court of appeal with additional privileges and can deal with the whole matter afresh as a court of first instance". SARS contended that Rappa needed a direction in terms of section 105 before becoming entitled to the rule 53 record.

[179] In its replying affidavit in the rule 30A proceedings, Rappa persisted with its stance concerning section 7(2) of PAJA and section 105 of the TAA and contended that it had an unqualified right to the rule 53 record. However, Rappa now took the precaution of giving notice that at the hearing of the rule 30A application it would seek an amendment of its rule 30A notice of motion so as to include a claim, insofar as might be necessary, for a section 105 direction.

The High Court's judgment on the rule 30A application

[180] The rule 30A application was argued on 10 August 2021. On 16 September 2021 the High Court delivered judgment.[156] The High Court granted the amendment to the notice of motion so as to insert a prayer for a section 105 direction but postponed consideration of that prayer, ruling that it should be heard together with the main review. In the meanwhile, the High Court ordered SARS to furnish the rule 53 record and to pay the costs of the rule 30A application.

[181] The High Court reasoned that the prayer for a section 105 direction required a consideration of the nature of the review proceedings and raised "matters of some complexity". The High Court agreed with Rappa that it would be premature to determine the merits of the review at that stage, given that Rappa could still supplement its papers in the light of the rule 53 record: "To effectively predetermine the prospects

[156] *Rappa Resources (Pty) Ltd v Commissioner of the South African Revenue Service* [2021] ZAGPJHC 555 (*Rappa HC*).

of success of the main review proceedings at present by determining the issues pertaining to section 105 of the TAA would be improper and prejudicial to the applicant." The High Court expressed no view on the merits of the arguments concerning section 105, but rejected SARS' contention that the section 105 direction had to be decided at the threshold. The High Court considered that the court hearing the review would be better placed to determine whether a section 105 direction should be granted.

[182] SARS sought leave to appeal to the Supreme Court of Appeal, which the High Court granted.[157] According to the High Court's judgment granting leave to appeal, the Judge's attention had not, in argument on the rule 30A application, been drawn to this Court's judgment in *Standard Bank*,[158] which held that if a review court's jurisdiction is contested, the jurisdictional issue must be decided before any order in the review proceedings (including an order for the production of the rule 53 record) is made. That case, however, took centre stage when leave to appeal was argued and it was the main basis on which the High Court granted leave.

The Supreme Court of Appeal judgment in the rule 30A appeal

[183] The Supreme Court of Appeal delivered judgment on 24 March 2023.[159] It reversed the High Court's decision, holding that section 105 deprived the High Court of jurisdiction unless and until a section 105 direction was granted. The Supreme Court of Appeal placed reliance in that regard on this Court's judgment in *Standard Bank*. The Supreme Court of Appeal said that the Tax Court's wide power of revision included the power to determine the legality of an assessment on grounds of review, referring in that regard to *Suikerkorporasie*[160] and *Jazz Festival*.[161]

[157] *Commissioner of the South African Revenue Service v Rappa Resources (Pty) Ltd* [2021] ZAGPJHC 623.

[158] Above n 60.

[159] Above n 78.

[160] Above n 106.

[161] Above n 106.

[184] The Supreme Court of Appeal said that Rappa had vacillated between a contention that section 105 did not apply to review proceedings and a contention that, insofar as needs be, it was entitled to a section 105 direction. However, a section 105 direction was "not simply to be had for the asking". A case had to be made out for a departure from the default rule. Rappa had self-evidently chosen not to make out such a case – "a choice that is not without its consequence". The Supreme Court of Appeal was not willing to entertain an argument that it should grant a section 105 direction if one was needed. This was because the High Court had declined to grant a section 105 direction as part of its decision on the rule 30A application, and Rappa had not cross-appealed such refusal.

[185] The Supreme Court of Appeal thus upheld the appeal with costs, including the costs of two counsel, and replaced the High Court's order with one dismissing the rule 30A application with costs, including the costs of two counsel.

Proceedings under Chapter 9 of the TAA

Rappa's objection to the additional assessments

[186] In the meanwhile, on 2 June 2021 Rappa filed an objection to the assessments. This was slightly more than two months after it launched the review, and the day before it served its rule 30A application. The introductory part of the objection repeated Rappa's contention that the procedures in Chapter 9 of the TAA were not of application in relation to the review. The review, if successful, would be dispositive of the matter, including the additional assessments. Rappa thus required that SARS' consideration of the objection be stayed pending the outcome of the review. The grounds of objection overlapped to a large extent with the review grounds:

(a) The first ground was that a section 73 scheme could not coexist with the simulations alleged by SARS.

(b) The second ground contested the various elements that had to be satisfied for reliance on section 73: that a scheme was entered into or carried out; that the scheme had the effect of granting a "tax benefit" as defined; that

the scheme was entered into or carried out in an abnormal way; and that it was entered into or carried out solely for the purpose of obtaining a tax benefit. Rappa said that SARS had acted irrationally; that it was guilty at least of a misdirection of law and at worst of an ulterior bad faith purpose of targeting a taxpayer with "deep pockets"; and that SARS had not set out facts demonstrating abnormality or the sole or main purpose of obtaining a tax benefit.

(c) The third ground complained of SARS' alleged non-compliance with sections 42(2)(b) and 96(2), with resultant procedural unfairness to Rappa. Rappa contended that the audit was conducted improperly and for an ulterior purpose in order to delay the payment of VAT refunds. The audit was also inconclusive. SARS had failed to apply its mind.

(d) The fourth ground concerned the understatement penalties. Rappa contended that it had acted in good faith and that SARS was not entitled to levy the penalties.

(e) The fifth ground concerned interest. Rappa contended that SARS should have remitted the interest.

The objection concluded with a request that SARS withdraw the additional assessments and reverse the adjustments.

[187] In its answering affidavit in this Court, SARS states that on 4 November 2021 SARS disallowed Rappa's objection. Whether Rappa had changed its mind or SARS acted unilaterally does not appear. Anyway, Rappa filed a notice of appeal to the Tax Court. SARS' affidavit does not indicate whether, before filing its tax appeal, Rappa availed itself of rule 6 of the Tax Court Rules by requesting reasons for the assessments so as to clarify matters which were said to be vague, confusing or contradictory. The pleadings in the tax appeal have closed, several pre-trial conferences and the parties have exercised their right to call for discovery.

[188] Although section 73 of the VAT Act involves the exercise by the Commissioner of a discretion, any decision by the Commissioner under that section is expressly subject

to objection and appeal.[162] In regard to section 20(4)(b) of the VAT Act, it does not appear from the papers in this Court whether Rappa confines itself to a contention that the invoices from the three vendors contained a full and proper description of the goods. Since Rappa's right to input tax deductions depends on the existence of compliant tax invoices, the Tax Court will be entitled to determine whether the invoices were, objectively, compliant. If Rappa contends that the Commissioner should in terms of section 20(4) have accepted non-compliant invoices, the Commissioner's decision in that regard would, in a tax appeal, probably be subject to quasi-review, as was done in *Jazz Festival*.[163]

Discussion

[189] In the light of my analysis of section 105, Rappa needed and still needs a section 105 direction if it wishes to pursue the review. Counsel for Rappa argues that this is not so, because Rappa was not seeking to review the assessments. Rappa was targeting SARS' prior decision in terms of section 92 of the TAA[164] in terms of which SARS was "satisfied" that Rappa's self-assessments did not reflect the correct application of the VAT Act. Counsel acknowledged that this was a new way of putting Rappa's case. It is at odds with Rappa's notice of motion in the High Court, which sought a review of the Commissioner's decision to issue the assessments and the setting aside of the assessments.

[190] In any event, counsel's argument is based on a false dichotomy. Section 92 confers a single power, namely to issue an additional assessment. Apart from the fact that section 92 confers no discretion on SARS,[165] the fact that SARS must be satisfied that the original assessment is incorrect as a prerequisite for issuing an additional assessment does not mean that the state of being satisfied is a separate reviewable decision. Absent an assessment, SARS' state of being satisfied has no external effect

[162] Above n 154.

[163] Above n 106.

[164] Quoted at [6] above.

[165] See at [85] above.

and is irrelevant. The additional assessment is the external manifestation of SARS' view that the original assessment was wrong.

[191] Where the exercise of a statutory power is dependent on the decision-maker being satisfied of something or holding a particular opinion, the satisfaction or opinion is said to be a "jurisdictional fact" for the exercise of the power.[166] If an aggrieved party considers that the satisfaction or opinion was absent or was defectively arrived at, the review is directed at the resultant exercise of the power, on the basis that the jurisdictional fact contemplated by the statute was not satisfied. If a taxpayer could target SARS' "satisfaction" as a separate act, section 105 of the TAA would be a dead letter.

[192] Because the High Court's review jurisdiction is suspended in the absence of a section 105 direction, the High Court did not have the power to order SARS to deliver a rule 53 record while at the same time deferring a decision as to whether a section 105 direction should be given.

[193] The Supreme Court of Appeal thus came to the right conclusion on this question. The High Court might also have done so if its attention had been drawn to this Court's judgment in *Standard Bank*. The High Court was concerned about adjudicating the section 105 issue at a time when Rappa had not yet had an opportunity of supplementing its case in the light of the rule 53 record. However, and as this Court's judgment in *Standard Bank* makes plain, a review applicant needs to establish the review court's jurisdiction in its initial founding papers. Rule 53(1)(b) of the Uniform Rules does not sanction a fishing expedition. It permits a supplementation of a review case properly made out in the founding papers. In order to properly make out a review case, the jurisdiction of the review court must be established. If the information known to the taxpayer when it launches its review does not justify the granting of a section 105

[166] *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 34H-35D.

direction, it cannot insist on obtaining a record in the hope that something will emerge justifying the exercise of jurisdiction by the High Court.

[194] It also seems to me that the High Court overstated the complexity of the task of adjudicating the case for a section 105 direction:

(a) The general principles set out earlier in this judgment do not necessarily call for a detailed assessment of the taxpayer's prospects of success in the review. Indeed, I said earlier that where review grounds closely overlap with grounds going to the merits of the impugned assessment, the fact that the taxpayer has good prospects of success would not normally be a factor in favour of giving a section 105 direction, since the taxpayer's good prospects will be rewarded in a tax appeal. In the present case, some of Rappa's grounds of review may be thought to be of that kind.

(b) In the case of alleged procedural non-compliance, which also features in Rappa's grounds of review, the High Court might wish to know that the complaint is at least plausible, but a detailed assessment of prospects would again not be needed. The main focus would be whether, assuming the review ground to be plausible, the case is one calling for a vindication of the taxpayer's right to fair administrative action by way of review or whether the curative effect of a tax appeal would suffice.

(c) I said previously that allegations of bad faith and ulterior purpose, which also feature in Rappa's proposed review, might well justify the giving of a section 105 direction, provided that the accusations are properly substantiated. I acknowledge that this might require the High Court to undertake a somewhat closer analysis of the review grounds in question, particularly where the taxpayer puts up no extrinsic evidence of abuse of power by SARS, and where the bad faith and ulterior purpose are instead sought to be merely inferred from reasoning that is alleged to be deficient or inconsistent. This may be a matter of degree.

(d) Without wishing to suggest that the High Court should cut corners in assessing requests for section 105 directions, common sense and a

> measure of robustness may be called for, lest there be procedural paralysis at the threshold. Neither side is likely to be irremediably prejudiced if the High Court's discretion is exercised one way or the other. If SARS must from time to time be subjected to the rigours of a High Court review, so be it; if it acted lawfully, it will be vindicated. And if the taxpayer is confined to a tax appeal, it will have the fullest opportunity to ensure that the Tax Court comes to the right answer on the merits; if, fortuitously, an assessment arrived at irrationally or for an improper purpose turns out to be objectively correct, it may be doubted that the taxpayer has substantial cause for complaint. This is particularly so, having regard to the Tax Court's wide curative powers in an appeal on the merits.

[195] As will be apparent from what I said earlier about the limits of the Tax Court's power to review the assessments on the basis of procedural irregularities,[167] the Supreme Court of Appeal (as well as SARS in its opposing affidavit in the High Court) may have overstated the Tax Court's powers in that regard. This Court's judgment should thus not be read as an affirmation of that part of the Supreme Court of Appeal's judgment. This does not, however, affect the outcome of the present case.

[196] The Supreme Court of Appeal, having correctly decided that the High Court could not order SARS to produce the rule 53 record in the absence of a section 105 direction, declined to entertain a request for a section 105 direction because Rappa had not cross-appealed. Technically, that is right. On the assumption that this Court, unlike the Supreme Court of Appeal, is not hamstrung by the absence of a cross-appeal, the question is whether we should now decide whether Rappa is entitled to a section 105 direction.

[197] In my view, we should not. We would be undertaking the analysis at first instance, since the question has not yet been considered on its merits by the High Court

[167] See [91]-[96] above.

or the Supreme Court of Appeal. The question is properly one for the High Court. If Rappa wishes to pursue the review, it may enrol the application for a preliminary ruling on section 105. That question is obviously not *res judicata* (already decided), as no court has yet considered it.

[198] As will be apparent from my earlier analysis, Rappa also needed a section 7(2) exemption. However, it appears from SARS' affidavit in this Court that the process of objection has been exhausted. The need for an exemption has thus fallen away.

[199] The result is that Rappa should be granted leave to appeal but its appeal should be dismissed. Based on *Biowatch*,[168] the parties should bear their own costs in this Court. I am not, however, inclined to interfere with the costs orders made by the Supreme Court of Appeal. Rappa did not seek leave to appeal the Supreme Court of Appeal's costs orders independently of the merits of the appeal

CCT 66/23 Forge Packaging (Pty) Limited v CSARS

[200] In this case the applicant is Forge Packaging (Pty) Limited (Forge). Forge's only relevant activities in the years of assessment relevant to this case were to borrow and lend money at interest.

Background

[201] Forge submitted its income tax return for its 2016 tax year on 15 January 2018. The return reflected gross income, in the form of interest, of R766 395 and expenses totalling R22 491 075, made up as follows: loss on the disposal of fixed assets – R19 500 644; professional fees – R17 811; interest paid – R2 970 882; and other expenses – R1738. The result was a net loss for the year of R21 724 680. The accumulated loss was R27 997 966.

[168] Above n 150.

[202] According to Forge's later explanation to SARS, the disposal loss arose in this way: Forge had previously acquired shares in Westpack Contract Packers (Pty) Limited (Westpack) for R24 160 863. In a sale agreement with an effective date of 30 December 2016, it sold those shares and its loan account in Westpack to AIH Limited for R9 293 462. The price was allocated as follows: loan account (at face value) – R4 633 243; shares (the balance) – R4 660 219. So, the loss on the disposal of the shares was R19 500 644 (R24 160 862 minus R4 633 243).

[203] On 31 January 2018 SARS addressed a letter to Forge headed "Verification of Income Tax Return". This letter notified Forge that its 2016 tax return had been "identified for verification" in terms of the TAA. Forge was notified that the notice of assessment reflected all the information SARS had obtained from Forge's tax return. Forge was asked to review this information. If Forge found any errors, it was to correct these by submitting a revised tax return. If Forge found no errors, it was to complete a prescribed supplementary declaration. This was to be done within 30 days.

[204] Having received no response, SARS wrote again to Forge, giving it a final opportunity within 30 days to comply with the previous letter in order to enable SARS "to finalise the verification".

[205] On 16 May 2018 Forge submitted a supplementary declaration (it should perhaps have submitted a revised income tax return) in which it now reflected the loss of R19 500 644 as a non-deductible capital loss. This reduced its taxable loss for the 2016 year to R2 224 036.

[206] On 4 July 2018 SARS notified Forge that SARS was "unable to complete the verification" of the 2016 return "as additional information is required in order to finalise the verification process". In an accompanying letter, SARS sought a detailed breakdown and calculation of the capital loss of R19 500 644 together with supporting

documents and requested reasons as to why this capital loss was "not clogged" in terms of item 39 of the Eighth Schedule to the ITA.[169]

[207] Forge replied on 6 August 2018, explaining the computation of the capital loss (see above) and furnishing SARS with a copy of the sale agreement. Forge acknowledged that the capital loss should be "clogged" as the transaction was with a connected person – "this was a mere oversight by the clerk while completing the tax return".

[208] On 8 August 2018 SARS issued notices of additional assessments in respect of Forge's 2014, 2015 and 2016 tax years. An accompanying letter tabulated the adjustments thus:

Tax period(s)	**Provision of the Act**	**Brief description of adjustment**	**Adjustment amount**	**Understatement penalty**
2014	Section 20(2A) ITA[170]	Assessed loss disallowed	R3 120 646	R218 445.22
2014	Section 11(a) ITA[171] and Practice Note 31 ITA[172]	Taxable loss is limited to nil	R1 504 117	R105 288.19

[169] Item 39(1) provides that a taxpayer must, when determining its aggregate capital gain or aggregate capital loss, disregard any capital loss in respect of the disposal of an asset to any person who was a connected person in relation to the taxpayer immediately before the disposal or to a person who is, immediately after the disposal, a member of the same group of companies as the taxpayer or a trust with a beneficiary which is a member of the same group of companies as the taxpayer.

[170] Section 20 of the ITA permits assessed losses to be set off against taxable income derived from carrying on any trade. Section 20(2A) applies in the case of a taxpayer that is not a company. Since Forge is a company, the reference to section 20(2A) was plainly wrong. It appears from later events that SARS may have intended to refer to section 20(2).

[171] Section 11 of the ITA lists the general deductions permitted in determining the taxable income derived by any person from carrying on any trade. Para (a) is the primary general deduction, namely "expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature". This provision is usually considered in conjunction with section 23(g), which provides that no deductions may be made in respect of "any monies, claimed as a deduction from income derived from trade, to the extent to which such monies were not laid out or expended for the purposes of trade".

[172] SARS Practice Note 31, issued on 3 October 1994. In summary, this Note says that where a taxpayer borrows money with a view to lending it out at a higher rate, this moneylending activity constitutes a trade. Where there is no such trade, but the taxpayer earns interest on surplus funds while also incurring interest expenditure, SARS in practice will allow a deduction of the interest expenditure to an extent that does not exceed the interest income. This is done, so the Note observes, even though strictly speaking there is no justification for the deduction.

2015	Section 11(a) ITA and Practice Note 31 ITA	Taxable loss is limited to nil	R1 648 642	R115 404.94
2016	Section 11(a) ITA and Practice Note 31 ITA	Taxable loss is limited to nil	R2 224 036	R155 682.52
2016	Para 39 8th Schedule ITA	Capital loss is clogged	R19 500 644	R1 365 045.08
Total			R27 998 085	R1 959 865

[209] Beneath this table, the following appeared:

> "**Reasons for adjustment**:
>
> - The following expense has been regarded to be capital in nature and has been disallowed.
>
> | **Description** | **Amount** |
> |---|---|
> | Capital loss is clogged in terms of para 39 8th schedule | R19 500 644 |
>
> - The claim of R2 224 036 in respect of operating expenses has not been taken into account due to the following reason(s):
> - In terms of the Tax Administration Act an understatement penalty of 25% has been imposed as a result of an incorrect statement in a return and the behaviour is considered to be reasonable care not taken in completing the return.[173] This amount can be found under "Omission of Income" and the Notice of Assessment (ITA34)."

[210] It is fair to say that this was not SARS' best work. The "reasons for adjustment" in the passage just quoted were confined to the 2016 year. In respect of the disallowance of operating expenses of R2 224 036, the space where reasons were meant to be given was left blank. Nothing beyond what is contained in the table was said in respect of the 2014 and 2015 tax years. The reference in the table to section 20(2A) was obviously wrong.[174]

[173] This is a reference to item (ii) and the second and third columns of the table forming part of section 223(1) of the TAA. The understatement penalties in SARS' table were arrived at by applying the corporate tax rate of 28% to the "adjustment amounts" and taking 25% of the resultant figures.

[174] See above n 170.

[211] On 11 October 2018 Forge lodged objections to the additional assessments. Its grounds were in summary the following. In respect of the 2014 year, SARS had not given reasons for disallowing the assessed loss. In respect of none of the three years had SARS given reasons for reducing the taxable loss to nil. SARS had referred to a "claim" of R2 224 036, yet in respect of none of the three years had Forge made such a claim. In respect of the understatement penalties, SARS had not invited Forge to make representations before imposing the penalties and had given no adequate reasons for imposing the penalties.

[212] On 11 January 2019 SARS disallowed the objections. SARS stated that Forge's first tax year was 2011. In that year Forge had submitted a nil return. In every subsequent year Forge had made losses and carried them forward. Since inception Forge had never made a profit on borrowed money. In terms of Practice Note 31,[175] there was thus no trade in respect of moneylending.

Litigation history

Forge's tax appeal

[213] On 27 February 2019 Forge lodged appeals, repeating and expanding upon the points made in its objections. Forge stated that it performed the function of a treasury company within a group of companies. Its interest expenditure qualified for deduction under section 11(a), and SARS had failed properly to apply the Practice Note. To the extent that there were errors in the tax returns, the resultant understatements were the result of a "*bona fide* inadvertent error" as contemplated in section 222(1) of the TAA.[176]

[175] See above n 172.

[176] Section 222(1) provides that in the event of an "understatement" (a defined term), the taxpayer must, in addition to the tax payable for the relevant tax period, pay an understatement penalty determined under subsection (2) "unless the understatement results from a *bona fide* inadvertent error".

[214] Alternative dispute resolution was tried but failed. On 9 December 2020 SARS filed its rule 31 statement:

(a) In regard to the disallowance of the assessed loss in 2014, SARS referred to section 20(1) of the ITA, which permits the deduction of an assessed loss against income derived from trade, and to the definition of "assessed loss" in section 20(2), namely "any amount by which the deductions admissible under section 11 exceeded the income in respect of which they are so admissible". SARS pleaded that it had disallowed the assessed loss, because the interest Forge had earned was passive income and had not been derived from carrying on a trade. According to Forge's financial statements, its trade was investment in the packaging industry but it had no income from that trade. Forge's business was not moneylending.

(b) In regard to the section 11(a) disallowances in each of the three years, SARS placed reliance on the Practice Note. SARS pleaded that Forge's income in each year was passive income. None of the deductions claimed as expenses had been incurred in the production of income derived from trade. Nevertheless, and in accordance with the Practice Note, SARS had allowed a deduction of the expenditure up to the amount of the passive interest earned, the rest being disallowed.

(c) In regard to the understatement penalties, SARS persisted with its contention that the case warranted penalties at the level of 25%. SARS pleaded that Forge had carried forward an assessed loss in 2014 despite deriving no taxable income from carrying on trade. It had claimed expenses in the 2014, 2015 and 2016 years despite having generated no income from carrying on trade. This showed that Forge had not taken reasonable care in completing its tax returns.

[215] Because of the developments to be mentioned next, the tax appeal has not seen substantial progress, although on 21 January 2022 Forge filed its rule 32 statement.

The Tax Court review

[216] Instead of filing its rule 32 statement, in April 2021 Forge instituted review proceedings in the Tax Court based on the principle of legality. According to Forge, SARS' rule 31 statement contained allegations never previously drawn to its attention. SARS was seeking to supplement or revise the reasons it had given for the assessments. This was a manifest breach, so Forge claimed, of its right to fair administrative action. Forge complained that SARS had not complied with sections 42(2)(b) and 106(5) of the TAA. Forge's reliance on section 42(2)(b) was perhaps inspired by a statement in SARS' rule 31 statement that on 31 January 2018 SARS had notified Forge that it would be conducting an "audit" into its tax affairs.

[217] SARS brought an interlocutory application in terms of rule 42 of the Tax Court Rules read with rule 30 of the Uniform Rules, contending that the review application was an irregular step. SARS contended that the taxpayer had no right to object and appeal against the alleged procedural non-compliance with sections 42 and 106 of the TAA. SARS also argued that any review powers which the Tax Court had could only be exercised in the context of deciding a tax appeal and not by way of a separate review application. The Tax Court, while not deciding the first of these contentions, accepted the second.

[218] In a judgment delivered on 19 October 2021, the Tax Court thus set aside the review application as an irregular step. Because Forge had intimated its intention to approach the High Court if the Tax Court ruled that a review application in the latter Court was not competent, the Tax Court directed that the tax appeal be stayed pending a determination of a review application to be launched in the High Court within 30 days, failing which the tax appeal was to proceed. The Tax Court ordered each party to pay its own costs.

The High Court review

[219] Forge launched its High Court review application on 17 December 2021. In its notice of motion it sought, insofar as necessary, an extension of the period of 180 days specified in section 7(1) of PAJA for the bringing of a review application. Forge did not seek a section 105 direction. The review was based on PAJA, alternatively the principle of legality. Forge did not frame its notice of motion in terms of rule 53. In particular, it did not call upon SARS to deliver a record.

[220] SARS opposed the review. In regard to section 42(2)(b) of the TAA, SARS stated that Forge's 2016 tax return had been selected for verification; Forge had not been selected for audit. In the course of verifying the 2016 tax return, SARS had examined the tax returns for the 2014 and 2015 tax years, and saw that in those years, too, Forge had earned only passive income. Forge had not, in SARS' opinion, earned income from any trade. SARS pointed out that if Forge had been uncertain of the basis of the assessments, it could have sought reasons in terms of rule 6 of the Tax Court Rules before filing its appeal in the Tax Court.

[221] SARS contended that it was not precluded from raising a new ground of assessment in its rule 31 statement. If this occurred, the taxpayer could request discovery from SARS of documents relating to the new ground. SARS argued, further, that deficiencies in a rule 31 statement could be dealt with by way of an exception in the Tax Court. However, SARS claimed that its rule 31 statement merely supplemented grounds to which objection had already been taken. SARS' pleaded grounds of assessment did not constitute a novation of the whole of the factual or legal basis of the disputed assessments.

[222] SARS opposed condonation for Forge's non-compliance with section 7(1) of PAJA. SARS also contended that in order to proceed with the High Court review, Forge needed a section 105 direction.

[223] In a replying affidavit, Forge persisted with its contention that SARS had to comply with section 42(2)(b) of the TAA. Forge said that it had not occurred to its legal team to request reasons under rule 6. As to delay, following the Tax Court judgment, Forge had needed to consider its position and take legal advice. It had also made a settlement offer in the hope of avoiding further litigation. As to section 105, Forge said that if such a direction was needed it would ask the High Court to make the necessary order under the prayer in its notice of motion for further or alternative relief. It appears from the High Court's judgment that in oral argument Forge's counsel applied from the bar for a section 105 direction.

[224] The High Court delivered judgment on 13 June 2022, refusing to give a section 105 direction, striking the review from the roll and ordering Forge to pay SARS' costs, including the costs of two counsel.[177] The High Court held that because Forge was seeking to have the assessment set aside it needed a section 105 direction. An appeal to the Tax Court being the default remedy, a taxpayer seeking a section 105 direction had to show good cause why an exception should be made to the usual procedure. The High Court said that such might be the case where the matter turned wholly on a point of law. The High Court rejected Forge's argument that its review turned wholly on a point of law. Several of Forge's attacks on the assessments involve factual questions.

[225] Even if the alleged non-compliance with section 42(2)(b) were a purely legal question, it would be undesirable to permit parallel legal proceedings. The potential for "unwholesome delay and forensic dislocation" was, in the High Court's opinion, "starkly evident". In any event, the High Court was not satisfied that the section 42(2)(b) point was purely one of law. On the face of it, Forge had been subjected to a verification, not an audit, but oral evidence might place a different complexion on the matter.

[177] *Forge Packaging (Pty) Ltd v Commissioner for the South African Revenue Service* [2022] ZAWCHC 119; 85 SATC 357 (*Forge HC*).

[226] While recognising that its refusal of a section 105 direction made adjudication of other matters unnecessary, the High Court considered it desirable to deal with Forge's application to condone non-compliance with section 7(1) of PAJA. The High Court regarded the delay as considerable and the explanation as unconvincing. Insofar as prospects of success were relevant to condonation, the High Court's *prima facie* view was against Forge on the section 42(2)(b) issue, so its prospects of success could not be described as good. The dislocating factors mentioned in the context of section 105 weighed against condoning delay in the interests of justice. The High Court also considered that, because Forge was resisting the coercive effects of the additional assessments, it could raise SARS' alleged non-compliance with sections 42 and 106 by way of a collateral challenge in the Tax Court, and delay could not be raised against such a collateral challenge.[178]

[227] The High Court refused Forge leave to appeal,[179] and an application to the Supreme Court of Appeal for leave to appeal suffered a similar fate. And so, on 13 March 2023 Forge brought an application in this Court for leave to appeal.

Discussion

[228] Forge needs condonation in three respects: for the late filing of its application for leave to appeal, which was late by 27 days; for the late filing of the record, which should have been filed on 3 November 2023 but was filed on 9 November 2023; and for the late filing of its submissions, which should have been filed on 10 November 2023 but were filed on 14 November 2023. The late filing of the record and submissions has been satisfactorily explained, the delay is minimal, and condonation should be granted. The delay in filing the application for leave to appeal is more substantial. The explanation offered by Forge was the need for foreign

[178] The High Court referred here to *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) at paras 32-6 and *Jazz Festival* above n 106 at paras 21-4.

[179] *Forge Packaging (Pty) Ltd v Commissioner for the South African Revenue Service* [2022] ZAWCHC 163.

shareholder approval and counsel's commitments. In my view, condonation in this respect must turn on prospects of success.

[229] The High Court was right to hold that Forge needed a section 105 direction. The High Court was generous in permitting Forge to ask for it from the bar. Such a direction should be sought in the notice of motion and needs to be properly substantiated in the founding affidavit.

[230] In this Court, Forge argued the matter as if we were at large to reach our own view on whether a section 105 direction should be given. No attention was paid to the nature of the discretion exercised by a Judge when granting or refusing a section 105 direction. As I explained earlier, the High Court exercised a true discretion. The High Court's refusal of a direction can thus only be impeached if the discretion was not exercised judicially or was influenced by wrong principles or a misdirection on the facts or if the result was one that could not reasonably have been reached by a court properly directing itself to all the relevant facts and principles.

[231] Forge did not try to demonstrate that the High Court had gone awry in a way justifying appellate interference with the exercise of a true discretion. No such basis exists. The High Court did not adopt an exceptional circumstances test. It asked itself whether there was "good cause" to justify a departure from the normal procedure. This is an unobjectionable way of asking whether such a departure is appropriate or justified.

[232] The High Court said that such justification might exist if an appeal turned wholly on a point of law. This is not necessarily so in all cases, but the High Court went on to make the important point that Forge's attack on the assessments was not confined to a complaint of non-compliance with section 42(2)(b) of the TAA. We know from Forge's grounds of objection that Forge contends that it was carrying on a trade entitling it to deduct all its expenditure in terms of section 11(a) of the ITA. The questions whether Forge was carrying on a trade and whether its expenses were incurred in the production of income from that trade are matters to be determined in the tax appeal. To allow a

review in these circumstances is open to the objection of piecemeal adjudication, as the High Court rightly observed.

[233] The High Court also said that the review ground based on alleged non-compliance with section 42(2)(b) of the TAA was not purely a point of law, because evidence might shed light on whether the process followed by SARS was verification or audit. This, in my view, was charitable to Forge. SARS' letters dated 31 January 2018, 2 March 2018, 4 July 2018 and 8 August 2018 repeatedly and explicitly stated that the process was one of verification. The power conferred on SARS by section 46 of the TAA to seek information from a taxpayer is not confined to audits. Such information may also be sought where the taxpayer is subject to verification; indeed, information may be sought even though no process of verification or audit has been initiated. Even the power of interview in section 47(1) is not confined to an audit. An interview may be held if it is intended "to clarify issues of concern to SARS" so as to "render further verification or audit unnecessary" or to "expedite a current verification or audit". In this case, there was only one request for information (contained in SARS' letter of 4 July 2018), and it concerned a matter that has become uncontentious, namely the computation of the capital loss and that it should be "clogged".

[234] Forge's objections to the assessments and its notices of appeal stated that Forge had been selected for "audit verification". This is not an expression used in the TAA, but there is nothing to show that Forge thought it had been the subject of an audit triggering section 42 of the TAA. This is apparent from the fact that Forge did not complain of non-compliance with section 42(2)(b) in its objections and notices of appeal.

[235] The complaint of non-compliance with section 42(2)(b) was made for the first time in Forge's review application to the Tax Court. I am driven to conclude that in making this complaint Forge opportunistically latched onto the averment in SARS' rule 31 statement that on 31 January 2018 SARS had notified Forge that it would be

conducting an "audit" into its tax affairs. The letter itself shows that this averment was wrong. Instead of clarifying this with SARS, Forge launched a review application, and has persisted with it despite SARS' statement, under oath in opposition to the review, that Forge was selected for verification, not audit.

[236] This review ground was thus not a plausible one, and it was not one which the High Court could have been expected to allow to go forward. Anyway, section 42(2)(b) would not have been the only occasion on which Forge saw and could comment on SARS' grounds of assessment. There were the objections Forge filed in response to SARS' letter of assessment; there were the notices of appeal Forge filed in response to SARS' disallowances; and there was the rule 32 statement Forge filed in response to SARS' rule 31 statement. Before it launched the review, Forge had a full statement of SARS' reasoning and had responded to it by way of its rule 32 statement. By the time the review was launched, it would have been a hollow formality to require SARS to comply with section 42(2)(b), assuming it to be applicable at all. The battle lines had been clearly drawn.

[237] The other complaint in the review, namely that SARS' rule 31 statement contained reasoning that SARS had not previously disclosed, was also not one that was worthy of consideration on review. SARS was not precluded by rule 31(3) from amplifying its reasoning. Despite the somewhat cryptic contents of SARS' letter of 8 August 2018, the bases of the adjustments were clear enough. SARS' grounds of assessment in its rule 31 statement are consistent with those bases.

[238] If, however, Forge thought that SARS' rule 31 statement went beyond the grounds of assessment that SARS was entitled to rely upon, its remedy was to apply to the Tax Court to strike out of the impermissible material on the basis that it contravened rule 31(3). If Forge's complaint is that it could not discern, from SARS letter of 8 August 2018 and from SARS' notices of disallowance of 11 January 2019, what the grounds of assessment were, it was entitled to request reasons in terms of rule 6 before lodging its notices of appeal. I must say, though, that anybody applying their mind

intelligently to the SARS' letter and notices of disallowance ought not to have been in any doubt, bearing in mind how uncomplicated Forge's tax affairs are, consisting of just a few items of income and expenses. There is nothing to show that Forge has been prejudiced in any way in conducting its defence in the Tax Court.

[239] In order to succeed in this Court, Forge not only has to displace the High Court's refusal of a section 105 direction but also the High Court's refusal to condone Forge's non-compliance with section 7(1) of PAJA. Here, too, the High Court exercised a discretion, which is probably to be categorised as a true discretion.[180] In any event, I can find no fault with the High Court's reasons for refusing condonation.

[240] The delay was egregious. The assessments were issued in August 2018 and the objections were disallowed in January 2019. If Forge thought it had been subjected to an audit and that SARS had been required to comply with section 42(2)(b), it knew the relevant facts in August 2018. If Forge considered that SARS had not, in disallowing the objections, given adequate reasons in terms of section 106(5), it knew the relevant facts in January 2019. The misconceived legality review in the Tax Court was launched two years and three months, and the High Court review two years and eleven months, after the disallowance of the objections. There is no justification for Forge's claim that time only started to run when SARS filed its rule 31 statement in December 2020, but in any event the High Court review was only launched a year after that.

[241] Apart from the absence of a satisfactory explanation for the delay, the possible need to condone non-compliance with section 7(1) in order to prevent an injustice is diminished in cases where a review is not the only remedy available to the aggrieved person. Here, Forge has the remedy of a tax appeal.

[180] *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC) at para 52 and *Member of the Executive Council for Cooperative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality* [2021] ZACC 46; 2022 (8) BCLR 959 (CC); (2022) 43 ILJ 505 (CC) at para 58.

[242] The High Court said that in the tax appeal Forge could make a collateral attack on the validity of the assessments based on alleged non-compliance with sections 42(2)(b) and 106(5) and that in such an attack delay could not be raised against it. I express no opinion on that point. Even if the High Court's opinion on that point were wrong, the rest of the High Court's reasoning amply justifies the refusal of condonation.

[243] Although the High Court dealt with delay as a separate matter, the fact that Forge needed condonation for non-compliance with section 7(1) was a factor that could have been taken into account in deciding whether a section 105 direction should be given. The fact that the taxpayer will need condonation if a section 105 direction is given, and that its prospects of getting it are bleak, are factors that can properly be taken into account in refusing a section 105 direction.

Conclusion

[244] Since Forge does not enjoy reasonable prospects of success, condonation for the late filing of its application for leave to appeal must be refused. Although uncertainty about the interpretation and application of section 105 might have justified granting leave if that were the only point in issue between Forge and SARS, Forge also needed to impeach the High Court's refusal to condone its non-compliance with section 7(1) of PAJA. Its lack of prospects on that leg of the case puts paid to the proposed appeal as a whole.

[245] In my view, Forge should not receive *Biowatch* protection. Its review was opportunistic and altogether lacking in merit. It delayed unreasonably in bringing review proceedings. Its application was filed in this Court more than four years after its objections to the assessments were disallowed. A straightforward and mundane tax case has been held up by manifestly inappropriate litigation.

[246] Forge should thus be directed to pay SARS' costs, including the costs of two counsel. For the guidance of the Taxing Master, the five tax cases were argued over

two days, and Forge's case was one of three matters in which argument was completed on the first day.

CCT 72/24 Absa Bank Limited and United Towers (Pty) Limited v CSARS

[247] In this case the applicants are Absa Bank Limited (Absa) and United Towers (Pty) Limited (United). Absa and United concluded transactions which were identical for present purposes and they were assessed on identical grounds. It is common cause that what goes for the one goes for the other. I shall thus deal only with Absa. Where I refer to both Absa and United, I shall call them the applicants.

Background

[248] Between 2013 and 2015 Absa concluded four subscription agreements to acquire preference shares issued by PSIC Finance 3 (RF) (Pty) Limited (PSIC3). Absa received tax-exempt dividends on these preference shares. The transactions were introduced to Absa by the Macquarie Group (collectively Macquarie). Absa concluded related agreements with entities in Macquarie. These agreements, which are detailed later in this judgment,[181] included a right on Absa's part to put the preference shares to Macquarie in certain circumstances and an obligation by Macquarie to make up any shortfall in Absa's anticipated returns on the shares, including any shortfall arising if the dividends were taxed contrary to expectation.

[249] In May 2018 SARS notified Absa that it would be conducting an audit into the tax treatment of the preference shares. SARS sought information from Absa, which was given. SARS also obtained information from other persons.

[250] On 13 November 2018 SARS gave Absa notice in terms of section 80J(1) of the ITA setting out its reasons for proposed GAAR[182] assessments in respect of Absa's 2014 to 2018 tax years (section 80J notice). Having obtained an extension to respond, Absa

[181] See at [253] below.

[182] This is the acronym for the "general anti-avoidance rules", as to which see [92] above.

on 15 February 2019 wrote to the Commissioner setting out reasons as to why, in Absa's opinion, the assessments proposed in the section 80J notice should not be issued and asking the Commissioner to withdraw the notice in the exercise of his powers under section 9 of the TAA.[183]

[251] On 5 March 2019 Absa was notified by SARS that the Commissioner disagreed with Absa's contentions and refused the request to withdraw the section 80J notice. On 29 March 2019, Absa furnished its response to the section 80J notice.[184]

[252] On 17 October 2019 SARS notified Absa that it intended to issue GAAR assessments. As required by section 96(2)(a) of the TAA, SARS set out the grounds of the assessments. The assessments were issued shortly afterwards. SARS determined the tax consequences of the arrangement by re-characterising the tax-exempt preference share dividends received by Absa as taxable interest. Cumulatively over the five tax years in question, this had the effect of increasing Absa's taxable income by R185 716 100, resulting in additional tax of R52 000 508. SARS also imposed understatement penalties at 75%, totalling a further R39 000 381.

[253] According to SARS, Absa had participated in an impermissible tax avoidance arrangement devised by the Macquarie Group. The arrangement consisted of the following sequence of transactions, which I shall refer to as steps (a) to (m). SARS stated that all of the steps were "inextricably linked (contractually and practically)":

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[183] Section 9(1) of the TAA provides:

> "A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act, excluding a decision given effect to in an assessment or a notice of assessment that is subject to objection and appeal, may in the discretion of a SARS official described in paragraph (a), (b) or (c) or at the request of the relevant person, be withdrawn or amended by—
>
> (a) the SARS official;
>
> (b) a SARS official to whom the SARS official reports; or
>
> (c) a senior SARS official."

In terms of the definition of "senior SARS official" read with section 6(3) of the TAA, the Commissioner is a senior SARS official.

[184] In terms of section 80J(2), such a response should be given within 60 days after the date of the notice. However, SARS granted an extension until 31 March 2019.

(a) Absa subscribed for preference shares in PSIC3, a South African company.

(b) PSIC3 used the money subscribed by Absa to subscribe for preference shares in PSIC Finance 4 (RF) (Pty) Limited (PSIC4), also a South African company.

(c) PSIC4, which was a beneficiary of an offshore trust, Delta 1 Finance Trust (D1 Trust), used the money subscribed by PSIC3 to make a capital contribution to D1 Trust.

(d) D1 Trust used the capital contribution to make an interest-bearing loan to Macquarie Securities South Africa Limited (MSSA), a South African company and subsidiary within the Macquarie Group. The loan was represented by floating rate notes issued by MSSA.

(e) MSSA used the loan capital from D1 Trust to settle short-term interest-bearing loans made to it by Macquarie EMG Holdings (Pty) Limited (MEMG) and treated the interest it paid to D1 Trust as tax-deductible.

(f) D1 Trust treated the interest it received from MSSA as exempt from tax in terms of section 10(1)(h) of the ITA.[185]

(g) D1 Trust used the interest received on the floating notes to acquire USD-denominated Brazilian government bonds (Brazilian bonds) which paid interest (Brazilian interest). D1 Trust bought the Brazilian bonds from Macquarie Bank Limited (MBL), and sold them back to MBL after receiving the Brazilian interest. These sales and repurchases were made in terms of a global master repurchase agreement (GMRA).

(h) D1 Trust distributed the Brazilian interest to PSIC4. The Brazilian interest was treated as not being taxable in the hands of D1 Trust but as

[185] Section 10(1)(h) exempts from income tax any interest which is received by or accrues to any person that is not a resident unless (relevantly) the debt from which the interest accrues is effectively connected to a permanent establishment of that person in South Africa.

being attributable to PSIC4 in terms of the conduit principle embodied in section 25B of the ITA.[186]

(i) In PSIC4's hands the Brazilian interest was understood by the participants in the scheme to be free of tax in South Africa as a result of Article 11(4)(b) of the double taxation agreement (DTA) between South Africa and Brazil.[187]

(j) PSIC4 used the Brazilian interest to pay preference dividends to PSIC3. In terms of sections 10(1)(k) and 64F(1)(a) of the ITA, the preference dividends were exempt from income tax and dividends tax in PSIC3's hands since it is a South African resident. The transactions were structured to avoid the clawing-back of tax on the dividends in terms of section 8EA of the ITA.[188]

(k) PSIC3 used the dividends it received from PSIC4 to pay preference dividends to Absa. Those dividends were again exempt from income tax and dividends tax in Absa's hands since it is a South African resident.

(l) Absa had the right to put its preference shares in PSIC3 to MSSA in certain circumstances.

(m) Macquarie Group Limited (MGL) guaranteed Absa's preference share returns and made certain undertakings regarding the tax treatment of the

[186] In terms of section 25B(1), non-capital amounts received by or accrued to a trustee must, if the amount has been derived for the immediate or future benefit of any ascertained beneficiary who has a vested right to that amount during that year, be deemed to be an amount which has accrued to the beneficiary. Section 25B(3) gives such a beneficiary a corresponding right to make deductions allowable in respect of the amount that was received by or accrued to the trustee.

[187] The DTA was promulgated as GN751 in *GG* 29073 dated 28 July 2006 and entered into force on 24 July 2006. In terms of Article 11(1), interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. Article 11(4)(b) provides that notwithstanding, among others, Article 11(1), and subject to Article 11(4)(a), "interest from securities, bonds or debentures issued by the Government of a Contracting State, a political subdivision thereof or any agency (including a financial institution) wholly owned by that Government or a political subdivision thereof shall be taxable only in that State".

[188] In terms of section 8EA(2), a dividend received by or accruing to a person is deemed to be "income" in that person's hands if the share is a "third-party backed share". The latter expression is defined as including a preference share "in respect of which an enforcement right is exerciseable by the holder of that preference share . . . as a result of any amount of any specified dividend . . . not being received by or accruing to any person entitled thereto". In terms of section 8EA(3), however, this taxing consequence will not follow if funds from the issuing of preference shares are applied for a "qualifying purpose" (as defined in section 8EA(1)) and the holder's enforcement right (as contemplated in the definition of "third-party backed share") is exerciseable against a person listed in section 8EA(3)(b).

amounts involved. MGL had to gross up Absa's returns if the amounts received by the latter were to become taxable.

[254] SARS explained that in its view the participants in the scheme were mistaken in believing that D1 Trust could take advantage of Article 11(4)(b) of the DTA. In SARS' view, such reliance was precluded by Article 11(9). In terms of Article 11(9), the provisions of Article 11 do not apply "if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid to take advantage of this Article by means of that creation or assignment". SARS contended that the Brazilian bonds were "debt-claims"; that the sale and repurchasing of the bonds between D1 Trust and MBL (step (g)) involved the "assignment" of the bonds; and that the main purpose of the assignments was to take advantage of the tax exemption afforded by Article 11(4)(d).

[255] It followed, so SARS reasoned, that the Brazilian interest attributed to PSIC4 by way of the operation of section 25B(1) of the ITA was taxable interest. However, in terms of section 25B(3), PSIC4 was entitled to a deduction of expenses incurred by D1 Trust in earning the Brazilian interest. D1 Trust incurred significant expenditure in earning the Brazilian interest, and such expenditure exceeded the amount of the interest. The net position remained, therefore, that PSIC4 had no taxable income, though for different reasons than those supposed by the participants.

[256] To understand subsequent developments in the High Court review, it is necessary to quote certain parts of SARS' reasoning in the assessment letter addressed to Absa:

"DETAILED STRUCTURE OF THE ABSA AND UNITED ARRANGEMENTS

. . .

18. The Absa Group has provided SARS with internal documentation relating to the four Absa arrangements, including credit applications and related documentation. In all four cases, Absa's understanding of the arrangement

appears to be that the arrangement consists of a back-to-back preference share investment into MSSA (via PSIC3), which investment would be used to fund MSSA's broker operations. None of the Absa documentation makes any reference to PSIC4, the D1 Trust or any of the transactions undertaken by the latter. SARS has been advised by Absa and United they were unaware of the unreferenced entities or transactions.

. . .

THE TAX AVOIDANCE MECHANISM EMPLOYED BY THE D1 TRUST

36. . . . . [T]he tax benefit/avoidance mechanism utilised in both the Absa and United arrangements is created by the carefully designed transactions undertaken by the D1 Trust, as well as the tax-residency and nature of the D1 Trust itself.

. . .

38. In substance, the D1 Trust utilises the interest from the South African loans (which is treated as tax-exempt in the hands of the D1 Trust but would not be in the hands of the South African beneficiaries should section 25B of the IT Act apply upon distribution) to 'purchase' an income stream (Brazilian bond interest) via short-term bond purchases and re-sales, which income stream is treated as tax-exempt when distributed. There is no apparent commercial reason for these transactions (i.e. the return on the Brazilian bonds is not superior compared to the South African interest), other than the favourable tax treatment for the parties.

. . .

PROPOSED BASIS OF ASSESSMENT: THE GENERAL ANTI-AVOIDANCE RULE ('GAAR')

. . .

66. As set out above, each Absa arrangement and each United arrangement . . . is clearly a pre-determined 'arrangement' as defined in section 80L of the IT Act. . . .

67. Every party to each of the above arrangements is accordingly a 'party' as defined in section 80L of the IT Act in relation to a given arrangement. For the avoidance of doubt, this would include Absa and United. This is because for the purposes of Part IIA of the IT Act, 'party' includes *inter alia* any person

that shares in or participates in an arrangement . . . . This would clearly include any person that benefited financially from the arrangement in question.

. . .

71. It is in our view abundantly clear that the mechanism employed by the D1 Trust, as described above, attempted to 'swap' a taxable income stream . . . for an income stream that was exempt from South African income tax due to the application of the Brazilian DTA. In this manner, the liability for income tax that would have arisen had the taxable income stream not been swapped was (according to the parties) completely avoided.

72. Each Absa arrangement and United arrangement involved/included the D1 Trust and the 'income swap' mechanism that ostensibly made the 'tax benefits' possible. . . .

73. As discussed above, SARS is of the view that the treaty relief that the parties sought to obtain was not in fact available. Even so, in terms of our construction, the arrangements create tax benefits by virtue of the involvement of the D1 Trust, which shields the South African interest income from tax (by virtue of the exemption afforded to non-residents) and uses this exempt income to purchase the (taxable) bond coupons that accrue to PSIC4. The tax benefits remain because of the deemed deduction that results in the hands of PSIC4.

. . .

78. Viewed objectively, each Absa arrangement and each United arrangement was designed to channel the capital invested by Absa/United into MSSA . . . and the transactions undertaken by the D1 Trust were designed to shield the return from MSSA . . . from South African income tax by swapping a taxable income stream for the exempt Brazilian bond income stream and (in the case of Absa and United) a further conversion into local dividend income. The intervening entities (PSIC3, PSIC4 and apparently MSSA in certain cases) were nothing more than conduits. In short, the effect of each arrangement was to increase the return from an underlying investment into interest-bearing instruments (the MSSA notes . . .) via the avoidance of South African tax; in other words, the objective purpose of each such arrangement was to obtain a tax benefit.

. . .

83. Our view is that the appropriate remedy in each case (as provided for in section 80B of the IT Act) is to disregard all intervening entities and

transactions between Absa and United (as primary funders/investor in each of their respective arrangements) and the underlying interest-bearing instrument (the true investment in each arrangement) and to treat the dividends that accrued to Absa and United as taxable interest, rather than exempt dividend income.

REBUTTALS TO THE NOTICE RESPONSE

. . .

The application of the GAAR to Absa

88. The 'unity' referred to by Absa was, as set out above, clearly present in the case of the transactions making up each Absa arrangement. The fact that Absa was ostensibly not aware of some of those transactions does not affect each such arrangement's nature as a composite 'scheme'; the 'unity' in question was designed by the Macquarie Group. Absa is, as set out in paragraph 67 above, a 'party' to each Absa arrangement by virtue of its funding thereof and its economic participation in the returns from such arrangements (including the tax benefits).

Tax benefit

89. SARS has demonstrated above that each Absa arrangement had the effect of avoiding liability for tax. The fact that the anticipated liability avoided was anticipated by the Macquarie entities and not by Absa does not affect our analysis in this regard. SARS has also demonstrated that Absa received substantially all of the tax benefits created by the Absa arrangement.

. . .

Means or manner not normally employed

. . .

105.1. Absa's purpose or intention is not the relevant consideration, but rather the 'means or manner' employed in each arrangement as a whole. SARS has demonstrated above that the structure of each arrangement was not (ignoring the tax benefits created) commercially normal in relation to its ostensible purpose (i.e. interest-bearing loans made to MSSA using Absa's funding). In other words, regardless of what Absa was made aware of by Macquarie, each arrangement was designed to channel Absa funding to MSSA as interest-bearing loans."

Litigation history

High Court review

[257] To retrace my steps, on 28 March 2019 the applicants had launched a High Court review application to set aside the Commissioner's refusal to withdraw the section 80J notices.[189] SARS delivered the rule 53 record without objection. This was followed by a supplementary founding affidavit and answering and replying affidavits. This was the state of play when SARS issued the GAAR assessments in October 2019. On 1 November 2019 the applicants filed a second supplementary founding affidavit in which they alleged that the assessments perpetuated the errors contained in the section 80J notices. They said that they would now be seeking additional relief, namely the reviewing and setting aside of SARS' decision to issue the additional assessments.

[258] The section 80J notices and the assessments were alleged by the applicants to be flawed on account of two legal errors:

(a) First, there is what I shall call the "party error". The applicants referred to the statement I have quoted from paragraph 67 of the assessment letter (an identical statement had appeared in the section 80J notices). The applicants contended that this was based on an incorrect understanding of the applicable legal principles. A scheme for purposes of GAAR could not consist of unconnected transactions – they must form part of an overall plan, there must be a "unity" between the transactions comprising the scheme. Such unity would be absent if, as appeared from SARS' exposition, the applicants invested in preference shares in PSIC3 on the basis that there would be back-to-back preference share investment into MSSA in order to fund MSSA's broker operations and if, unknown to the applicants, the funds were instead used in further transactions involving D1 Trust and MBL. In short, the applicants could not, on SARS'

[189] United, in respect of which the processes had been identical, was a co-applicant and sought the same relief in respect of the section 80J notice issued to it.

exposition, be found to have been parties to a scheme which included transactions between D1 Trust and MBL.

(b) Second, there is what I shall call the "tax benefit error". The applicants quoted SARS' exposition of the law on "tax benefit", culminating in the statement I have quoted from paragraph 71 of the assessment letter (again, an identical statement had appeared in the section 80J notices). The applicants contended that this statement likewise reflected an incorrect understanding of applicable legal principles. A "tax benefit" is defined in section 1 of the ITA as including "any avoidance, postponement or reduction of any liability for tax". SARS' factual exposition did not show that Absa or United had anticipated any tax liability which they had avoided by participating in the transactions. Even if the applicants were party to a unified scheme, the tax benefit identified by SARS was a tax benefit for PSIC4.

[259] In a supplementary answering affidavit, SARS stated that it objected to the applicants' proposed amendment of their notice of motion. SARS emphasised that the assessments were not a final determination of the rights of the parties, since the applicants could still object to the assessments. SARS would give proper consideration to any such objections. If the objections were disallowed, the applicants could appeal to the Tax Court. The applicants filed a short supplementary replying affidavit.

[260] I should also mention that in SARS' first answering affidavit, filed in August 2019, SARS' deponent said that it did not accept that the evidence of Absa's deponent, Mr Erwin, as to what the applicants understood and believed was exhaustive on the question of what was known to them. The question as to what the applicants understood and believed would have to be tested by way of cross-examination in the Tax Court, should the matter get there. It was also a question on which discovery in the tax appeal was likely to shed light.

Amendment application

[261] On 28 November 2019 the applicants launched a substantive application to amend their notice of motion to include a review of SARS' decision to issue the assessments and to exempt the applicants from exhausting internal remedies. In its opposing affidavit SARS stated that the applicants should be required to pursue their remedies under the TAA by way of objection and appeal to the Tax Court. SARS also said that the applicants had failed to ask for a section 105 direction, which was fatal to the amendment application. In their replying affidavit, the applicants contended that SARS had misconstrued the ambit and effect of section 105.

[262] On 25 August 2020 the High Court (Fabricius J) delivered judgment in the amendment application.[190] He held that the questions of exhausting internal remedies and section 105 were matters to be dealt with by the court hearing the review. He granted the applicants leave to amend their notice of motion. Short supplementary answering and replying papers followed. In the supplementary replying affidavit, the applicants submitted that their papers made out a proper case for not exhausting internal remedies and that this covered relief in terms of section 7(2) of PAJA and section 105 of the TAA.

High Court judgment

[263] On 11 March 2021 the High Court (Sutherland DJP) delivered judgment in the main case.[191] I have already quoted what the High Court said about the test for granting a section 105 direction.[192] The High Court held that the applicants were raising points of law, and that this justified a section 105 direction and an exemption from having to exhaust the objection procedure.

[190] *Absa Bank Limited v Commissioner for the South African Revenue Service* [2020] ZAGPPHC 414.

[191] Above n 75.

[192] Above at [66].

[264] The High Court held that the section 80J notices were reviewable in terms of the legality principle (the notices were not final and did not have external legal effect, and so did not constitute "administrative action" as defined in PAJA) while the notices of assessment were reviewable in terms of PAJA (this was common cause).

[265] In regard to the alleged party error, the High Court considered whether there was a factual dispute. SARS argued that the statement which I have quoted from paragraph 18 of the assessment letter (an identical statement had appeared in the section 80J notices) did not convey an acceptance by SARS of Absa's statement that it was unaware of PSIC4, D1 Trust and the transactions undertaken by them. SARS argued that it was entitled to test the veracity of Absa's claim of ignorance through discovery and cross-examination in the Tax Court.

[266] The High Court rejected this argument on the basis that SARS had "put its eggs in one basket". Having assessed on the basis that the tax was due despite Absa's ignorance, it was not open to SARS to seek a chance to go behind this premise by trying to prove that Absa did have knowledge.[193] (The High Court did not mention SARS' statement in the passage I have quoted from paragraph 88 of its letter: namely, the fact that "Absa was ostensibly not aware" of some of the transactions did not affect the arrangement's nature as a composite scheme.)

[267] On the merits, the High Court upheld the applicants' argument on the alleged party error. A scheme "requires a unity to tie the several transactions into a deliberate chain".[194] Absent a factual basis to allege that Absa was anything more than an investor in preference shares, no scheme that reached Absa was established.[195] There was also no factual basis supporting an inference that Absa's investment was in the least motivated by an intention to obtain relief from an anticipated tax liability:

[193] *Absa HC* at para 35.

[194] The High Court cited *Commissioner for Inland Revenue v Louw* 1983 (3) SA 551 (A) at 572 ff.

[195] *Absa HC* at para 40.

> "The expectation of receiving dividend income which is free of tax is so banal a transaction that it cannot support a suspicion of pursuing an ulterior motive and thus cannot serve to broaden the compass of the participants in a scheme."[196]

[268] The High Court also accepted the applicants' case on the alleged tax benefit error. Whether a tax liability has been avoided was to be determined by the "but for test".[197] The question was thus: but for the purchase by Absa of preference shares in PSIC3, how might an anticipated tax liability have been avoided? No foundation for such a result was set out in the section 80J notices or the assessment letter.[198]

[269] The High Court thus granted the applicants leave to pursue the review, set aside the Commissioner's refusal to withdraw the section 80J notices, set aside SARS' letters of assessment, and ordered SARS to pay costs, including the costs of two counsel.

Supreme Court of Appeal judgment

[270] The High Court granted SARS leave to appeal to the Supreme Court of Appeal. That Court delivered judgment on 29 September 2023.[199] In regard to the review of the section 80J notices, the Supreme Court of Appeal held that the notices themselves had no adverse effect or impact. Section 80J(3) sets out the powers of the Commissioner in light of the taxpayer's response to a notice. A decision by the Commissioner not to withdraw the notices in terms of section 9 of the TAA was not reviewable.

[271] With regard to section 105, the Supreme Court of Appeal referred to *Rappa SCA* and said that the High Court had recognised that it could only exercise jurisdiction in exceptional circumstances. The Supreme Court of Appeal seems to have accepted that the High Court could properly have granted a section 105 direction if the review raised

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[196] Id at para 41.

[197] Id at para 42. The High Court cited *ITC 1625* (1997) 59 SATC 383 and *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 492 ff.

[198] *Absa HC* at para 43. In paragraphs 42 and 43 the High Court uses the word "evade" rather than "avoid", which I take to be an oversight.

[199] *Absa SCA* above n 83.

only points of law, but it disagreed with the High Court that the two alleged errors were pure questions of law.

[272] As to the alleged party error, the Supreme Court of Appeal disagreed with the High Court's supposed finding that SARS had accepted the facts stated by the applicants about their knowledge of the transactions.[200] The section 80J notices and the assessment letters set out SARS' reasons for believing that the GAAR provisions applied; they were "not statements of the accepted factual basis for application of the GAAR provisions". Whether the applicants had knowledge of the full nature of the transactions comprising the alleged arrangement, and whether their sole or main purpose in participating was to secure a tax benefit were "matters of disputed fact". So too was the question whether the "arrangement" constituted an "impermissible avoidance arrangement".

[273] As to the alleged tax benefit error, this was also, in the Supreme Court of Appeal's view, a question of fact. It was not "a mere question of law, determinable upon the basis of the assessment as framed by SARS".

[274] Because the grounds of review did not raise pure questions of law, so the Supreme Court of Appeal reasoned, the High Court had erred in finding that exceptional circumstances existed for giving a section 105 direction. The Supreme Court of Appeal thus upheld the appeal with costs, including the costs of two counsel, and substituted the High Court's order with one dismissing the review application with costs, including the costs of two counsel.

[200] I say "supposed" finding, because on my reading of its judgment the High Court did not find that SARS had admitted the applicants' version of the limits of their knowledge. The High Court merely held that SARS had chosen not to take issue with that version, contenting itself with the assertion that it did not matter whether the applicants had the knowledge in question.

The application in this Court

[275] On 19 March 2024, some six months after the Supreme Court of Appeal delivered judgment, the applicants filed an application for leave to appeal and for the consolidation of the hearing of their case with *UMK*, *Rappa* and *Forge* which this Court had already decided to hear.

[276] The applicants sought condonation for the late filing of their application, which should have been filed by 20 October 2023. They explained the delay as follows. They initially decided, on legal advice, not to appeal *Absa SCA* and instead to continue with the process of objection and appeal under the TAA. On 19 January 2024, however, they learnt that this Court had agreed to hear *UMK*, *Rappa* and *Forge*. They sought legal advice on this development, which they received on 26 January 2024. They then requested further advice from their in-house lawyers, who provided memoranda over the period 5-20 February 2024. On 21 February 2024 the applicants instructed their attorneys to brief a senior counsel specialising in administrative and constitutional law to give a written opinion. Since the senior counsel who had previously represented them on these aspects had recently left the bar, new counsel had to be found. A new senior was briefed on 28 February 2024. The attorneys met with senior counsel on 6 March 2024, and on 11 March 2024 the legal team met with representatives of the applicants to give legal advice and to prepare papers in an application to this Court.

[277] The applicants contended that the delay would cause no significant prejudice to SARS, because SARS had already been cited as a respondent in the other three cases which the Court was to hear. The applicants' case raised important issues which were similar to those in the other three cases.

[278] In its answering affidavit SARS opposed condonation. SARS raised an additional objection to the application, namely that on the applicants' own version the appeal had been perempted by their deliberate decision not to pursue an appeal against the Supreme Court of Appeal's judgment. SARS criticised the applicants for not addressing the question of peremption in their founding affidavit. By ignoring

peremption, the applicants had failed to demonstrate that non-enforcement of peremption was justified by "overriding constitutional considerations", a test taken from *SANDF*.[201]

[279] On the merits of leave to appeal, SARS agreed with the Supreme Court of Appeal's finding that the two alleged errors involved factual disputes. In dealing with the alleged party error, SARS stated that the upshot of the transactions was that "the money that Absa invested in PSIC3 found its way back to it in the form of tax-exempt dividends": "Absa received an inflated return on its investment for no reason other than that its funds had been used in an impermissible avoidance arrangement".

[280] This, SARS submitted, amounted to participating in the avoidance arrangement. The High Court's judgment would set a dangerous precedent, namely that as long as an investor remains ignorant about precisely what is done with its investment, it is entitled to reap the rewards of tax avoidance. The investor might know that it is obtaining a higher return than should be the case, but as long as it "does not ask too many questions" it is entitled to profit at the expense of the fiscus. The extent of the taxpayer's knowledge cannot be determinative of its GAAR liability though it would be germane in determining liability for understatement penalties.

[281] In regard to the alleged tax benefit error, SARS stated that the question was not whether, but for the transaction as a whole, the taxpayer would have incurred a tax liability. The question was whether, if the transaction had not been "dressed up with

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[201] *Minister of Defence v South African National Defence Force Union* [2012] ZASCA 110 (*SANDF*) at para 23:

> "The general rule that a litigant who has deliberately abandoned a right to appeal will not be permitted to revive it is but one aspect of a broader policy that there must at some time be finality in litigation in the interests both of the parties and of the proper administration of justice. Bearing in mind the policy underlying the rule it must necessarily be open to a court to overlook the acquiescence where the broader interests of justice would otherwise not be served. As this Court said recently in *Government of the Republic of South Africa v Von Abo*, in response to a similar contention that the appeal had been perempted:
>
> > 'It would be intolerable if, in the current situation, this Court would be precluded from investigating the legal soundness of the first order, as a result of the incorrect advice followed by the appellants or an incorrect concession made by them.'"

features designed to avoid the imposition of tax", the taxpayer would have incurred the tax liability. On this approach, SARS contended, the tax benefit to Absa is self-evident:

> "If one ignores the tax-avoidance features of the transaction, the dividend income that Absa received on its preference shares was funded by the downstream interest income from the MSSA loan in South Africa. The 'tax benefit' inquiry therefore requires a comparison, on the one hand, of the tax liability that Absa would have faced if it had advanced a loan directly to MSSA and, on the other, of the tax liability it faced under the avoidance arrangement. Quite simply, but for the avoidance arrangement, instead of earning the inflated tax-exempt dividends which it did, Absa's investments would have been subject to taxable interest."

[282] SARS filed a separate affidavit opposing the applicants' prayer for what SARS described as "intervention" in the other tax cases, which by then also included *Lueven*. This affidavit was filed at a time when the other four tax cases were still scheduled to be heard on 23 May 2024. SARS complained of prejudice if the present applicants' case were also to be heard on that date, which was less than two months away.

[283] The applicants sought leave to file a replying affidavit. They stated that the question of peremption had not been in issue in the High Court or Supreme Court of Appeal. It was raised for the first time in SARS' answering affidavit in this Court. They contended that the burden rested on SARS to raise peremption. SARS having done so, the applicants should, in the interests of justice, be given a chance to reply.

[284] In the proposed replying affidavit, the applicants alleged that there were overriding constitutional and policy considerations militating against the enforcement of peremption. The case was said to raise important constitutional issues relating to the rights to a fair hearing, administrative justice and an effective remedy. It would be extremely prejudicial to the applicants if they were barred by peremption and this Court were then to reverse the precedents on which the Supreme Court of Appeal had relied in *Absa SCA*. It would be contrary to the interests of justice for this Court to "confront

the legally untenable orders in *Rappa* and *UMK*, without also remedying the order in the present case, which followed directly thereon".

[285] The applicants stated that SARS had not claimed to have acted to its prejudice on the strength of the applicants' initial decision not to appeal *Absa SCA*. The applicants disclosed that they had filed an objection to the assessments which SARS had disallowed on 28 February 2024. The applicants had until 15 April 2024 within which to note an appeal to the Tax Court. The "lengthy and costly appeal process" under the TAA had not yet commenced and was capable of being stayed pending the outcome of the proposed appeal in this Court.

[286] SARS opposed the application for leave to file a replying affidavit. SARS contended that the applicants should indeed have dealt with peremption, given that their founding affidavit in this Court disclosed that they had deliberately decided not to appeal. Peremption was said to take effect by operation of law; it did not need to be pleaded by a respondent.

Peremption, condonation and leave to appeal

[287] Before dealing with the merits, the questions of peremption and condonation must be addressed. However, and since the merits may have a bearing on peremption and condonation, I should mention here, by way of anticipation, that in my view the application for leave to appeal has sufficient merit to warrant adjudication if peremption and condonation are not a fatal obstacle in the applicants' way.

Peremption

[288] I previously mentioned the statement in *SANDF* that a court may overlook peremption where the broader interests of justice would otherwise not be served.[202] This

[202] See [278] and above n 201.

proposition was approved by this Court in *SARS v CCMA*.[203] In *SANDF* the appellants had publicly announced that they were withdrawing an appeal that was then pending in the Supreme Court of Appeal. Within a week or two they changed their stance and said they were persisting with the appeal. In holding that the peremption should be overlooked, the Supreme Court of Appeal emphasised the relatively short period within which the appellants abandoned the peremption and the intolerability if an interdict that had been wrongly granted against them were to impede them in the discharge of their statutory duties.[204]

[289] The Supreme Court of Appeal in *SANDF* referred to that Court's judgment in *Von Abo*.[205] In the latter case the High Court had made an order against the appellants declaring certain rights of Mr von Abo and requiring the appellants to take certain steps to give effect to those rights. The appellants were to file a compliance affidavit and were ordered to pay Mr von Abo's costs. The appellants took steps in attempted compliance with the order and filed a compliance affidavit. They also paid Mr von Abo's taxed costs. On 5 February 2010 the High Court made a second order to the effect that the first and third appellants were liable to pay damages to Mr von Abo as a result of the violation of his rights by the Government of Zimbabwe. The quantum of damages was referred to oral evidence. On 26 February 2010 the appellant applied for leave to appeal against the first and second orders. The High Court granted leave. The question arose whether an appeal against the first order had been perempted.

[290] The Supreme Court of Appeal left open the question whether the first order was appealable, holding that peremption should in any event not stand in the way of an appeal against both orders:

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[203] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; [2017] 1 BLLR 8 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC); (2017) 38 ILJ 97 (CC) at para 28.

[204] *SANDF* above n 201 at paras 25-6.

[205] *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65; [2011] 3 All SA 261 (SCA); 2011 (5) SA 262 (SCA).

> "[I]t matters not whether the first order was appealable or whether the appeal had been perempted. As a matter of logic the second order arose from the first order and has no independent existence separate from the first order. As the second order was given in consequence of the first order, and would not nor could have been given if it was not for the first order, it follows that if the first order is wrong in law, the second order is legally untenable. Whether the appellants were ill-advised not to appeal against the first order, but rather to try and comply with it, should not have the unacceptable result that this court is held to a mistake of law by one of the parties.
>
> In *Paddock* the principle of the court not being bound by what is legally untenable was applied in the narrower context of a legally wrong concession by one of the parties during proceedings, but the principle is equally valid in the present context. It would be similarly intolerable if, in the current situation, this court would be precluded from investigating the legal soundness of the first order, as a result of the incorrect advice followed by the appellants or an incorrect concession made by them."[206]

[291] In *SARS v CCMA*[207] SARS had failed in the Labour Court and Labour Appeal Court to obtain the reversal of a reinstatement award made by the Commission for Conciliation, Mediation and Arbitration in favour of an employee who had been found guilty of highly offensive racist language. Following the Labour Appeal Court's decision, SARS notified the employee that it would not be pursuing a further appeal and asked the employee to consult with a named official about returning to work. Within three days SARS notified the employee that it had changed its mind, and an application for leave to appeal to this Court followed. In deciding that the peremption should be overlooked, this Court had regard not only to the quick reversal but to the fact that it was important to address "the mother of all historical and stubbornly persistent problems in our country: undisguised racism".[208]

[206] Id at paras 18-19.

[207] Above n 203.

[208] Id at para 29.

[292] In *Booi*[209] the applicant had been dismissed by the respondent but was exonerated in an arbitration held under the auspices of the South African Local Government Bargaining Council. The arbitrator ordered his retrospective reinstatement. The Labour Court upheld the employer's ground of review that the arbitrator had erred by awarding reinstatement in view of the supposed breakdown of the trust relationship between the applicant and the respondent. The Labour Court replaced the reinstatement award with an order for the payment of eight months' compensation, which came to R741 341.

[293] Acting on the advice of his attorneys, the applicant instructed them to claim the compensation from the respondent, and the money was paid. He later explained that this was done because funds were needed to pursue a further appeal. He then brought a late application in the Labour Court for leave to appeal, which the Labour Court refused on the basis of peremption. A year later the applicant applied to the Labour Appeal Court for leave to appeal, which application was dismissed. He then filed an application for leave to appeal in this Court which was 213 calendar days late.

[294] This Court condoned the late application and held that it was in the interests of justice not to enforce peremption. Among the reasons given by this Court were that the case raised questions about unfair labour practices and job security, which were core values of the Labour Relations Act[210] and important constitutional issues. The applicant's conduct in claiming the compensation and later pursuing an appeal, while surprising to a lawyer, was "not altogether unfathomable" in the case of a layperson. This Court took into account that the applicant had been unemployed and unrepresented for a large part of the time.[211] On the merits of the case, the Court reversed the Labour Court's decision and ordered the applicant's retrospective reinstatement,

[209] *Booi v Amathole District Municipality* [2021] ZACC 36; [2022] 1 BLLR 1 (CC); (2022) 43 ILJ 91 (CC); 2022 (3) BCLR 265 (CC) (*Booi*).

[210] 66 of 1995.

[211] *Booi* above n 209 at paras 31-3.

directing that the money he had received as compensation should be deducted from his retrospective remuneration.

[295] These judgments show how various the circumstances are in which peremption may be overlooked in the interests of justice. Little purpose is served by trying to show how similar or different one case is from another. Each case must depend on its own facts.

[296] In the present case, the Supreme Court of Appeal gave judgment on 29 September 2023. The date for filing a timeous application for leave to appeal in this Court was 20 October 2023. Having decided not to appeal against the Supreme Court of Appeal's judgment, the applicants decided to change tack, a course precipitated by their discovery on 19 January 2024 that this Court had agreed to hear three other tax cases concerning section 105 of the TAA. The application was eventually filed in this Court on 19 March 2024.

[297] The change in stance took much longer in the present case than it did in *SANDF* and *SARS v CCMA*, but not nearly as long as in *Von Abo*. The relevant time period in *Booi* is unclear. The time it takes for a litigant to retract its peremption seems to me to be important mainly in relation to prejudice to the other party. And in this respect the present case differs from the others in an important respect. In each of the other cases, the conduct constituting peremption was communicated to the other side. Since peremption is a species of waiver, the conduct would ordinarily need to come to the attention of the other party. Inaction might suffice to justify an inference of acquiescence, but in the other cases I have discussed the peremption was not inferred from inaction but was the result of positive conduct.

[298] There is nothing on the record to indicate that the applicants' initial decision not to appeal against *Absa SCA* was communicated to SARS; and SARS does not say that it inferred from the applicants' inaction that they had acquiesced in *Absa SCA*. The fact that the applicants had taken a positive decision not to appeal *Absa SCA* was only

disclosed to SARS in the applicants' application for leave to appeal in this Court. SARS does not say that in the meanwhile it had done anything to its prejudice on an assumption that the applicants were not appealing *Absa SCA*.

[299] Even so, if the applicants were the only litigants wishing to pursue the section 105 issues in this Court, the circumstances I have just identified would almost certainly be insufficient to overcome the hurdle presented by peremption. However, the important and unusual feature of the present case is that the applicants belatedly changed tack because this Court had already agreed to hear three other tax cases raising section 105 issues (*United Manganese*, *Rappa* and *Forge*) and a fourth case (*Lueven*) was later added to the docket. In the absence of prejudice to SARS, it would be undesirable to allow peremption to stand in the applicants' way in circumstances where the issues they wish to ventilate include issues that we may in any event decide in the context of the other four cases.

[300] SARS criticises the applicants for not confronting peremption head on in their founding affidavit in this Court. I am by no means persuaded that peremption is a matter going to the jurisdiction of a court or that it is a matter of which a court may take notice of its own accord. Being a species of waiver, peremption technically is an objection to be raised by the other party. All the same, where, as here, an applicant for leave to appeal is aware of circumstances amounting to a clear peremption, the applicant should anticipate the objection and deal with it upfront. Although the applicants in this case did not address peremption in terms, they did candidly disclose the fact that they had initially taken a positive decision not to appeal *Absa SCA*. It was that very disclosure that allowed SARS to raise the peremption objection. Moreover, almost all the circumstances relevant to the question whether the peremption should be overlooked were contained in the founding affidavit in this Court, albeit with reference to condonation rather than peremption. In the circumstances, I consider that the replying affidavit could be allowed and that the applicants should not be held to the peremption.

Condonation

[301] I have already summarised the explanation the applicants have given for the delay. One may consider that after 19 January 2024 the applicants proceeded too cautiously, seeking legal advice from multiple sources. Nevertheless, the delay has been explained.

[302] The absence of prejudice to SARS is an important consideration. If the applicants had timeously applied for leave to appeal in October 2023, their case would have been added to those the Court had already agreed to hear. Because urgent election business prevented this Court from hearing the other tax cases on 23 May 2024, the applicants' case could be added to the other four without any inconvenience. The applicants' delay in seeking leave has not in the event delayed this Court's hearing of the case. I would thus grant condonation.

Merits

[303] The applicants did not argue that the Supreme Court of Appeal was wrong to conclude that the Commissioner's refusal to withdraw the section 80J notices was not reviewable. I shall thus deal only with the review of the assessments. Although in the High Court the applicants needed a section 7(2) exemption, this has become moot. The internal remedy of objection has now been exhausted, since the applicants eventually filed objections and SARS disallowed those objections.

[304] The question of section 105, on the other hand, remains a live issue. The applicants had an express right to object and appeal against the Commissioner's decision to invoke section 80B of the ITA.[212] Since the High Court granted a section 105 direction, the first question is whether the Supreme Court of Appeal was entitled to interfere with this exercise of a true discretion. If we find that the Supreme Court of Appeal was entitled to interfere, the next question is whether we are

[212] See section 3(4)(b) of the ITA.

entitled to interfere with the true discretion that the Supreme Court of Appeal exercised in substitution of the High Court's decision.

[305] Although the High Court adopted a test of exceptional circumstances apparently put forward by counsel, the High Court understood exceptional circumstances in a distinctly diluted form. The circumstances, said the High Court, did not need to be "exotic or rare or bizarre". There simply need to be circumstances, properly construed, which "sensibly justified an alternative route".[213] If, as appears to be the case, the High Court asked itself whether there were circumstances that sensibly justified recourse to the High Court rather than what it styled the "usual procedure", I do not think it misdirected itself by applying a heightened test of exceptional circumstances in the sense expounded in *Rappa SCA*.

[306] However, the High Court held without more that if the dispute is entirely a dispute about a point of law, this sensibly justifies recourse to the High Court rather than following the route of a tax appeal, in other words, this was an exceptional circumstance in the High Court's diluted sense of that term. The High Court, I take it, meant that it sufficed, for a section 105 direction, that the dispute raised in the High Court proceedings was entirely a point of law. However, a proper consideration of a request for a section 105 direction requires the High Court to consider any undesirable prospect of piecemeal and parallel adjudication. This means that the High Court must consider whether the applicant impugns an assessment on other grounds that do not feature in the High Court litigation.

[307] The applicants have not said that they have no objections to the assessments apart from the two alleged errors. We do not have the applicants' objections to the assessments, but their responses to the section 80J notices are in the record. After dealing with the two alleged errors, they made a number of other points, including the following:

[213] *Absa HC* at para 25.

(a) They denied having had the sole or main purpose of obtaining tax benefits.

(b) Even on the composite scheme alleged by SARS, they denied that it involved a lack of commercial substance in the form of round-trip financing as contemplated in section 80C(2)(b)(i) read with section 80D.

(c) In regard to the transactions of which they were aware, they denied that the means or manner employed were not normal as contemplated in section 80A(1)(a)(ii). They stated that the structure of providing the funding required by MSSA through a special purpose vehicle, PSIC3, was proposed by MSSA. From the applicants' point of view, using PSIC3 as a funding special purpose vehicle was normal in the context of redeemable preference share funding transactions. MSSA had explained to the applicants why, for regulatory reasons, it was not possible for MSSA itself to issue redeemable preference shares directly to the applicants.

(d) The applicants stated that, given their reasonable and genuine belief that their tax returns had been completed in compliance with the tax legislation, no understatement penalties should be imposed.

[308] These and other additional points will have to be litigated in the Tax Court if the review fails. By overlooking these additional disputes and their implications for piecemeal adjudication, the High Court misdirected itself. That was sufficient to entitle the Supreme Court of Appeal to consider the matter afresh. This was not, however, the basis on which the Supreme Court of Appeal interfered with the High Court's section 105 direction.

[309] The Supreme Court of Appeal presumably had *Rappa SCA* in mind when it spoke of exceptional circumstances. *Rappa SCA* understood exceptional circumstances as imposing a more stringent test than that adopted in *Absa HC*. Nevertheless, this probably did not taint the reasoning in *Absa SCA*, because the Supreme Court of Appeal in *Absa SCA* proceeded from the same premise as *Absa HC*, namely that exceptional

circumstances would exist if the issues raised in the review were pure points of law. The Supreme Court of Appeal differed from the High Court only on whether the questions were pure points of law. The Supreme Court of Appeal thus acted on a wrong principle.

[310] In my view, the Supreme Court of Appeal also misdirected itself in holding that the two alleged errors involved disputed facts and were not purely questions of law. The applicants' case was that the two errors were errors of law emerging from SARS' own statement of the facts, first in the section 80J notices and later in the assessment letters. The applicants were in reality raising a type of exception: namely that the facts alleged by SARS did not sustain, and were indeed irreconcilable with, the following two conclusions: (a) that the applicants were "parties" to the alleged impermissible tax-avoidance arrangement; (b) that, if the applicants were parties, they had received a "tax benefit" and could be subjected to a GAAR assessment.

[311] The interpretation of the letters of 19 October 2019, which superseded the section 80J notices, is a matter of law. Although the applicants have not said so, I do not doubt that they would accept that SARS is entitled to the benefit of any reasonable interpretation of which the letters are capable, in much the same way as on exception a court will adopt any reasonable interpretation of the pleading that avoids the ground of exception.

[312] Once the meaning of the letters has been ascertained, the question whether they manifest the two errors is also a question of law:

(a) The alleged party error raises, as a question of law, whether a taxpayer needs to have knowledge of all the steps in a tax-avoidance arrangement, and in particular the step at which tax is said to have been avoided, in order to be identified as a "party" to the arrangement, or whether it suffices that the taxpayer obtained a financial benefit under the arrangement.

(b) The alleged tax benefit error raises, as questions of law:

(i) whether a taxpayer which is a party to an impermissible tax-avoidance arrangement must itself have sought to avoid an anticipated tax liability in order to be identified as having obtained a "tax benefit" from the arrangement;

(ii) whether a taxpayer which did not itself obtain a "tax benefit" but which benefited financially from the arrangement can permissibly be subjected to a GAAR assessment or whether SARS is confined to taxing the party which obtained the "tax benefit".

[313] In regard to the alleged party error, it may indeed be so that SARS has not admitted the applicants' ignorance of the involvement of PSIC4 and D1 Trust and the transactions they concluded. This, however, does not point to the existence of factual disputes relevant to the alleged party error. The assessment letters clearly state SARS' position that it is irrelevant whether the applicants had knowledge of these matters[214] and that what is relevant is that the applicants reaped a financial benefit from the arrangement.[215] SARS' audit evidently did not enable it to make the positive allegation that the applicants indeed had knowledge of these matters, but SARS has said that the absence of such knowledge does not preclude a finding that the applicants were parties to the overall arrangement.[216] This is the essence of the alleged party error, and it is a legal question.

[314] To take a High Court exception as an analogy, suppose a plaintiff formulates his particulars of claim without alleging fact X. The defendant takes an exception on the ground that fact X is an essential allegation to disclose a cause of action. The plaintiff can try to ward off the exception by arguing that he does not need to allege fact X, and the Court will then have to decide whether in law the plaintiff needs to allege fact X. What the plaintiff cannot do is to try to ward off the exception by saying that he does not know whether fact X exists, but that its existence might be established through

[214] See paras 18, 88 and 105 of the letter to Absa, quoted at [256] above.

[215] See paras 67 and 88 of the letter, quoted at [256] above.

[216] This remains SARS' position in its affidavit in this Court: see [279]-[280] above.

discovery and cross-examination. The point of an exception is to avoid a trial if the plaintiff has not made the allegations necessary to sustain a cause of action.

[315] In the present case, the applicants are contending that an essential ingredient of SARS' case against them is their knowledge of the involvement of PSIC4 and D1 Trust and the transactions concluded by those entities, and that SARS has not alleged this essential ingredient. SARS' riposte, evident from SARS' own letters, is that SARS has not alleged this because it does not need to do so. A court can decide as a matter of law who is right.

[316] In regard to the alleged tax benefit error, the letters certainly appear to convey that—

(a) the anticipated tax liability was avoided by D1 Trust;

(b) the tax savings occurred at the level of D1 Trust and PSIC4;[217]

(c) in consequence of those tax savings, PSIC4 was able to pay PSIC3 higher tax-exempt dividends than would otherwise have been the case; and

(d) PSIC3 in turn was able to pay the applicants higher tax-exempt dividends than would otherwise have been the case.[218]

It is a question of law whether in these circumstances the applicants can be said to have obtained a "tax benefit" or whether, even if they did not, they can be subjected to a GAAR assessment by virtue of having received a financial benefit.

[317] Since the Supreme Court of Appeal acted on a wrong principle and misdirected itself on the character of the issues raised by the proposed review, this Court is at large to decide whether a section 105 direction should have been given. The two alleged errors are points of law, and this is a factor (though not necessarily decisive) favouring the grant of a section 105 direction. It may be argued that SARS could refine its case

[217] See paras 36, 38, 67, 71-3, 78 and 89 of the letter, quoted at [256] above.

[218] Whether this remains SARS' case is less clear: see [281] above. This may signal a shifting of ground.

in its rule 31 statement and that the law points should rather be taken in the Tax Court in response to the rule 31 statement, which – unlike the assessment letters – is a pleading. For two reasons, the force of that argument is significantly diminished in this case.

[318] First, SARS has, despite ample opportunity, not stated that it intends to depart from the grounds of assessment stated in the assessment letters. It would of course be open to SARS to abandon its contentions on which one or both of the legal points depend, in which case the need to adjudicate the point or points would become moot. Unless and until that happens, however, a court is entitled to assume that SARS stands by its contentions in the assessment letters.

[319] Second, because one is dealing with a GAAR assessment, the assessment letters have a heightened significance. In several Tax Court judgments decided with reference to the now repealed anti-avoidance provisions of section 103 of the ITA,[219] it was held that a taxpayer's appeal against a GAAR assessment is an appeal against the Commissioner's satisfaction on the facts constituting the necessary components for such an assessment. For this reason, the Commissioner could not afterwards attempt to justify a GAAR assessment on the basis that he had now satisfied himself on different facts. If the Commissioner wished to base a GAAR assessment on different facts, he needed to withdraw the one assessment and issue another.

[320] The GAAR provisions in the TAA do not use the language of "satisfaction". It has, however, been argued that the approach in the above Tax Court judgments remains valid.[220] The argument is not without merit:

(a) The Commissioner can only override the ordinary tax consequences of transactions if certain preconditions are satisfied. If they are satisfied, the

[219] *ITC 1862* (2013) 75 SATC 34; (2012) 61 *The Taxpayer* 229 at paras 59-60 and *ITC 1876* (2015) 77 SATC 175 at paras 43-4.

[220] Emslie, Blumberg and Kotze "The Extraordinary Nature of a GAAR Assessment – Why SARS cannot broaden, amplify or change the determination that constitutes its GAAR assessment" (2024) 73 *The Taxpayer* 142.

Commissioner "may" determine the tax consequences of the impermissible avoidance arrangement in any of the ways listed in section 80B(1). In terms of section 80H, the Commissioner "may" apply the GAAR provisions to steps in or parts of an arrangement.

(b) In terms of section 80J(1), the Commissioner's notice to the taxpayer must state that "he or she believes" that the GAAR provisions may apply in respect of an arrangement and must set out in the notice "his or her reasons therefor". If the Commissioner remains unpersuaded by the taxpayer's response, he or she must, in terms of section 80J(3)(c), "determine" the liability of that party for tax in terms of the GAAR provisions, that is, by exercising the power conferred by section 80B.

(c) Section 80J(4) provides that if, at any stage after giving a section 80J(1) notice, "additional information" comes to the knowledge of the Commissioner, "he or she may revise or modify his or her reasons for applying this Part or, if the notice has been withdrawn, give notice in terms of subsection (1)". This appears to accommodate the case of a change of reasons before the GAAR assessment is issued: if the assessment has not yet been issued, the Commissioner must either revise or modify the existing section 80J(1) notice or, if it has been withdrawn, issue a fresh one.

[321] While it is unnecessary in this case finally to decide to what extent the Commissioner may depart from the grounds given in a letter of GAAR assessment, the fact that his right to do so may be restricted and may be contested is a factor in favour of determining the questions of law arising from assessment letters.

[322] The presence of other disputes about the assessments militates against High Court adjudication. Piecemeal adjudication would be avoided if the Tax Court were to adjudicate the two alleged errors along with the remaining attacks on the assessments. It is nevertheless fair to observe that the two alleged errors are not a sideshow. They are the two main grounds on which the applicants contest the

assessments. A decision on those two points will go a long way to disposing of the case. In that regard, I note the following about the applicants' other grounds for impeaching the assessment:

(a) The applicants' statement as to their purpose is closely allied to their case on the alleged party error. They say that, in the context of the parties and transactions of which they were aware, their subjective purpose was not to obtain a tax benefit but to provide preference share funding in the ordinary course of their business for a return in the form of exempt dividend income. SARS may not contest that statement of their subjective purpose. SARS' case is that the applicants' subjective purpose is irrelevant: "the purpose test is an objective test of the effect of an arrangement".[221]

(b) The applicants' contentions about round-trip financing are legal rather than factual. And round-trip financing is not the only basis on which SARS has invoked GAAR.

(c) In regard to abnormality, the applicants' contentions are again closely allied to their case on the alleged party error. Quite possibly SARS will not contest the normality, taken in isolation, of the provision of preference share funding to MSSA via PSIC3.[222]

(d) The applicants' contentions on understatement penalties flow from their other contentions.

[323] In favour of the Tax Court adjudication is that permitting the High Court to adjudicate the review exposes the losing party to an adverse costs order. While the applicants chose to institute a High Court review and might in any event be entitled to *Biowatch* protection if they lost, SARS as an unwilling respondent in the High Court

[221] Para 77 of the assessment letter. I have already quoted para 78 of the letter at [256] above, a paragraph that starts, "Viewed objectively" and ends, "[I]n other words, the objective purpose of each such arrangement was to obtain a tax benefit". In the rebuttal part of the assessment letter, SARS addressed Absa's contentions as to purpose in paras 92-9, again emphasising that the test is objective. SARS did not state in its rebuttal that it contested the applicants' version as to their subjective intentions, though SARS did not go as far as admitting it.

[222] That this is probably so appears from para 105 of the assessment letter, in rebuttal to the applicants' contentions on normality. This paragraph has been quoted at [256] above.

would on ordinary principles have to pay the applicants' costs if it lost. SARS should not lightly be deprived of the costs protection it enjoys in the Tax Court. (The applicants sought and were awarded costs in the High Court, including the costs of two counsel.)

[324] If I were assessing the section 105 question at first instance, I would probably have declined to give a direction, since the two alleged legal errors were not the only grounds on which the applicants attacked the assessments. Nevertheless, and as I have shown, the case for refusing a direction is not clear-cut. At first instance, SARS' exposure to High Court costs could perhaps have been neutralised by requiring the applicants to forego costs in the main case or to subject themselves to the same test as would be applied by the Tax Court in terms of section 130(1)(a) of the TAA.

[325] We are not, however, deciding the question at first instance. I do not think we can ignore later developments.[223] The High Court granted a section 105 direction at a time when the test for doing so was not firmly established. The High Court's direction was not manifestly inappropriate. Importantly, the High Court went on to decide the merits of the case. Much time has passed since the High Court gave judgment in March 2021. The avoidance of piecemeal adjudication cannot now be achieved, as might have been possible at the threshold. A refusal of a section 105 direction at this late stage would nullify the High Court's judgment and require the Tax Court to adjudicate the same points afresh. It may be expecting too much from the Tax Court not to be influenced by the High Court's judgment, even if its status as precedent has been set at nought.

[326] Although we do not have the benefit of a judgment on the merits from the Supreme Court of Appeal, we do have the High Court's judgment on the merits, so we

[223] The Court in *Nichol* above n 89 at para 17 said that, for purposes of a section 7(2) exemption, the exceptional circumstances "should primarily be facts and circumstances existing before or at the time of the institution of the review proceedings", but that "[t]his does not mean that the court may not, in principle, take into consideration events occurring after the launch of such proceedings". Where an appellate court is required to consider afresh whether a section 105 direction should be granted, it would in my view be at odds with the sound administration of justice to hold that the appellate court may under no circumstances have regard to events that occurred after the launch of the proceedings, even events that occurred after the High Court gave judgment.

will not be deciding the merits at first instance. The two points of law are undoubtedly important questions of general significance in GAAR cases. SARS' counsel did not seek to persuade us that the law points do not enjoy sufficient prospects of success to warrant a hearing. After all, the High Court has already decided them in favour of the applicants.

[327] In the circumstances, I consider that the High Court's direction should be allowed to stand and that this Court should give directions for a hearing in due course on the merits of the review. Although it is a review in form, in substance the successful party will have a declaration in their favour on the two legal issues.

Conclusion

[328] Although this Court normally hears an application for leave to appeal simultaneously with any resultant appeal, that could not be done in these five cases for reasons, hence this Court's directions as to the limited issues to be addressed at this stage. In my view, the appropriate order in the present case is to condone the late filing of the application for leave to appeal; to confirm, albeit for different reasons, the High Court's grant of a section 105 direction; and to grant leave to appeal on the merits, on the basis that directions will be issued for the enrolment of the appeal itself in due course.

[329] Since SARS' conduct in opposing condonation and the overlooking peremption was reasonable, the applicants should pay SARS' costs of opposition in those respects, including the costs of two counsel. For the guidance of the Taxing Master, the issues of condonation and peremption occupied about one-third of the time devoted to the hearing of this case. For the rest, and since the outcome of the appeal may affect the appropriate costs orders in this Court and in the other Courts that have dealt with the case, all questions of costs should be reserved for later determination.

CCT 320/23: Lueven Metals (Pty) Limited v CSARS

[330] In the last of the five cases the applicant is Lueven Metals (Pty) Limited (Lueven). Lueven refines scrap gold and supplies the refined gold to Absa Bank Limited (Absa) in the form of bars.

Background

[331] Section 11(1)(f) of the VAT Act provides that the following supply of goods is zero-rated:

> "the supply . . . to the South African Reserve Bank, the South African Mint Company (Proprietary) Limited or any bank registered under the Banks Act, 1990 (Act No. 94 of 1990), of gold in the form of bars, blank coins, ingots, buttons, wire, plate or granules or in solution, which has not undergone any manufacturing process other than the refining thereof or the manufacture or production of such bars, blank coins, ingots, buttons, wire, plate, granules or solution."

[332] I shall, as the parties did in their papers, refer to the South African Reserve Bank and the South African Mint Company (Pty) Limited as SARB and Mintco respectively, and to a bank registered under the Banks Act as a bank. To avoid tedious repetition, I shall refer to "bars, blank coins, ingots, buttons, wire, plate or granules or in solution" as the eight forms.

[333] Lueven buys gold-bearing scrap, including jewellery, with a view to refining and supplying the gold in the form of bars (one of the eight forms) to a bank, Absa. Absa, in common with the other institutions named in section 11(1)(f), requires the gold bars to have a purity of 99.5%.[224] Lueven refines the scrap gold into bars with a purity of 80% to 90% (partially refined bars). Lueven deposits the partially refined bars with Rand Refinery Limited (Rand Refinery), which further refines them into bars with a purity of 99.5% (fully refined bars). This is done on a contract basis, with Lueven

[224] Gold with a purity of 99.5% is a gold alloy made up of 99.5% gold and 0.5% of other metals such as copper, silver and zinc.

remaining the owner of the gold. Lueven sells the fully refined bars to Absa, with delivery made on Lueven's behalf by Rand Refinery.

[334] Lueven, which obtained its precious metals refining licence in November 2012, treated its sales of fully refined bars to Absa as zero-rated in terms of section 11(1)(f). The zero-rating allowed Absa to buy the bars at a price that did not include VAT and allowed Lueven to deduct, as input tax, the output tax it paid to the suppliers of the scrap gold.

[335] In March 2020 SARS notified Lueven that in terms of section 40 of the TAA it had been selected for a VAT verification in respect of the tax period September 2019 to February 2020. SARS requested information from Lueven in terms of section 46 of the TAA. In June 2020 SARS notified Lueven that it was to be the subject of a VAT audit in respect of the VAT periods March 2018 to March 2020 and an income tax audit in respect of the 2019 tax year. Again, information was requested and supplied in terms of section 46 of the TAA. An interview in terms of section 47(1) took place in March 2021.

[336] On 8 April 2021 SARS furnished Lueven with a notification in terms of section 42(2)(b) of the TAA. SARS told Lueven that it was minded to treat its sales of fully refined bars to Absa over the period March 2018 to March 2020 as standard-rated rather than zero-rated. In SARS' view, the fully refined bars were made from gold which had previously undergone a manufacturing process as contemplated in section 11(1)(f), namely the manufacture of the gold into jewellery, electronic components and the other items that Lueven bought from its suppliers as scrap gold. Lueven's sales to Absa over this period were R4 007 123 079, of which the tax fraction was R521 305 417.[225] Lueven was invited to make representations on the merits and on understatement penalties. No income tax adjustments were identified.

[225] In March 2018 the VAT rate was 14%. For the remaining months it was 15%.

[337] On 2 June 2021 Lueven, through its attorneys, furnished its response in terms of section 42(3) of the TAA. On the merits, Lueven's contention was that the phrase "which has not undergone any manufacturing process" is merely part of a provision regulating the form in which the gold must be in order to qualify for zero-rating. As long as Lueven simply refines the gold and supplies it in one of the forms permitted by section 11(1)(f), without subjecting the gold to any other process of manufacture or production, the supply is zero-rated. The provision does not contemplate an investigation into the source of the gold. On understatement penalties, Lueven contented itself with an assertion that because it had correctly treated the sales as zero-rated there was no scope for understatement penalties.

[338] On the same day, Lueven gave notice to SARS in terms of section 11(4) of the TAA that it intended to approach the High Court for declaratory relief.

Litigation history

High Court

[339] Lueven launched its application in the High Court on 24 June 2024. At that stage no additional assessments had been issued. However, and in case such assessments should follow during the course of the litigation, Lueven sought a section 105 direction. On the merits, Lueven's notice of motion sought orders declaring that—

> "2.1. the word 'gold' in section 11(1)(f) of the [VAT Act] refers to, and only applies to: gold (in any of the eight unwrought forms permitted in the subsection) refined to the grade of purity required for acquisition by the [SARB], [Mintco] or any bank . . .;
>
> 2.2. 'gold' in the form of 'bars' supplied to the SARB, Mintco or a bank, in terms of section 11(1)(f) of the VAT Act, refers to gold of a purity equal to or greater than 99.5%;
>
> 2.3. the phrase 'which has not undergone any manufacturing process other than the refining thereof or the manufacture or production of' in section 11(1)(f) of the VAT Act, precludes the zero-rating of a supply of gold:

(i) not being in one of the eight unwrought forms identified in the subsection; and

(ii) that has undergone further manufacturing or production processes once it has reached the state of purity required for acquisition by the SARB, Mintco or a bank;

2.4. the phrase 'which has not undergone any manufacturing process other than the refining thereof or the manufacture or production of' in section 11(1)(f) of the VAT Act, refers to any manufacturing process(es) carried out by the vendor supplying gold to the SARB, Mintco or a bank, and does not refer to any process(es) which gold may have been subjected historically, prior to being refined to the grade of purity required for acquisition by the SARB, Mintco or a bank."

[340] In its founding affidavit, Lueven stated that it operated on very small profit margins. Because of SARS' stance, SARS had withheld VAT refunds of more than R51 million to which Lueven believed it was entitled. Its business had all but ground to a halt. In its 2020 financial year its turnover was R2.2 billion. In 2021 this dropped to R8.5 million. Lueven had been forced to retrench its staff.

[341] Following the institution of this application, SARS did not issue additional assessments and that remains the position. SARS took the view that the question was one of law and suitable for decision by the High Court. Lueven did not pursue its request for the declaratory order set out in paragraph 2.2 of its notice of motion but pressed for the remaining relief.

[342] The High Court delivered judgment on 19 May 2022.[226] The High Court found that SARS' interpretation of section 11(1)(f) was correct. The High Court observed that zero-rating was based on policy considerations, for example to stimulate the economy, make exports competitive or to provide relief to the indigent. In the case of section 11(1)(f), SARS had stated in its answering affidavit that the provision was promulgated with the specific intention of providing the mining industry with a

[226] *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* [2022] ZAGPPHC 325; 84 SATC 447 (*Lueven HC*).

favourable tax regime in order to enhance the viability of gold mining in the context of a highly capital intensive industry. This was important, because the mining industry was a major employer and a significant contributor to the country's gross domestic product.

[343] Lueven had criticised this assertion by SARS as "bare, unsubstantiated and . . . inconsistent with what is expressly stated in the subsection". According to Lueven, it was impermissible for a respondent "flatly" to assert what the lawmaker's intention was. The High Court reasoned, however, that SARS was not prescribing an interpretation but stating the policy reasons that informed the provision. This policy needed to be taken into account in the process of interpretation.

[344] I should mention in passing that Lueven in argument had its own view of the purpose of section 11(1)(f). First, says Lueven, the purpose is to enable the SARB, Mintco and banks to obtain gold in unwrought form at a zero rate because of the importance of gold "to the functions and mandates of the recipients in relation to investment, liquidity and currency". Lueven emphasises that it is only the supply to these specified recipients that benefits from the zero-rating. The emphasis, Lueven argues, falls on the recipients, not the suppliers. Second, and so as to ensure the availability and longevity of the gold supplied to these recipients, the suppliers to these recipients are placed on an equal footing with other suppliers of gold making domestic or export sales, insofar as the deductibility of their input tax is concerned. According to Lueven, the lawmaker could easily have stated that the exemption would only apply to newly mined gold if that had been the intention.

[345] To return to the High Court's judgment, the Court considered that Lueven's interpretation rendered superfluous the words "which has not undergone any manufacturing other than the refining thereof or the manufacture or production of [one of the eight forms]". Those words did not, in the High Court's view, apply only to the gold once it was in the form supplied to a section 11(1)(f) recipient. Lueven wanted to recast the provision as if it read "gold. . . which has not undergone any manufacturing

process other than the refining thereof or the manufacture or production of [the eight forms]". The eight forms were, however, listed twice in section 11(1)(f), and the second listing was introduced by the word "such". A meaning had to be given to all the words in the provision.

[346] The High Court rejected an argument that Lueven's interpretation was supported by certain binding class rulings issued by SARS in terms of section 82(1) of the TAA. Those rulings merely addressed the problem of documentary compliance where gold deposited with Rand Refinery by multiple suppliers was mingled in the refining process.

[347] As to SARS' past practice of supposedly permitting zero-rating in accordance with Lueven's interpretation, the High Court said that the evidence for such a practice was scant. Furthermore, *Bosch*,[227] the authority relied upon by Lueven, only accorded weight to a past practice in "marginal" cases.[228] In the High Court's view, the interpretation of section 11(1)(f) was not a marginal case. In any event, so the High Court said, this Court in *Marshall*[229] had disapproved *Bosch* in this respect.[230]

[348] The High Court concluded:

> "The supply of gold which is derived from gold which had previously been refined and subsequently undergone any manufacturing process before being refined or manufactured in the prescribed eight unwrought forms for purposes of supply to the listed recipients, is therefore excluded from zero-rating."

For this reason, said the High Court, Lueven was not entitled to a declaratory order and its application was dismissed with costs, including the costs of two counsel. The High Court granted Lueven leave to appeal to the Supreme Court of Appeal.

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[227] *Commissioner for the South African Revenue Service v Bosch* [2014] ZASCA 171; [2015] 1 All SA 1 (SCA); 2015 (2) SA 174 (SCA).

[228] Id at para 17.

[229] *Marshall v Commission for the South Africa Revenue Service* [2018] ZACC 11; 2018 (7) BCLR 830 (CC); 2019 (6) SA 246 (CC); 80 SATC 400.

[230] Id at paras 6-10.

Supreme Court of Appeal

[349] The Supreme Court of Appeal required counsel at the outset to address whether the High Court was entitled to pronounce on the merits, having regard to sections 104 and 105 of the TAA. Both parties argued that those provisions were inapplicable because no assessments had been issued. They wanted the Supreme Court of Appeal to decide the merits. They submitted that the Court should grant a section 105 direction if it held that one was needed.

[350] The Supreme Court of Appeal delivered judgment on 8 November 2023.[231] The appeal was dismissed with costs, including the costs of two counsel. The members of the Court were agreed on the outcome but divided on the reasoning. The majority (per Ponnan JA, with Meyer JA, and Keightley and Mali AJJA concurring) said that the parties' approach to section 105 came down to one of mere timing, with no logical explanation as to why a taxpayer who had only received a notice of an intention to assess should be placed in a better position than a taxpayer who had already been assessed.

[351] The Supreme Court of Appeal emphasised the discretionary nature of declaratory relief. As to such relief in tax matters, the majority was critical of the line of cases where this had been held to be permissible. The cases could be traced back, said the majority, to the "unreasoned conclusion" in *Gillbanks*.[232] This critical treatment is perhaps surprising, since the majority also quoted the emphatic statement by this Court in *Metcash*[233] that "it has for many years been settled law that the Supreme Court has jurisdiction to hear and determine income tax cases turning on legal issues".[234] Alive to this, the majority said that with the introduction of section 105 the legislative landscape had changed significantly since *Metcash* was decided.

[231] *Lueven SCA* above n 85.

[232] *Gillbanks v Sigournay* 1959 (2) SA 11 (N).

[233] Above n 28.

[234] Id at para 44.

[352] Even if section 105 was not directly applicable, the scheme of the TAA, in the majority's view, was relevant to the question whether the granting of declaratory relief was appropriate. Although the majority did not altogether rule out the possibility of declaratory relief in tax disputes, their occurrence in the majority's view was likely to be "rare and their circumstances exceptional or at least unusual".

[353] Without seeking to lay down hard and fast rules, the majority considered that the present case was on any reckoning not suitable for declaratory relief. In response to the section 42(2)(b) notice, Lueven had "simply gone through the motions" – it did not give SARS time to reconsider its position in the light of the response. This ignored the emphasis placed by the TAA on exhausting internal remedies. Moreover, the parties had "adopted diverging views not only in relation to the law but also the facts". The disputes were in truth matters for adjudication in accordance with the special machinery created by the TAA. The circumstances of the case did not favour piecemeal consideration.

[354] The majority also held that "we may well be precluded from entering into the substantive merits of the appeal". This was because the matter was supposedly approached as if an appeal lies against the reasons for a judgment. The High Court was called upon to resolve the competing contentions of the parties; but in the absence of a counter-application by SARS, all the High Court could do was to dismiss Lueven's application with costs.

[355] In her separate judgment, Molemela P said that in the absence of an assessment section 105 did not find application. No direction under that section was needed in order for the High Court to exercise the jurisdiction conferred by section 21(1)(c) of the Superior Courts Act.[235] Seeking declaratory relief on the interpretation of tax legislation was unequivocally established by authority. However, the majority was right, in

[235] 10 of 2013. In terms of section 21(1)(c) the High Court has the power "in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

Molemela P's view, to say that the parties had adopted diverging views not only in relation to the law but also the facts. This meant that declaratory relief was not appropriate. The High Court's actual order – the dismissal of Lueven's application – could thus not be faulted.

This Court

[356] On 28 November 2023 Lueven turned to this Court for leave to appeal. Apart from a wide-ranging critique of the judgments in the High Court and Supreme Court of Appeal, Lueven contended that the case raised arguable points of law of general public importance. Those points of law were said to include not only the interpretation of section 11(1)(f) but also: (a) the Supreme Court of Appeal's imposition of restrictions on the High Court's right to grant declaratory relief, its unjustified appellate interference in the High Court's discretionary decision to entertain the application for declaratory relief, and the Supreme Court of Appeal's failure to follow binding precedent; and (b) the High Court's failure to apply the unitary approach to statutory interpretation, its failure to give effect to the lawmaker's purpose, and its acceptance of SARS' unsubstantiated assertion as to the purpose of section 11(1)(f).

[357] The questions of law were said to impact the public in general, including the SARB and the financial sector, and affected the second-hand gold industry's sustainability and the industry's continued trade practices and tax treatment.

[358] On 24 January 2024 SARS filed its answering affidavit and an application for leave to cross-appeal together with an application to condone the late filing of these documents. If condonation was granted, SARS sought by way of cross-appeal (a) the issuing of a section 105 direction authorising the adjudication of the declaratory relief sought by Lueven and (b) confirmation of the High Court's order dismissing the application for declaratory relief, alternatively the remittal of the matter to the Supreme Court of Appeal for adjudication.

[359] In its affidavit, SARS confirmed that at the hearing of the appeal in the Supreme Court of Appeal both parties had been of the view that section 105 did not apply. SARS explained that due to developments in other tax cases as well as the majority's judgment in the present case, SARS had come to the conclusion that a section 105 direction was indeed needed and that the Supreme Court of Appeal should have granted one.

[360] SARS contended that the Supreme Court of Appeal's failure to issue a section 105 direction was a misdirection on its part. Both parties had asked the Supreme Court of Appeal to issue such a direction if one was found to be necessary and Lueven's notice of motion had included the necessary prayer. A direction was appropriate because the parties required an interpretation of section 11(1)(f), the High Court had granted leave specifically to enable the parties to get an authoritative interpretation, and the correct interpretation was a matter of law and was dispositive of the disputes between the parties. There were no factual disputes impacting on the interpretation of section 11(1)(f).

[361] SARS stated that the unfortunate position that now prevailed in the light of the Supreme Court of Appeal's judgment was that the High Court's judgment, which in SARS' view correctly interpreted section 11(1)(f), was of no force or effect:

> "This is to the prejudice of SARS and not in the interests of justice. The quantum of the applicant's potential tax liability if the intended assessments are issued, amounts to hundreds of millions of rands and the same applies to other refineries that may have conducted business in a similar manner. The second-hand gold industry has a substantial and material interest in the outcome of this litigation."

[362] In its affidavit answering the condonation application and the application for leave to cross-appeal, Lueven abided this Court's decision on condonation and on leave to cross-appeal but opposed the cross-appeal itself if leave were granted. Lueven contested SARS' new attitude on the applicability of section 105. Lueven also stated that a remittal to the Supreme Court of Appeal would not be appropriate. The matter

was ripe for consideration by this Court. Lueven would be prejudiced by the further delays and costs that a remittal would bring about, since SARS was likely to appeal any judgment against it by the Supreme Court of Appeal. Tax refunds to which Lueven believed it was entitled had been withheld by SARS for nearly four years.

[363] Then came a surprising development. On 25 March 2024 SARS delivered a notice withdrawing its application for leave to cross-appeal together with a short affidavit in which the deponent said that since delivering the answering affidavit on 24 January 2024 SARS had come to the view that there was no basis for a section 105 direction and that the Supreme Court of Appeal's order was unassailable.

[364] In a letter to the Registrar, Lueven's attorneys stated that their client did not consent to or condone the withdrawal of the application to cross-appeal, that it was irregular having regard to rule 27 of this Court's Rules,[236] and that it was not in the interests of justice to allow the application for leave to cross-appeal to be withdrawn, since an authoritative determination on section 105 was required.

[365] The question inevitably arises whether SARS' change of stance was a tactical one to avoid potentially undermining the arguments that SARS was adopting in the other tax cases then pending in this Court. In any event, the short affidavit that accompanied the withdrawal did not retract any of the statements which SARS had made under oath in this Court two months previously about the nature and importance of the issue and the circumstances which rendered it suitable for determination in declaratory proceedings.

[236] Rule 27, headed "Withdrawal of cases", provides:

> "Whenever all parties, at any stage of the proceedings, lodge with the Registrar an agreement in writing that a case be withdrawn, specifying the terms relating to the payment of costs and payment to the Registrar of any fees that may be due, the Registrar shall, if the Chief Justice so directs, enter such withdrawal, whereupon the Court shall no longer be seized of the matter."

Discussion

[366] Lueven did not need a section 105 direction and still does not need one, because no additional assessments have been issued. SARS' counsel for all practical purposes conceded this at the hearing.

[367] The majority in *Lueven SCA* was nevertheless right to observe that section 105 plays a role when it comes to the High Court's discretion to entertain an application seeking declaratory relief in advance of an anticipated assessment. However, since the test of exceptional circumstances does not apply when section 105 is directly applicable, it also does not apply when declaratory relief is sought before an assessment is issued. I thus cannot endorse the majority's statement that the circumstances in which declaratory relief can be entertained in tax cases are likely to be "rare and their circumstances exceptional".

[368] In my view, the majority and the minority erred in finding that the present case was not suitable for declaratory relief. The majority referred to the risk of piecemeal adjudication. While that is a proper consideration, the majority did not explain why it was thought to be a problem in this case. The only point of contention between the parties is whether Lueven's supply of fully refined bars to Absa is zero-rated in terms of section 11(1)(f). That depends, in turn, on the interpretation of that provision, and in particular the phrase "which has not undergone any manufacturing process other than". Does this phrase refer only to a manufacturing process undertaken by the vendor who supplies gold in one of the eight forms to a listed recipient or does it include a manufacturing process to which the gold was subjected at some earlier stage of its life? A declaratory order will resolve this question one way or the other. If the point is finally determined against Lueven, it does not claim that its supplies to Absa are zero-rated on any other basis. SARS itself has confirmed that a declaratory order will be dispositive. The determination of the question also transcends the interests of the immediate parties in this case, because it will apply to all similarly-placed gold refiners.

[369] Neither the majority nor the minority explained why they considered there to be factual disputes. This is something that should have received closer attention, given that the litigants themselves did not think that there were any relevant factual disputes and that the High Court's reasoning did not reveal the existence of any such disputes. The majority said that Lueven's response to SARS had addressed a range of issues, including—

> "the requirements of section 11(1)(f), the relevant principles of statutory interpretation and the application of international law; what constitutes gold and the gold supply chain; the manufacturing process; the definition of refining and the refining process; the distinction between manufacturing and production; co-mingling and a relevant class ruling; the reasonable care standard and understatement penalties; and, lawful, reasonable and procedurally fair administrative action".[237]

[370] This listing of issues does not in itself disclose the presence of relevant factual disputes. In order to establish whether relevant factual disputes exist, one must have regard to the affidavits. In its founding affidavit, Lueven made some critical statements about SARS' conduct. Those statements were not, however, relevant to the legal question the High Court was asked to resolve and SARS in its answering affidavit pointed out that those statements were irrelevant. They evidently did not feature in argument in the High Court, since no reference is made to them in the judgment.

[371] I have not been able to discover, in the affidavits, any relevant factual dispute about manufacturing and refining processes or the distinction between manufacturing and production. SARS does not dispute that the fully refined bars that Lueven supplies to Absa constitute gold in one of the eight forms and that such supply would qualify for zero-rating were it not for the phrase "which has not undergone any manufacturing process other than . . . ". SARS does not dispute that Lueven, itself and through Rand Refinery on a contract basis, refines scrap gold to make the fully refined bars.

[237] *Lueven SCA* above n 85 at para 25.

Lueven does not manufacture the bars into anything else. SARS relies on the manufacturing to which the scrap gold was subjected at an earlier stage of its life.

[372] Co-mingling and the binding class rulings likewise do not raise factual disputes. The rulings speak for themselves. The fact that Rand Refinery mingles gold deposited with it from multiple sources is also common cause.

[373] As to the reasonable care standard and understatement penalties, I acknowledge that if Lueven ultimately fails in getting the declaratory relief it seeks, SARS may impose understatement penalties. Whether it does so and at what level may be influenced by the tenor of a final judgment on the merits. Whether there will ultimately be a dispute about any understatement penalties imposed is unknown. Understatement penalties are a risk in every case if the taxpayer loses. If that were a reason for declining to decide a declaratory matter, declaratory relief could never be obtained in tax cases.

[374] The majority in the Supreme Court of Appeal thought that they might be precluded from deciding the substantive merits of the case because it was supposedly approached as if an appeal lies against the reasons for judgment. I have difficulty in following that concern. In every case where an application for declaratory relief fails on the merits, the result will be a dismissal of the application and there will not be a converse declaration in favour of the respondent unless the latter counter-applied for declaratory relief. This plainly does not mean that an unsuccessful applicant cannot appeal against the dismissal of its application. The refusal of declaratory relief on the merits is a final and appealable order. The Supreme Court of Appeal and former Appellate Division have often entertained such appeals,[238] as has this Court.[239]

[238] See, for example, *South African Fabrics Ltd v Millman N.O.* 1972 (4) SA 592 (A) and *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A).

[239] See, for example, *King N.O. v De Jager* [2021] ZACC 4; 2021 (4) SA 1 (CC); 2021 (5) BCLR 449 (CC), where the High Court and Supreme Court of Appeal had refused to make a declaratory order that a clause in a will was invalid. That decision was reversed by this Court and a declaration was granted. See also *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Ltd* [2018] ZACC 37; [2018] 2 CPLR 411 (CC); 2018 (12) BCLR 1553 (CC); 2019 (1) SA 370 (CC), where the Competition Appeal Court's refusal to grant a declaratory order was reversed in this Court.

[375] The majority in the Supreme Court of Appeal stated that Lueven had "simply gone through the motions" when replying to SARS' section 42(2)(b) notice and that it did not give SARS an opportunity to reconsider its position. SARS itself did not make that complaint. Lueven evidently believed that a crisp legal issue had crystallised early between the parties. Events proved Lueven to be right. When SARS filed its answering papers in the High Court six weeks after the application was launched, it adhered to its position, and it has consistently adhered to that position since then.

[376] The Supreme Court of Appeal's reasoning on the question of discretion is not altogether clear. Ponnan JA stated that it was for an applicant to show the circumstances justifying declaratory relief, that he was "by no means satisfied" that those circumstances were present in this matter and that there were several considerations that "suggest" that the High Court ought to have exercised its discretion against hearing the application.[240] Towards the end of his judgment, Ponnan JA said that an application for declaratory relief was not appropriate and that, although the High Court had "incorrectly entertained" the case, the order dismissing the application was right. Ponnan JA added, almost as an afterthought, that the Supreme Court of Appeal "could not interfere with the exercise of the High Court's discretion to deal or not deal with the matter (as should have happened here), unless there was a failure to exercise a judicial discretion".[241]

[377] While the majority evidently would have exercised its discretion not to entertain the case, it did not squarely address whether appellate interference was justified and, if so, why. This said, the High Court did not expressly address itself to the question of discretion, perhaps because both sides were in agreement that the High Court should entertain the case. If on this basis one supposes that the High Court did not exercise a discretion at all,[242] the Supreme Court of Appeal would have been entitled to exercise

[240] *Lueven SCA* above n 85 at para 12.

[241] Id at para 30.

[242] Compare *South African Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd* 1977 (3) SA 642 (A) at 658A-F.

its own discretion. If that be the case, we are entitled to interfere in the Supreme Court of Appeal's exercise of that discretion because of the misdirections I have identified.

Conclusion

[378] It follows that the Supreme Court of Appeal erred in dismissing the appeal on the basis it did. Whether the appeal should have failed on its merits has yet to be determined. It is unfortunate that the Supreme Court of Appeal did not express its view on the merits to cover the eventuality of a further appeal to this Court.[243] However, we have the benefit of the High Court's judgment. The legal issue is a crisp one. It would cause substantial further delay and expense to remit the matter to the Supreme Court of Appeal.

[379] The appropriate order, therefore, is to grant leave to appeal and for this Court to adjudicate the merits. Whether there should be a further hearing need not be decided now. Sometimes this Court decides appeals by way of substantive judgments on the strength of written argument alone. This case might perhaps be suitable for such treatment. However, the parties will be afforded an opportunity to file supplementary submissions on the merits in which they can also address the question whether in their view an oral hearing is reasonably required.

[380] There is a satisfactory explanation for SARS' delay in filing its answering affidavit in this Court and the delay should be condoned. In regard to the withdrawal of the application for leave to cross-appeal, the attempted withdrawal did not comply with rule 27. However, since both sides have been heard in argument, SARS should be permitted to withdraw the application for leave to cross-appeal. This causes no prejudice to Lueven, because we have considered the implications of section 105 in the

[243] *Spilhaus Property Holdings (Pty) Ltd v MTN* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC) at paras 44-5 and *Casino Association of South Africa v Member of the Executive Council for Economic Development, Environment, Conservation and Tourism* [2023] ZACC 39; 2024 (5) BCLR 611 (CC) at para 33.

context of Lueven's own application for leave to appeal and have concluded that there was no need for a section 105 direction.

[381] SARS must bear its own costs in regard to its application for condonation. SARS must also pay Lueven's costs in relation to the withdrawn application for leave to cross-appeal, as SARS indeed tendered at the hearing. Since the application for leave to cross-appeal did not take up any time in argument, the costs to which Lueven is entitled are confined to the costs of its answering affidavit in respect of the application for leave to cross-appeal. All other questions of costs must stand over for determination together with the appeal on the merits.

Orders

[382] In Case CCT 94/23 *United Manganese of Kalahari (Pty) Limited v Commissioner for the South African Revenue Service* the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant must pay 50% of the respondent's costs in this Court, including the costs of two counsel.

[383] In Case CCT 98/23 *Rappa Resources (Pty) Limited v Commissioner for the South African Revenue Service* the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The parties are to pay their own costs in this Court.

[384] In Case CCT 66/23 *Forge Packaging (Pty) Limited v Commissioner for the South African Revenue Service* the following order is made:

1. Condonation is granted for the late filing of the record and the applicant's submissions.

2. Condonation for the late filing of the application for leave to appeal is refused.
3. The applicant must pay the respondent's costs in this Court, including the costs of two counsel.

[385] In Case CCT 72/24 *Absa Bank Limited and United Towers (Pty) Limited v Commissioner for the South African Revenue Service* the following order is made:

1. Leave is granted to the applicants to file a replying affidavit.
2. Condonation is granted for the late filing of the application for leave to appeal.
3. Leave to appeal is granted, the peremption of the appeal being excused.
4. On the question whether a direction should be granted in terms of section 105 of the Tax Administration Act 28 of 2011, the appeal succeeds and the High Court's decision to grant such a direction is confirmed.
5. The remaining issues in the appeal stand over for later determination in accordance with directions to be issued.
6. The applicants, jointly and severally, the one paying the other to be absolved, must pay the respondent's costs of opposing the overlooking of peremption and of opposing condonation, including the costs of two counsel.
7. The remaining costs incurred to date in this Court stand over for later determination.

[386] In Case CCT 320/23 *Lueven Metals (Pty) Limited v Commissioner for the South African Revenue Service* the following order is made*:*

1. The late filing of the respondent's answering affidavit is condoned.
2. The applicant is granted leave to appeal.
3. The respondent is granted leave to withdraw its application for leave to cross-appeal.

4. On the question whether the High Court should have entertained the applicant's application for declaratory relief in light of the provisions of section 105 of the Tax Administration Act 28 of 2011, the appeal succeeds and the High Court's decision to entertain the application on its merits is confirmed.
5. The remaining issues in the appeal stand over for later determination in accordance with directions to be issued.
6. The respondent must bear its own costs in respect of its application for condonation.
7. The respondent must pay the applicant's costs of opposing the application for leave to cross-appeal, including the costs of two counsel.
8. The remaining costs incurred in this Court to date stand over for later determination.

Case CCT 94/23 *United Manganese of Kalahari (Pty) Limited v Commissioner for the South African Revenue Service*

For the Applicant	J J Gauntlett SC, P A Swanepoel SC, F B Pelser and O Lugabazi Instructed by Edward Nathan Sonnenbergs Incorporated
For the Respondent:	G Marcus SC, L Sogogo SC, M Mbikiwa and M Masilo Instructed by Ramushu Mashile Twala Incorporated

Case CCT 98/23 *Rappa Resources (Pty) Limited v Commissioner for the South African Revenue Service*

For the Applicant:	I Goodman SC, G Goldman and G Singh Instructed by Girard Hayward Incorporated
For the Respondent:	G Marcus SC and M Mbikiwa Instructed by VZLR Incorporated

Case CCT 66/23 *Forge Packaging (Pty) Limited v Commissioner for the South African Revenue Service*

For the Applicant:	R Kotze Instructed by Theron and Partners
For the Respondent:	G Marcus SC, A R Sholto-Douglas SC, M Mbikiwa and T S Sidaki Instructed by Mathopo Moshimane Mulangaphuma Incorporated practising as DM5 Incorporated

Case CCT 72/24 *ABSA Bank Limited and United Towers (Pty) Limited v Commissioner for the South African Revenue Service*

For the Applicants:	M Janisch SC, K Hofmeyr SC, L Mnqandi and C Kruyer Instructed by A & O Shearman

For the Respondent:	G Marcus SC, A R Sholto-Douglas SC and M Mbikiwa Instructed by the Office of the State Attorney, Johannesburg

Case CCT 320/23 *Lueven Metals (Pty) Limited v Commissioner for the South African Revenue Service*

For the Applicant:	P A Swanepoel SC, F B Pelser, C A Boonzaaier and M N Davids Instructed by Edward Nathan Sonnenbergs Incorporated
For the Respondent:	G Marcus SC and M Mbikiwa Instructed by VZLR Incorporated