REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 40420/2020

CASE NO: 17064/2021

(1)	REPORTABLE: **YES**
(2)	OF INTEREST TO OTHER JUDGES: **YES**
(3)	REVISED.
.....	**14 July 2022**
SIGNATURE	DATE

In the matter between:

SACS (LOUIS TRICHARDT) (PTY) LTD Applicant

and

The COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

VALLY J:

Introduction

[1] The applicant, relying on certain concessions granted to taxpayers under the Public Private Partnership (PPP) agreement in terms of Treasury Regulations contained in the Public Finance Management Act, 1 of 1999[1] brings two applications before this court in which it seeks relief against the respondent, the Commissioner for the South African Revenue Service (SARS). In the first application (Case No.: 40420/2020) it asks for an order declaring that SARS is precluded from auditing, assessing or "performing tax computations" in respect of its tax liabilities for the 2013 to 2016 tax years, by (a) treating the Capital portion of the Fixed Fee earned by it as constituting gross income; (b) disallowing the exemption contained in section 10(1)(*z*I) of the Income Tax Act 58 of 1962 (ITA); (c) recouping the building allowance[2] which it claimed in terms of section 11(*g*) of the ITA; and further that SARS is precluded from (i) disallowing the exemption claimed in terms of section 10(1)(*z*I) of ITA for the tax years 2013 to 2019; and (ii) disallowing the building allowance claimed in terms of section 11(*g*) of the ITA or by applying section 23B of the ITA. In the second application (Case No.: 17064/2021) applicant seek an order declaring that SARS is precluded from raising additional assessments in respect of applicant's tax liabilities for the 2013 to 2016 years, "because the period of limitation for the issuance of additional assessments, as contemplated in section 99 of the Tax Administration Act, 28 of 2011 (TAA), has expired".

[2] The parties have been engaged in extensive litigation since 2007.

Overview

[3] On 4 May 2007 SARS issued a revised assessment for applicant's 2001 to 2004 tax years which, *inter alia*, dealt with the issue of exempt income in terms of section 10(1)(*z*I) of the ITA. The exemption was claimed in the tax return of applicant. The revised assessment allowed it. However, on 19 September 2007 applicant objected to the revised assessment. The parties were unable to resolve the objection between themselves. Applicant lodged an appeal in the Tax Court (Pretoria). The matter was called before Claasen J who ruled in favour of applicant. The matter proceeded on appeal to the Supreme Court of Appeal (SCA). In the meantime, the tax computations for the 2005 to 2012 years were put on hold. The appeal was finalised on 20 November 2012. SARS was partially successful in its endeavours to overturn the order of Claasen J. The matter was referred back to SARS to deal with the issue of "the amount that is deductible from [applicant's] income in terms of section 11(*b*A)" of the ITA.

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1 The agreement was concluded between applicant and the Department, but qualifies as a PPP.

2 The recoupment is undertaken in terms of section 8(4)(*a*) of the ITA.

SARS complied with the SCA order and in the course of so doing disallowed an expense identified as “further costs”. This led to further litigation in the Tax Court (Pretoria) where the matter was called before Victor J. It was finalised in favour of applicant. SARS did not appeal the decision. As a result, the tax liability of applicant for the tax years 2002 to 2004 was finalised on 20 March 2014. This legal battle had an impact on the calculation of the tax liabilities of applicant for the subsequent years.

[4] On 7 April 2014 applicant requested that SARS compute its liabilities for the 2005 to 2012 years in accordance with the outcome of the 2002 to 2004 tax liabilities dispute. On 15 April 2015 SARS informed applicant by letter that it had completed its audit of applicant’s tax affairs and that it had come to the conclusion that the building allowance had to be recouped. In the letter it spelled out its assessment of how much it owed to SARS for each of the 2005 to 2012 tax years as a result of the recoupment. It explained its conclusion by drawing on the provisions of sectsions 8(4)(*a*), 10(1)(*z*l) and 11 of the ITA. The conclusion reads:

> “The capital amount of the Contract Fee, which compensates applicant for the capital cost of the building of the prison bears a direct relationship to the amounts claimed under the section 11(*g*) allowance for the capital cost of the building of the prison. The recovery of the capital cost included in the Contract Fee each year is thus a recoupment of the section 11(*g*) allowance each year.”

[5] Attached to the letter was a table setting out the adjusted assessments it made with regard to the tax liabilities of APPLICANT for each of the years in question. These were:

2005	2006	2007	2008	2009	2010	2011	2012
-6 844 266	3 463 196	53 526 480	70 775 405	92 098 790	106 193 616	119 083 295	134 576 815

[6] Applicant responded by way of a lengthy letter on 17 June 2015 explaining why it disagreed with the conclusion. It spelt out in detail what its understanding of the applicable legal principles were, and how they affected the calculation of its tax liabilities for the relevant years. It called on SARS to reconsider its stance.

[7] On 1 November 2015 SARS issued a Finalisation of Audit letter dealing, *inter alia*, with the contentions of applicant regarding its 2005 to 2012 tax liabilities. In this letter it explained why it disallowed an exemption in terms of section 10(1)(*z*l) of the ITA and why it recouped the building allowance which applicant claimed in terms of section 11(*g*). The recoupment was undertaken in terms of s 8(4)(a) of the ITA. The letter contained the revised assessments of applicant's tax liabilities, which included a new liability for understatement – Understatement Penalties – in terms of the TAA. applicant was unhappy with this and on 1 December 2015 it wrote to SARS seeking reasons for the decision reflected in the Finalisation of Audit letter. SARS responded on 15 December 2015 outlining its reasons. Applicant remained dissatisfied with the reasons provided as well as with the revised assessments. Instead of objecting to the revised assessments it decided to bring an application in the Tax Court in terms of rule 6(1) of the Tax Court Rules seeking reasons for (i) the disallowance of the exemption and (ii) why it decided to "withdraw a prior decision allowing the exemption". The application was served before Henney J in the Tax Court (Cape Town).[3] On 3 June 2016 Henney J delivered his written judgment wherein he found that SARS had "supplied [applicant] on more than one occasion with well-motivated, complete, sufficient and adequate reasons as required by law as to why it adjusted its original assessment as contained in the letter dated 4 May 2007". Following upon that finding, Henney J dismissed the application with costs. Thus, applicant was left with no choice but to accept the decision as relayed in the Finalisation of Audit letter. If not, it would now have to lodge a formal objection and SARS would have to respond thereto, and if the matter were to remain unresolved – which it obviously would be given the parties' irreconcilable differences – appeal the revised assessments in the Tax Court.

[8] At this point the tax returns of applicant for the 2013 and 2014 tax years were due and were submitted. Applicant continued to adopt the view that it was entitled to the exemptions claimed, despite SARS taking a different view. And so, the returns for 2013 and 2014 reflected a claim for these amounts. Applicant knew, or ought to have known, that this issue being unresolved would pose difficulties for its future returns. After all, it chose to object to the assessments for the 2005 to 2012 returns, and knew that if the objection was refused – which given the irreconcilable stances adopted by the parties was a certainty – it could challenge the assessments in the Tax Court.[4] Instead it decided to engage in what can be described as ancillary litigation – seeking reasons for SARS' refusal to allow the exemptions – that would only prolong the matter. It was clear that the parties were in deadlock and that the only way the matter would be finalised would be through an appeal launched in the Tax Court by

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3 It is not clear why this application was launched in Cape Town whereas previous matters were launched in Pretoria.

4 See section 107 of the TAA.

applicant. In any event, now having found itself at sea as a result of the order by Henney J, applicant decided to object to the assessments reflected in the letter of Final Audit. This it did on 19 July 2016, five weeks after the order of Henney J. SARS, on the other hand, instead of dealing with this expeditiously. given that its position was clearly and unequivocally spelt out in its letter of 15 December 2015, only responded on 23 November 2016 disallowing the objection. To this end it wrote to applicant stating, *inter alia*:

> "**REASONS FOR DISALLOWANCE OF SECTION 10(1)(*z*l) EXEMPTION**
>
> …
>
> In the years of assessment prior to 2005 SARS incorrectly granted an exemption under section 10(1)(zl) for the capital portion of the Fixed Component on the basis that this portion of the fee received relates to the development of the physical infrastructure.
>
> In the light of [applicant's] argument that there is no causal connection between the cost of the buildings and the fixed component fees received, as well as the fact that the total fees (and even the fixed component fees) exceed the building costs it has been decided to disallow the section 10(1)(zl) exemption on the basis that:
>
> - There is no requirement in terms of the PPP to expand any amount
> - Alternatively if there is such a requirement applicant is not required in terms of the PPP to expand an amount at least equal to the amount received or accrued."

[9] The disallowance of the exemption, which falls under section 10(1)(*z*l), is contra what SARS said in its 4 May 2007 assessment. There it allowed the exemption.

[10] On 9 May 2016 SARS wrote to applicant requesting certain material in respect of the 2013 and 2014 years of assessment. It asked for:

> "1. Detailed Income Statement.
>
> 2. Detailed tax computation, including capital gains tax calculation, if applicable.
>
> 3. Schedules to substantiate all amounts in the tax computation.
>
> 4. Supporting schedules for the balance sheet items disclosed in the income tax returns.
>
> 5. Supporting schedules for the income statement items disclosed in the income tax returns.
>
> 6. Annual financial statements."

[11] There is no indication on the papers as to whether this letter was responded to. However, it is clear that SARS was not satisfied with the disclosure of applicant's financial affairs as reflected in its returns for the two tax years.

[12] On 5 July 2016 applicant wrote to SARS inviting it to agree to extend the prescription period for the assessment of all tax liabilities post 2012 until the dispute relating to the 2005 to 2012 tax liabilities was finally determined. The agreement would be in terms of section 99(2)(*c*) of the TAA. SARS did not respond to the letter. On 19 July 2016 applicant objected to the 2005 to 2012 assessments. The objection is a comprehensive document consisting of the facts as well as detailed legal submissions. This objection, in my view, should have been lodged soon after receipt of SARS' 1 December 2015 letter of Finalisation of Audit, or at the very least soon after its 15 December 2015 letter detailing its reasons for the disallowance of the section 10(1)(*z*I) exemption.

[13] On 14 October 2016 applicant and SARS concluded a written agreement (the APA) to extend the prescription period for the 2013 to 2014 tax years. The relevant clauses of the agreement read:

> "1 Introduction
>
> 1.1.2 'Additional Assessment' means the additional assessments that may be issued by the Commissioner in respect of the Taxpayer's 2013 and 2014 years of assessment and any subsequent tax year afterwards.
>
> 1.1.7 'Final Decision' means the final decision in relation to the Dispute as contemplated in s 100 of the [TAA]
>
> 1.1.10 'Further Years of Assessment' means the 2013 and 2014 years of assessment, and any year of assessment thereafter, the return of which is filed prior to the Final Decision.
>
> …
>
> 2 PREAMBLE
>
> 2.1 The purpose of this Agreement is to extend various time periods of the Further Years of Assessment to ensure that there is no barrier to affect the changes as a result of the Final Decision to the Further Years of Assessment and that neither SARS nor [applicant] would be prejudiced solely as a result of the time periods expiring in terms of the Further Years of Assessment.
>
> 2.2 This Agreement is entered into in the context of the Dispute and SARS' letter of 9 May 2016 requesting information pertaining to the 2013 and 2014 years of asessment's returns and the information which [applicant] provided to SARS on 6 June 2016.
>
> 2.3 Finality of the 2005 to 2012 years of assessment will follow the course as set out in section 100 of the [TAA], and in this regard the objection was electronically filed on 19 July 2016 and hand-delivered at SARS' Business and

Individual Tax Centre at Megawatt Park, Sunninghill on 20 July 2016. The letter of objection to the Disputed Assessments explains how the deadline of 20 June 2016 is determined. The Final Decision will have an impact on the Further Years of Assessment insofar as it will indicate how the tax computations of the Further Years of Assessment should have been prepared.

…

2.6 [Applicant] will object to all Further Years of Assessment to bring them in line with [applicant's] objection to the Disputed Assessments, and given the Final Decision [applicant] will, within the extended periods for purposes of section 104(3), (4) and (5) of the Act, augment or withdraw these objections as the case may be, to bring them in line with Final Decision.

…

3 AGREEMENT

3.1 The Parties agree in terms of section 95(2)(*c*) of the TAA that the Further Years of Assessment should not prescribe after the normal three years, but be extended, and that the relevant three year period for the Further Years of Assessment should only start from the date of the Final Decision. This will allow SARS to either raise additional assessment or reduced assessment in respect of the Further Years of Assessment, to give effect to the Final Decision.

…

5 Jurisdiction

The Parties agree to the jurisdiction of the High Court (Gauteng North) for any dispute which may arise in terms of this Agreement."

(Quote is verbatim)

[14] On 23 August 2016, applicant lodged an objection to the assessments in respect of the 2013 and 2014 years. The objection is a lengthy document. The facts are carefully outlined and detailed legal submissions are made. These, however, are identical to those made in applicant's objection with regard to the 2005 to 2012 assessments.

[15] On 23 November 2016 SARS disallowed the objection to the 2005 to 2012 assessments. SARS was of the view that the detailed letter of objection, which contained information and argument that had been repeatedly presented to it was wrong. At the same time it did not itself present any new argument.

[16] Two months and one week after the objection was disallowed, on 31 January 2017, applicant launched an appeal in the Tax Court against the assessments reflected in the Finalisation of Audit letter. The grounds of appeal listed therein though were a repeat of what applicant had said in its letters to SARS before the Finalisation of Audit letter was issued, and what it said in its letter of objection, which was rejected with full reasons furnished. The issues in dispute as reflected in the notice were repeated and characterised as being:

> "• Is the Capital Portion of the Fixed Component of the Contract Fee of a capital nature for purposes of the definition of 'gross income' in section 1(1)?
>
> • Is the Fixed Component of the Contract Fee a recovery or a recoupment of the building allowance in terms of section 8(4)(a), which building allowance applicant claimed in terms of section 11(*g*)?
>
> • Is applicant entitled to the exemption in terms of section 10(1)(*z*l)?
>
> • Is the section 11(*g*) adjustment applicable if –
>
> ➢ the building allowance is recouped or recovered in terms of section 8(4)(*a*) and/or
>
> ➢ applicant is not entitled to the section 10(1)(zl) exemption?"

[17] In terms of the Tax Court Rules, SARS' rule 31 statement opposing the appeal was due on 5 April 2017. SARS failed to meet this deadline. Applicanrt agreed to extend the deadline to 13 June 2017. SARS failed to meet this deadline too. Applicant agreed to extend the deadline to 14 July 2017 – which was five and a half months after the notice of appeal was lodged – and SARS, for the third time, failed to meet the deadline. On 17 July 2017 applicant issued a notice in terms of rule 56(1)(*a*) of the Tax Court Rules of its intention to seek default judgment should SARS fail to remedy its default within 15 days. Despite this warning, SARS failed to purge its default. On 8 August 2017, applicant applied for default judgment. The application sought a final order in terms of section 129(2) of the TAA upholding the appeal. As is customary, a founding affidavit was annexed to the application. SARS filed a notice of intention to oppose the application but failed to file an answering affidavit to the founding affidavit. On 8 September 2017 – seven months and one week after the notice of appeal was lodged – SARS finally delivered its rule 31 opposing statement. The statement merely repeats what it said in its reasons to applicant as to why its assessments were correct. In other words, SARS really believed that it had an arguable case. However, it failed to apply for condonation for the late filing of the statement. The matter was set down for hearing for 4 October 2017. On 29 September 2017 SARS lodged an application for condonation for the late filing of its answering affidavit. It, however, failed to seek condonation for the late filing of its rule 31 statement. The matter was called before Cloete J on 4 October 2017.

[18] In a written judgment delivered on 17 October 2017 Cloete J dismissed the application for condonation for the late delivery of the answering affidavit. As a result, applicant's application for default judgment was successful: its appeal against the 2005 to 2012 additional assessments was upheld. SARS essentially lost all the claims it made in the Finalisation of Audit letter. These are substantial amounts as can be seen from the Table in [5] above which were lost simply by SARS failing to comply with the rules of the Tax Court. SARS did not lodge an appeal against the judgment of Cloete J. Between 23 – 25 January 2018 it gave effect to the order and relinquished any claims for the 2005 to 2012 tax years. Consequently, applicant became entitled to a refund and to interest for overpayment. There was a dispute between the parties regarding the interest payment which commenced with a notice of objection to SARS' revised calculation of the 2005 to 2012 tax liabilities of applicant. SARS failed to respond to the objection, despite it being obliged to do so in terms of the provisions of the TAA.

[19] Emboldened by its success in its appeal concerning its tax liabilities for the 2005 to 2012 tax years, on 5 December 2017 applicant wrote to SARS asking it to revise its assessments for the 2013 to 2016 periods in accordance with the calculations for the 2005 to 2012 tax years. SARS only responded three months later – on 2 March 2018 – where it asked for an explanation as to why applicant was of the view that the approach utilised for the 2005 to 2012 tax years was applicable to the 2013 to 2016 tax years, especially since the merits of the dispute regarding the 2005 to 2012 tax liability calculations was never judicially determined. Applicant replied on 8 March 2018 stating, *inter alia*, that the tax liabilities for the 2013 to 2016 years "are the subject of the agreement SARS and [applicant] entered into on 19 October 2016". Applicant went on to quote from what it alleged was the two relevant clauses in the agreement, clauses 1.1.7 and 3.1.[5] The essence of its claim was that once the decision of Cloete J was issued, the matter was "finally determined" and clause 3.1 read with clause 1.1.7 put an end to the dispute regarding the 2013 to 2016 tax liabilities of applicant. It articulated its position in the following terms:

> "The final decision is effectively the decision which brings the assessments of the 2005 to 2012 years of assessment to finality, however arrived at. SARS have accepted the finality of that decision in respect of those years by issuing revised assessments in terms of the judgement.
>
> The parties could not at the time when the agreement was entered into foresaw that the matter may be dispose of by way of a default order, but then again procedural arguments, technical arguments, administrative arguments, points *in limine*, etc. are all part of the litigation landscape

[5] The relevant clauses of the agreement, including clauses 1.1.7 and 3.1 are quoted in [13] above.

> just as a default order. It would be naïve for one of the parties to now submit that a legal narrative for a '*final decision*' in terms of s 100 of the TA Act should exclude a default order."

(Quote is verbatim.)

[20] SARS responded on 4 April 2018 stating, *inter alia* that Cloete J did not address the merits of the dispute and therefore the merits remain unresolved, and SARS would not enter into an agreement to abide "the outcome of a court decision that fails to address [the] disputed merits as then also being binding on all other tax years, which are also under dispute, but were never simultaneously presented in court". Applicant replied to SARS' letter on 20 April 2018. Applincant maintained that the judgment of Cloete J constituted a "final decision" as defined in the APA, and in terms of the APA the parties had agreed that the future tax liabilities of applicant would be determined on the basis of such "final decision".

[21] On 2 May 2018 applicant delivered another notice in terms of rule 56 of the Tax Court Rules calling on SARS to deliver its decision on the objection to the 2013 to 2014 tax years. SARS failed to do so. Applicant applied for another default judgment, this time in the Tax Court (Cape Town). The matter came before Nuku J on 13 August 2018. The application was dismissed on 1 November 2018. Applicant appealed against the judgment.

[22] On 28 December 2018 SARS issued an assessment in relation to applicant's 2017 tax liability. On 18 January 2018 applicant granted SARS an extension of 21 days to issue its decision on the dispute concerning the interest payment for the overpayments of the 2005 to 2012 tax years.

[23] On 29 May 2019 SARS issued a notification of audit for the 2013 to 2017 tax years, seeking exactly the same information referred to in [10] above, save for the fact that the information was no longer restricted to the 2013 and 2014 tax years. On 20 June 2019 applicant responded to the notification by providing some of the information. It refused to furnish information concerning the 2013 and 2014 tax years because, it says, the parties are in dispute over tax liabilities for these years, which dispute has become the subject of litigation before the Tax Court (Cape Town). In my judgment, applicant was incorrect not to furnish the information concerning the 2013 and 2014 tax years on the grounds that the tax liabilities for those years are a subject of litigation. However, nothing turns on it for our present purposes.

[24] On 19 August 2019 SARS wrote to applicant seeking further information. It asked for a copy of the Concession Agreement as well as reasons as to why applicant believed it was entitled to the exemptions. The letter drew upon the provisions of sections 10(1)(*z*l),11(*g*) and 23B of the ITA and made clear that SARS' interpretation of the sections of the ITA was contrary to that of applicant and that it was not persuaded that applicant's interpretation was correct.

[25] Clearly, the parties still remained deadlocked on the issue of the interpretation and applicability of these sections of the ITA. This issue constituted the main part of the dispute concerning the 2005 to 2012 tax years. Instead of getting on with having the dispute resolved in court the parties were busy litigating by way of correspondence. It must be said though that both parties are guilty of this practice. Applicant said it had made its position clear in 2007 and SARS had made its position absolutely clear at the very least on 15 April 2015,[6] if not before then.

[26] Applicant waited until 22 May 2020 to respond to SARS' 19 August 2019 letter. This is dealt with below at [28]. Instead on 13 September 2019 it applied in terms of rule 56 for default judgment on the issue of interest for the overpayment of the 2005 to 2012 tax liabilities. The matter came before Davis J on 12 September 2019. An order compelling SARS to deliver its response to the objection within 15 days was issued. On 15 October 2019 SARS delivered its decision disallowing the objection. There was a dispute between the parties as to whether the decision was issued outside the time period afforded by Davis J's order. Applicant decided to pursue the rule 56 application contending that the decision was well out of time. Before the matter could be adjudicated by the court the parties settled the dispute.

[27] On 31 January 2020 applicant's appeal against the judgment of Nuku J was placed before a full bench of the Cape Provincial Division. The parties settled the dispute at the door of court, which settlement was made an order of court. Accordingly, the full bench – consisting of Fortuin, Parker and Sher JJ – reversed the order of Nuku J and ordered SARS to respond to the objection to the 2013 to 2014 tax years' assessments within 60 days of the order, failing which applicant was to seek a final order in terms of rule 56(1) read with section 129(2)(*b*) of the TAA. SARS failed to comply with the order, as a result of which applicant placed the matter before the Tax Court (Cape Town). This matter came before Davis J who dismissed it.

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6 See [8] and [9] above.

[28] On 21 May 2020 SARS wrote once again to applicant requesting a copy of the Concession Contract. On 22 May 2020 by way of another lengthy letter applicant responded to SARS' 19 August 2019 letter. It did not provide a copy of the Concession Contract sought, and instead made a number of legal submissions. These are: (a) the APA precludes SARS from auditing and/or assessing tax computations on a different basis from that done post the default judgment issued by Cloete J; (b) Henney J's judgment precludes SARS from disallowing the exemption claimed; and, (c) SARS cannot "resurrect" the issues after accepting the 2005 to 2012 tax computations by not challenging Cloete J's judgment. Having made the submissions, the letter concludes that "in these circumstances, it is not necessary for applicant to provide any further information to SARS as SARS is already in possession of all the relevant information".

[29] SARS responded on 4 June 2020 with its own lengthy letter. A key part of its response was that the Cloete J judgment and order read with the APA does not prevent it from issuing assessments for applicant's tax liabilities for the years 2013 and following. In short, it did not accede to applicant's claims. What, however, is of importance is that applicant indicated that it would no longer be submitting "any further documentation" to SARS. SARS did not confront applicant on its refusal to furnish a copy of the Concession Contract. Instead it engaged applicant in a legal debate on the application of sections 10(1)(*z*l), 11(*g*) and 8(4) of the ITA.

[30] On 12 June 2020 applicant delivered a notice in terms section 11(4) of the TAA informing SARS that it intended to bring the first application. It said that the application is in relation to the tax assessment of "2013 onwards".

[31] The correspondence then ceased until 7 July 2020 – 72 days after expiry of the 60 days per the order – when SARS responded to the objection. It disallowed the objection and gave its reasons. On 12 August 2020 applicant informs SARS that it intended to pursue its application for default judgment regarding the 2013 and 2014 tax years, as SARS had failed to comply with the court order of 31 January 2020. The matter was set down for hearing on 24 August 2020. There is nothing said in the papers revealing what occurred on 24 August 2020.

[32] On 19 August 2020, SARS issued a notification of audit letter extending the scope from 2013 to 2017 to include 2018 tax year. It also requested information in respect of the 2015 to 2018 years of assessment. On 14 September 2020 SARS issued its audit findings in respect of the 2013 and 2014 tax years. It explained therein why, in its view, in terms of the application of sections 10(1)(zl) and 11(*g*) of the TAA applicant is not entitled to the exemption claimed. It also made reference to section 8(4)(*a*) of the TAA. In short, it provides a detailed account of

its view of the law applicable to the tax affairs of applicant. But this is nothing short of a repetition of its position since 2007.

[33] On 28 September 2020, applicant served the first application on SARS.

[34] On 12 October 2020 applicant sent SARS a copy of a pre-signed draft anti-prescription agreement (APA2). On 14 October 2020 SARS responded saying that it has a difficulty with a particular clause therein and asked for it to be deleted. A telephone conversation ensued on the same day where applicant's representative explained to a SARS' official the import and necessity of the clause. The SARS official informed applicant that SARS accepted all the terms of the agreement and then sent it to his superior for signature.

[35] The rule 56 application concerning the 2013 and 2014 tax years was heard around this time – October 2020 – in the Tax Court (Western Cape) by Davis J. On 20 October 2020 Davis J dismissed the application.

[36] On 11 November 2020 applicant's representative telephoned the SARS' official querying whether the APA2 was counter-signed by SARS. On 13 November 2020 SARS' official counter-signed the APA2. She received it on 14 October 2020, when one of her juniors informed applicant's representative that SARS had accepted the terms in full. According to applicant the agreement had to be signed by 17 October 2020, failing which the claim of SARS for the 2013 to 2016 tax years had prescribed. According to SARS it was orally concluded on 14 October 2020.

[37] On 16 November 2020 applicant secured an extension from Davis J to file an appeal against his judgment. A new controversy emerged between the parties involving an intention by applicant to amend its notice of motion in the first application, which controversy was resolved by applicant launching the second application.

The applications

[38] The applications are aimed at preventing scrutiny of applicant's tax affairs for the 2013 to 2019 tax years. If scrutiny is prevented then as a matter of course any consequential assessments cannot occur, thus absolving applicant of any additional tax liabilities for these years. It is common knowledge that scrutiny in the form of an audit by SARS follows a declaration by the taxpayer (tax return) of its tax liabilities. It normally occurs when for one reason or another SARS is not satisfied with the tax return.

[39] The two applications rely in the main on the same set of facts. Their aim, according to applicant, is to "finally obtain clarity regarding the treatment of its tax affairs". While the two applications share most of the facts and have the same objective, the legal argument in the second application is distinct.

[40] Before analysing the cases of applicant in each application, it is necessary to record that SARS challenges the jurisdiction of this court. It says that the dispute should be ventilated in the Tax Court and not the High Court. Section 21(1)(*c*) of the Superior Courts Act which is relied upon by applicant to approach this court certainly confers jurisdiction on this court to entertain the application. Furthermore, the dispute concerns, in large part, if not exclusively, the interpretation of the APA. Such a dispute is foreshadowed in clause 5 of the APA, which records that the parties agreed to the "jurisdiction of the High Court (Gauteng North) for [the resolution of] any dispute which may arise in terms of this agreement". Applicant was therefore correct to bring the matter in this court.

The first application

[41] Applicant wants an order precluding SARS from "auditing and/or assessing" its tax liabilities for the 2013 to 2016 tax years on a basis different from the assessments for the 2005 to 2012 years. Those assessments, it will be recalled, were the subject of a robust disagreement over the application of sections 10(1)(*z*l), 11(*g*) and 8(4)(*a*) of the TAA. SARS assessed applicants' tax liabilities in line with its understanding of those sections of the TAA. The assessments were appealed against by applicant. SARS failed to comply with the procedural rules – more particularly it failed to file its rule 31 outlining the basis of its opposition to the appeal – applicable to the prosecution of the appeal. Its failure resulted in applicant securing a default judgment, handed down by Cloete J. Cloete J only addressed the issue of SARS' application for condonation for its failure to file the 31 statement timeously. As SARS failed to persuade Cloete J that its default should be purged, a judgment by default was accordingly rendered. The merits of the dispute between the parties was not considered and therefore was not pronounced upon.

[42] Nevertheless, it is applicant's case that since SARS did not appeal the judgment, it is final and therefore definitive of the question as to whether its appeal against the 2013 to 2016 assessments should be allowed to stand. Those assessments were made pursuant to SARS' understanding of the applicable sections. Applicant maintains that the APA specifically precludes SARS from relying on its understanding of those sections. This is because both it and SARS agreed that their respective divergent understandings would yield to the final decision that followed the litigation involving the 2005 to 2012 years. It draws on clause 3.1

which states that the APA "will allow SARS to either raise additional assessments or reduced assessment in respect of the Further Years of Assessment, to give effect to the Final Decision", and refers to section 100(1)(*f*) of the TAA which provides that a final decision in relation to an assessment is when "the matter has been determined by the tax court and there is no right of further appeal". Reliance on the APA is the main basis for the relief sought and Cloete J's judgment is understood by Applicant as providing the act which allows for the terms of the APA to be put into effect.

[43] However, I am of the view that applicant's argument can only carry if it is accepted that Cloete J's judgment constitutes a final pronouncement on the dispute concerning the four issues identified in [16] above which engages sections 10(1)(*z*I), 11(*g*) and 8(4)(*a*). But Cloete J said nothing on that score, and instead said that she "is not determining the merits of the disputed assessments".[7] When considering the issue of the merits of the case for purposes of determining whether condonation should be granted, Cloete J said that what SARS had placed before the court made it impossible to say, definitively, that the prospects of success of its case were good. This is not saying SARS' case lacked prospects of success. Cloete J did not make a finding to that effect. Doing so would have been tantamount to determining the merits of the case, which Cloete J distinctly eschewed.

[44] The key component of the context[8] of the APA was a joint recognition by the parties that their respective understandings of the interpretations and applications of sections 10(1)(*z*I), 11(*g*) and 8(4)(*a*) of the ITA were not the same, and that the only way to resolve their differences was for the court to make a determination on these issues. This is patent from a reading of the facts set out in [3] – [37] above. Since 2013 each party remained adamant that its understanding of the interpretation and application of the said sections of the ITA was correct. It is for this reason that they sought a judgment from the Tax Court – and thereafter from the appellate court if the matter went on appeal - to clarify which of the two versions was correct. That was the purpose of the APA. The context and purpose of the APA demonstrates that their intention was to acquire a reasoned judgment detailing which of their respective versions was correct. Only such a judgment could put an end to their annually recurring dispute in order to prevent piecemeal referrals to the Tax Court. While the 2005 – 2012 tax liabilities have been finalised by virtue of the fact that Cloete J's order – even though it was issued by default – has not been appealed against, the merits of their respective cases concerning sections 10(1)(*z*I), 11(*g*) and 8(4)(*a*) remain alive and await judicial

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7 *S Company v The Commissioner for the South African Revenue Service* (Case No IT 0122/2017) at [54].

8 "Context is everything", *KPMG v Securefin* 2009 (4) SA 399 (SCA) at [39].

pronouncement. This is what was to occur with regard to the 2013 and 2014 tax years and that should now take place. In short, the consequence of resolution of the dispute regarding the 2005 to 2012 tax years occurring through default meant that the Final Decision as referred to in the APA has yet to be made. Only such a judgment "will allow SARS to either raise additional assessments or reduced assessment in respect of the Further Years of Assessment", to give effect to the Final Decision. This, I hold, is the only sensible or business-like interpretation that can be given to clauses 1.1.7, 1.1.10 and 3.1 of the APA, read together with the agreement as a whole and approached contextually.

[45] Applicant claims further that it is entitled to the exemption provided for by section 10(1)(g)(*z*I) because SARS made an assessment on 4 May 2007 wherein it conceded that applicant qualified for the exemption. The exemption applied to all tax liabilities of applicant up until 2019. SARS denied it made such an assessment, but the court found it was an assessment. SARS, applicant says, cannot now resile from a decision taken in that assessment. Henney J commenting on the SCA judgment said that it was an assessment. In contrast, SARS contends that the determination made on 4 May 2007 relates only to the 2001 to 2004 tax years, and cannot be determinative of applicant's tax liabilities for subsequent years, including those for the 2005 to 2012 years. It is correct that the exemption was granted in the 2001 to 2004 tax computations. But this does not mean that SARS has to grant the exemptions thereafter. It is clear from a comparison of what SARS said in its assessment for the 2001 to 2004 tax years – allowing the exemption – and what it said in its assessment for the 2005 to 2012 tax years – disallowing the exemption – that upon further analysis and reflection it had reassessed its understanding. There is nothing in law precluding it from doing so. If its understanding and application of section 10(1)(*z*I) was, as it now believes, incorrect when it issued the 2001 to 2004 assessments, it is not obliged to replicate the error in future assessments. Put differently, it is entitled to re-examine its understanding of section 10(1)(*z*I), take a different view, adjust future assessments in line with what it believes is the correct legal position, and apply the same facts to what it now believes is the correct legal position. The same logic would apply to an incorrect understanding of the facts. Such misunderstanding can be corrected in later assessments.

The second application

[46] In the second application applicant asks for an order precluding SARS from raising additional assessments in respect of applicant's 2013 to 2016 years of assessment, because, it says, "the period of limitations for the issuance of these assessments, as contemplated in section 99(1)(*a*)" of the TAA has expired. The second application was necessitated by SARS' refusal to consent to applicant's intention to amend its notice of motion and supplement its

founding affidavit in the first application. SARS' resistance to the intended amendment was founded on the fact that by the time applicant gave notice of its intention to amend, SARS had already filed its answering affidavit. Applicant had not yet filed its replying affidavit though, so SARS was still able to file a supplementary answering affidavit once the amendment was effected and the supplementary founding affidavit introduced. As SARS did not see it this way, applicant elected to launch a new application.

[47] The facts set out in [34] and [36] are relied upon by applicant for the relief it claims in the second application. The application is really based on what occurred during this exchange between the representatives of the parties.

[48] It is common cause that the limitations period expired on 16 October 2020, and that a copy of a new agreement was sent to SARS on 12 October 2020 but was only signed on 11 November 2020. According to applicant this resulted in a failure by the parties to extend the limitations period set out in section 99(1)(*a*) of the TAA. The only way to extend the limitations period is for the parties to agree to do so – as they did with the APA – in terms of section 99(1)(*c*) of the TAA. Here, they could only extend the period prior to 16 October 2020. According to applicant it was not done by this date, but according to SARS it was so done orally, and that the signing of it on 11 November 2020 was merely a confirmation of what was agreed.

[49] Section 99(1)(*c*) which allows for the extension, does not prescribe any method by which the extension should be agreed upon. More specifically, it does not preclude an oral agreement extending the limitations period. SARS' contention in this regard cannot on these papers be dismissed. It is not far-fetched, nor is it simply a bare assertion. The deponent to the answering affidavit is unequivocal that such an oral agreement was concluded. On the application of the trite principle outlined in *Plascon Evans* [9] and refined in *Wightman*[10] it has to be found that the APA2 was concluded. In the circumstances, it is not possible for me to hold that the period of prescription had expired by effluxion of time and that, accordingly, applicant is immunised from further assessment for the 2013 to 2016 tax years.

Conclusion

[50] For the reasons set out above, the applications stand to be dismissed.

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[9] *Plascon-Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C
[10] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at [12] - [13]

SARS' conduct in these matters since inception

[51] The history of these matters demonstrate that applicant keenly utilises rule 56 of the Tax Court Rules[11] to deal with its disputes with SARS. It has brought a number of applications in this regard. Each of these applications do not address the merits of parties' respective cases. There is, in the words of the deponent to applicant's founding affidavit, "a long history of litigation between applicant and SARS dating back as far as 2007". The litigation has engaged the attention of at least 10 judges – sitting in the Tax Court (Pretoria), the Tax Court (Cape Town), the High Court (Gauteng Provincial Division), the High Court (Cape Provincial Division) and the Supreme Court of Appeal. None of these courts have attended to the issue concerning sections 10(1)(*z*l), 11(*g*) or 84(*a*) of the ITA. And yet these constitute the core, if not all, of their dispute. This has not been an efficient or effective utilisation of judicial resources.

[52] It is time that the dispute concerning the tax liabilities of applicant from 2013 and the following years are placed before the Tax Court for it to adjudicate on the merits of their dispute. Their dispute as reflected in [16] above is really on four issues which bring into focus sections 10(1)(*z*l), 11(*g*) and 8(4)(*a*) of the ITA. Applicant has exhaustively and repeatedly outlined its position in the numerous letters and objections it has written or lodged. SARS has done the same, though with less elaboration.

[53] It has to be said that applicant was only able to bring the rule 56 applications because of SARS' conduct – acts or omissions – which has fallen woefully short of what is required of it in terms of sub-sections 195(1)(*a*) and (*b*) of the Constitution of the Republic of South Africa Act, 108 of 1996[12] (the Constitution). It has failed dismally in its duty to comply with the rules of the Tax Court and with court orders. If its version of the tax liabilities of applicant is correct, then it has by virtue of its acts or omissions concerning the 2005 to 2012 tax years caused the fiscus to lose a considerable amount of money. Its operations constitute the lifeblood of public affairs of the country. Apart from breaching its obligations as set out in section 195 of the Constitution, SARS' conduct has caused significant harm to the public interest, which by definition is intense. It is for this reason that I believe that this matter should be brought to the

[11] This is apart from the application it brought seeking reasons for SARS' disallowance of its objections, which application merely served to delay the finalisation of their dispute as well as the present application which is brought in terms of s 21(1)(c) of Superior Courts Act 10 of 2013 (the Superior Courts Act) and the Uniform Rules of Court.

[12] Sub-sections 195(1)(*a*) and (*b*) of the Constitution reads:

> 195(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (*a*) A high standard of professional ethics must be promoted and maintained.
>
> (*b*) Efficient, economic and effective use of resources must be promoted.

attention of its head, the Commissioner, who it is hoped will take personal charge of the matter and ensure that it is properly and efficiently attended to, and that it is finalised with expedition.

Costs

[54] Both parties agreed that costs should follow the result. I do not see any reason to adopt a different view.

Order

[55] The following order is made

1. The applications are dismissed with costs of two counsel.
2. The registrar of this court is to bring a copy of this judgment to the attention of the Commissioner of SARS.

Vally J

Dates of hearing:	2 March 2022
Date of Judgment:	14 July 2022

Representation

For the applicant:	N Maritz SC with T Emslie SC N Komar
Instructed by:	Shepstone Wylie Attorneys
For the respondent:	Lindelani Segogo SC with Lindeni Kalipa
Instructed by:	Madiba Motsai Masitenyane & Githiri