



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 41667/2021

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED: Yes
DATE: 24th April 2023

SIGNATURE

A handwritten signature in black ink, appearing to be "R. M. M.", is written over the signature line.

In the matter between:

I-CAT INTERNATIONAL CONSULTING (PTY) LTD

Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

J U D G M E N T

The judgment and order are published and distributed electronically.

VERMEULEN AJ

[1] This application comes before me as an opposed application to review and set aside a decision of the Respondent dated the 26th of January 2021. For the ease of reference I will refer to the Applicant as "I-cat" and to the Respondent as "SARS".

- [2] The relevant decision of SARS relates to a request submitted by I-cat to SARS for a reduced assessment in terms of Section 93 of the Tax Administration Act in respect of the I-cat's 2015 tax assessment.
- [3] In terms of the decision of SARS, I-cat's application for reduced assessment was declined premised thereon that SARS is of the opinion that the 2015 assessment of I-cat has become prescribed in terms of Section 99 of the Tax Administration Act;
- [4] At the hearing I-cat was represented by Adv. van Rensburg SC assisted by his junior Mr Coetzee and SARS was represented by Adv. Dreyer;
- [5] In its preparation for the hearing of the application, the Court identified two questions of law that were not raised by the parties either in the application papers or in their Heads of Argument. As a consequence the Court, prior to the hearing of the matter, issued a directive to the Counsel of both parties that read as follows:

"Counsel is requested to prepare to present submissions to the Court on the following questions of law:

(a) Are the provisions of Section 99(2)(d)(i) of the Tax Administration Act, 28 of 2011 applicable and relevant to the evidence presented to the Court in the application proceedings and the relief requested by the Applicant; and/or

(b) Are the provisions of Section 150 of the Tax Administration Act read with the definition of 'settlement' in Section 142 of the Tax Administration Act applicable and relevant to the evidence presented to the Court in the application proceedings and the relief requested by the Applicant;

(c) Is the Court entitled in the present application to mero motu raise the aforementioned as questions of law that emerges fully from the evidence before the Court in the application and which the Court may deem necessary for the decision of the case."

- [6] The application was initially set down to commence for hearing on Tuesday, the 28th of February 2023. As a consequence of the aforementioned directive counsel for both parties requested an indulgence to have the matter stand down in order for both counsel to properly prepare upon this directive. In the premises the matter stood down for hearing to 14h00 on Thursday, the 2nd of March 2023.

- [7] At the hearing of the application on the 2nd of March 2023 counsel acting for both parties presented the Court with supplementary Heads of Argument which addressed the questions as contained in the aforementioned directive. Both parties assured me they were ready to proceed.
- [8] Both counsel were also *ad idem* that the Court in the present matter can *mero motu* raise the aforementioned questions of law as contained in the directive and that no prejudice would be caused to any of the parties. In this regard Mr van Rensburg who appeared on behalf of the Applicant referred the court to the Constitutional Court matter of ***Molusi & Others v Voges NO. & Others 2016 (3) SA 370 (CC)*** where the court *inter alia* in paragraph 27 of its judgement noted as follows:
- "[27] *The purpose of pleadings are to define the issues for the other party and the Court and it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there may be instances the Court may of its own accord (mero motu) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long its consideration on appeal involves no unfairness to the other party against whom it is directed*".¹
- [9] As I have indicated, both counsel are in agreement that the court may raise these questions of law and I am satisfied that both parties prepared to address the court on these questions and that no prejudice is caused to any of the parties in the present proceedings.
- [10] I also need to mention that at the commencement of the hearing of the matter, Mr van Rensburg advised the court that I-cat no longer relies on the submission that the relevant assessment which was submitted by I-cat in 2015, should be regarded as a "self-assessment" as defined in the Tax Administration Act. The effect of this concession does not only limit the issues in dispute between the parties but also narrows the disputes in respect of the prescription period applicable. Section 99(1) of the Tax Administration Act

¹ Also see: *MEC for Health, Eastern Cape and Khumbulela Melane & Special Investigating Unit, unreported judgement with case no. 2017/2015 reported in the High Court of South Africa (Eastern Cape Local Division, Mthatha in par. 23; and Fischer & Another v Ramahlele & Others 2014 (4) SA 614 (SCA) at para. 13 – 14*

provides that in cases of self-assessment, the relevant prescription period that is applicable is a period of five years. In all other matters of assessment the relevant prescription period that will apply is three years.

[11] In making the concession aforementioned, Mr van Rensburg agreed that the matter will be argued by I-cat on the basis that the relevant prescription period that applies to the matter at hand is three years. I wish to state that as a consequence the issue whether the relevant assessment is a self-assessment or a normal assessment has neither been argued before this court, nor has it been necessary for the court to decide upon this issue. This issue is therefor left open.

[12] Although SARS has not seriously opposed the condonation for the late filing of the present application for review this is still an outstanding aspect that needs to be dealt with.

RELEVANT COMMON CAUSE FACTS:

[13] During 2013 I-cat obtained a tax opinion from Cova Advisory and had relied upon that opinion to file its tax return for the 2014 year. The opinion on which I-cat relied caused I-cat to claim an amount of R17 171 433.00 as an expense and as an allowable deduction in the 2014 year of assessment;²

[14] The main issue between SARS and I-cat in respect of the 2014 assessment was that I-cat, after having received advice in the legal opinion aforementioned that it was entitled to do so, adopted the tax position that the amount of R17 171 433.00 paid to a third party as compensation for royalties and accounted for by I-cat as cost of stock, could be claimed as a deduction against I-cat's taxable income under Section 11(a) of the Income Tax Act. I-cat accounted for the entire portion of the expense incurred and which flowed from the principal transaction in the 2014 year of assessment.³

³ See: case line, p. 007 – 114 to 007 – 118;

- [15] On the 15th of July 2015 SARS assessed I-cat in respect of the 2014 year of assessment and issued a notice of finalisation of an audit.⁴ SARS did not agree with the position adopted by I-cat and disallowed the amount as a deduction..
- [16] On the 15th of September 2015 I-cat objected against the additional assessment in respect of 2014 year of assessment.⁵
- [17] On the 26th of February 2016 I-Cat filed its income tax return for the 2015 year of assessment. ⁶
- [18] On 26th of February 2016 SARS issued I-Cat with an original assessment in respect of the 2015 year of assessment.⁷
- [19] On the 20th of January 2017 SARS disallowed I-Cat's objection against the additional assessment for 2014.⁸
- [20] On the 24th of March 2017 I-Cat filed a notice of appeal against the disallowance of the objection in respect of the additional 2014 income tax assessment (the 2014 assessment dispute). ⁹
- [21] On the 11th of October 2017 the ADR Facilitator issued a report noting that the parties are unable to resolve the 2014 assessment dispute.¹⁰
- [22] On the 25th of October 2017 I-Cat filed a notice in terms of Tax Court Rule 25(3) that it intends to pursue the tax appeal to the Tax Court in respect of the 2014 assessment dispute (the 2014 income tax appeal).¹¹
- [23] On the 5th of October 2018 SARS filed its Rule 31 statement in the 2014 income tax appeal.¹²

⁴ *par. 46 of founding affidavit on case line, p. 003 – 46 read with 003 – 167 to 003 – 175;*

⁵ *FA162, Case line, p. 002 – 36;*

⁶ *Answering affidavit, par. 14 on Case line, p. 008 – 5;*

⁷ *See: SARS2, Case line, p. 008 – 32 to 008 - 34*

⁸ *See: FA162 on case line, p. 002 – 47;*

⁹ *See: FA162 on case line, p. 002 – 47;*

¹⁰ *See: FA162 on case line, p. 002 – 47;*

¹¹ *See: FA162 on case line, p. 002 – 47*

¹² *See: FA162 on case line, p. 002 – 47 read with annexure PH1 to the replying affidavit on case line, p. 006 – 12 to 006 – 34;*

- [24] On the 4th of December 2018 I-Cat filed its Rule 32 statement in the 2014 income tax appeal.¹³
- [25] On the 25th of February 2019, a three year period subsequent to the date of I-Cat's original 2015 assessment lapses¹⁴ and may have possibly become prescribed.
- [26] On the 8th of March 2019 the Registrar of the Tax Court issues a notice of set down for the hearing of the 2014 income tax appeal for the 28th of October 2019.¹⁵
- [27] On the 28th of October 2019, the date for the hearing of the 2014 income tax appeal, I-Cat and SARS settled the 2014 income tax appeal in respect of the 2014 year of assessment.¹⁶ On the 28th of October 2019 the Tax Court makes the settlement agreement between the parties a consent order of court.
- [28] Pursuant to the settlement and the consent order I-cat proceeds and on the 13th of December 2019 filed an application for a reduced assessment in respect of the 2015 year of assessment in terms of Section 93 of the Tax Administration Act¹⁷ (the 2015 reduced assessment request).
- [29] On the 21st of February 2020 I-Cat gives notice of its intention to institute High Court proceedings in terms of Section 11(4) of the Tax Administration Act 28 of 2011¹⁸ in respect of the 2015 reduced assessment request.
- [30] Absent any decision in respect of the 2015 reduced assessment request, I-cat proceeded on the 14th of October 2020 I-Cat and instituted review proceedings under case no. 48638/2020.¹⁹
- [31] On the 26th of January 2021 SARS refused the application for reduced assessment in respect of 2015 year of assessment²⁰ premised thereon that SARS is of the opinion that the

¹³ See: FA162 on case line, p. 002 – 47;

¹⁴ See: AA15 on case line, p. 008 – 5;

¹⁵ See: FA162 on case line, p. 002 – 47;

¹⁶ See: W5 to founding affidavit, case line, p. 003 – 101 to 003 – 103;

¹⁷ See: annexure W4 to founding affidavit, case line, p. 003 – 77 to 003 – 100;

¹⁸ See: annexure W2 to founding affidavit, case line, p. 003 – 2 to 003 – 14;

¹⁹ See: founding affidavit, par. 13, case line, p. 002 – 04;

²⁰ See: decision annexed as annexure W6 to founding affidavit, case line, p. 003 – 104;

2015 assessment of I-cat has become prescribed in terms of Section 99 of the Tax Administration Act;

[32] On the 13th of May 2021 I-Cat and SARS agreed to remove I-Cat's first review application under case no. 48638/2020 from the roll.²¹

[33] On the 20th of May 2021 I-Cat gives notice to SARS of its intention to institute the present review proceedings in respect of the 21st of January 2021 decision.²²

[34] On 19 August 2021, I-Cat launches the present application for review, 25 days outside the 180 day prescribed period in terms of PAJA. On 14 December 2021, I-Cat files its application for condonation for the late institution of the review proceedings.

APPLICATION FOR CONDONATION:

[35] As is apparent from the timeline above, the present application for review that was instituted in terms of the provisions of the Promotion of Administration Justice Act was filed approximately 25 days outside of the prescribed 180 days.

[36] I raised the issue with Ms Dreyer whether any prejudice was caused to the Respondent as a consequence of the late filing. Ms Dreyer could not direct my attention to any prejudice and also did not make any submissions in opposition to the request for condonation. Miss Dreyer merely drew my attention to the fact that there was an outstanding application for condonation.

[37] It is apparent from the application for condonation that the reasons offered for the late filing of the application for review was mainly as a consequence of the senior counsel appearing on behalf of the Applicant who had contracted the Covid19 virus during July 2021.

[38] Having regard to the effect which the Covid pandemic had to the country as a whole an in particular the effect that it had not only on the administration of justice but all other businesses during that time I do not deem this explanation unreasonable by I-cat.

²¹ See: annexure W15 to founding affidavit, case line, p. 003 – 215;

²² See: annexure W3 to founding affidavit, case line, p. 003 – 15 to 003 – 76;

[39] Section 9(1)(b) and Section 9(2) of PAJA reads as follows:

- “(1) The period of –
- (a) ...
- (b) 90 days or 180 days referred to in sections 5 and 6 may be extended for a fix 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 sub-section (1) where the interest of justice so require.”

[40] There is no evidence before me to indicate that the Applicant did not at all relevant times act expeditiously in the institution of the review application. On the contrary as indicated above I-cat already proceeded with an application for review during 2020 absent any decision by SARS on the 2015 request for a reduce assessment.

[41] The standard to be applied in assessing the delay under PAJA is thus whether the delay was unreasonable.²³

[42] The Supreme Court of Appeal in ***Opposition to Urban Tolling Alliance v South African National Roads Agency Limited (2013) 4 ALL SA 639 SCA*** held that Section 7 of PAJA creates a presumption that a delay of longer of 180 days is “per se unreasonable”:

“At common law application of the undue delay rule required a two stage enquiry. First whether there was an unreasonable delay and, secondly, if so whether the delay should in all circumstances be condoned ... up to a point I think, Section 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature’s determination of the delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180 date period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interests of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the

²³ *City of Cape Town v Aurecon South Africa (Pty) Ltd 2017 (4) SA 223 (CC);*

review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay."²⁴

[43] In **South African National Roads Agency v Cape Town City**²⁵ Appellate Justice Navsa rejected a suggestion that the question of delay must be dealt with before the merits of the review can be entertained:

*"It is true that in (the Supreme Court of Appeal's judgement in opposition to Urban Tolling Alliance) this court considered it important to settle the court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read the signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate a delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious."*²⁶

[44] This approach was confirmed by the Constitutional Court in **Aurecon** where the explanation for the delay was found to be unsatisfactory:

"Nonetheless, due regard must also be given to the importance of the issue that is raised and the prospects of success. In this case that means considering the significance of the alleged procedural irregularities that were raised in the Ernest & Young report. It should be borne in mind that, when carrying out a legal evaluation a court must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision".

[45] In the matter of **City of Cape Town v Aurecon** supra²⁷ the Constitutional Court referred with approval to the principles enunciated by the Supreme Court of Appeal in that matter who, relying on this Constitutional Court's decisions in *Van Wyk*²⁸ and *eThekwinini*²⁹, adeptly set out the factors that need to be considered when granting condonation as follows:

²⁴ *Id* at par. 26;

²⁵ 2017 (1) SA 468 (SCA) (*Sanral*);

²⁶ *Sanral* judgement (*supra*) at par. 81;

²⁷ footnote 21 *ibid* par 46 on page 239

²⁸ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) (2008 (4) BCLR 442; [2007] ZACC 24) para 20

²⁹ *eThekwinini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC) (2013 (5) BCLR 497; [2013] ZACC 7) para 28.

- (i) the nature of the relief sought in the review application;
- (ii) the extent and cause of the delay;
- (iii) the effect of the delay on the administration of justice and other litigants;
- (iv) the reasonableness of the explanation for the delay;
- (v) the importance of the issue to be raised in the intended appeal and the prospects of success; and

[46] Applying the aforementioned principles to the matter *in casu* I am satisfied that condonation should be granted to I-cat.

[46.1] The application was only filed 25 days out of time. This is not significant and in no way caused any prejudice to SARS or the administration of justice.'

[46.2] The application was launched in the midst of the world wide Covid 19 pandemic. This pandemic had a severe influence on all aspects of business, government and the public in general. Even the administration of Justice was severely affected by the imposed regulations and lockdowns. I do not deem it unreasonable if the contraction of the Covid 19 virus is offered as an excuse for the lapse of such a short delay.

[46.3] As is apparent from the history above, I-cat had to wait for more than a year to obtain a decision from SARS in respect of the request for a reduced 2015 assessment. I-cat was even compelled to proceed with another application for review premised upon SARS failure to take a decision. The fact that the present application for review was only filed 25 days late will have no effect on SARS or the administration of justice.

[46.4] I am in any event of the opinion that the importance of the issue to be raised in the present application for review and the prospects of success which will be discussed below justify that condonation be granted.

[47] In the premises I deem it in the interests of justice to grant I-cat condonation for the late filing of the present application for review.

[48] The seeking of condonation is an indulgence. I do not think that SARS opposition of the application for review was unreasonable. In the premises I find that I-cat is liable to pay SARS costs in respect of the opposition of the application for condonation.

AD MERITS:

[49] As I have indicated above, the present matter now comes before the court on the basis that a 3 year prescriptive period applies in respect of the 2015 income tax assessment of I-cat.

[50] In this respect Section 99(1) of the Tax Administration Act (Act 28 of 2011) provides as follows:

“(99.1) An assessment may not be made in terms of this chapter –

(a) 3 years after the date of assessment of a regional assessment by SARS; ...”

[51] The date of I-cat’s original 2015 assessment was 26th of February 2016.

[52] In the premises the 3 year period as provided for in Section 99(1)(a) of the Tax Administration Act in respect of I-cat’s 2015 tax assessment expired on the 25th of February 2019.³⁰

[53] In the premises the right to assess in respect of I-cat’s 2015 assessment has become prescribed unless any of the exclusions to the prescription period as provided for under Section 99(2) of the Tax Administration Act apply to the facts in the present matter.

[54] It is common cause between the parties that the provisions of sub-sections 99(2)(a), 99(2)(b) and 99(2)(c) of the Tax Administration Act are not applicable to the facts of the present matter.

[55] Before me it was argued by I-cat that the provisions of Section 99(2)(d)(i) and 99(2)(d)(iii) are applicable to the facts *in casu*.

³⁰ See: par. 21 of judgement above

as well as in the manner on how the incorrect claim of the Applicant in the 2014 year of assessment was to be dealt with (in both years of assessment);

[59.4] At the time when the parties entered into the compromise, SARS not only knew of the error that affected the 2014 year of assessment but also knew of the error affecting the 2015 year of assessment prior to the lapsing of the expiry of the 2015 assessment prescription period. This is borne out by what was stated by Mr Bekker in the Rule 31 Statement of Sars.

[59.5] The provisions contained in the Tax court order that relates to both the 2014 and 2015 years of assessment cannot be ignored as the provisions relate to the resolution of the dispute between the parties. In the premises in order to give effect to the resolution of the dispute between the parties the provisions of section 99(1) does not apply.

[60] In opposition to these submissions Mrs Dreyer argued that section 99(2)(d)(i) were not applicable:

[60.1] In the first instance Ms Dreyer argued it is necessary to distinguish between the factual and legal matrix of the issues which served before the Tax Court in 2019 and the factual and legal matrix of the issues which served before me;

[60.2] I-cat's tax appeal before the Tax Court in 2019 solely related to the 2014 year of assessment;

[60.3] The sole issue before me relates to whether the Commission was correct to refuse to make I-cat's reduced assessment in respect of the 2015 year of assessment;

[60.4] Ms Dreyer reiterated that the limited jurisdiction in which the Tax Court, as a creature of statute has and that the jurisdiction of the Tax Court is limited to the tax appeal in respect of the specific year of assessment in issue. In this regard I-cat's tax appeal which came before the Tax Court in October 2019, was in respect of a tax appeal which I-cat lodged against the disallowance of its objection in relation

to the additional income tax assessment the Commissioner raised in respect of the 2014 year of assessment and nothing more.

[60.5] In this respect the order of the Tax Court on the 29th of October 2019 related solely and only to the tax appeal before it and in particular provided:

[60.5.1] How the I-cat claimed the deduction in the 2014 year of assessment;

[60.5.2] How much of the deduction would be allowed as a deduction in the 2014 year of assessment;

[60.5.3] That the balance of the deduction would be disallowed as a deduction in the 2014 year of assessment.

[60.5.4] In addition the order of the Tax Court specifically records in paragraph 6:

"That the issues pertaining to the deductibility of the amount referred to in paragraph 4 above, as it may relate to the 2015 year of assessment, being R10 154 940.00, fall outside of the issues in this tax appeal. The appellant may endeavour to address such issues in terms of section 93 of the ITA;"

[60.6] In the premises it was argued that in terms of the consent order SARS was not bound to make a decision in I-cat's favour in respect of the 2015 year of assessment nor did the parties reach any agreement in respect of the 2015 year of assessment.

[60.7] I-cat did not object against the original assessment in respect of the 2015 year of assessment. In the premises there is no dispute as defined in Chapter 9 of the Tax Administration Act between I-cat and the Commissioner in respect of the 2015 year of assessment. Further in the premises there was no and could not be any resolution of the dispute under Chapter 9 of the Tax Administration Act in relation to the 2015 year of assessment. Accordingly the provisions of Section 99(2)(i) of the Tax Administration Act do not apply.

[60.8] Further the consent order between I-cat and SARS on the 29th of October 2019 resolved the tax dispute between the parties in respect of the 2014 year of assessment. As such, the underlining agreement of compromise has no bearing on the dispute between the parties in relation to the 2015 year of assessment. It is the question of the application for a reduced assessment in the 2015 year of assessment that is presently before this court for adjudication.

[61] For the reasons as set out below, I am of the opinion that the provisions of Section 99(2)(d)(i) are indeed applicable to the present matter as a consequence of which the prescription period of 3 years as provided for in Section 99(1) is not applicable:

[62] The main issue between SARS and I-cat in respect of the 2014 assessment was that I-cat claimed that an amount of R17 170 433.00 paid to a third party as compensation for royalties and accounted for by I-cat as cost of stock, could be claimed as a deduction against I-cat's taxable income under Section 11(a) of the Income Tax Act.

[63] I-cat, after receiving advice that it was entitled to do so (in the aforementioned legal opinion), acted on the advice received and accounted for the entire portion of the expense incurred and which flowed from the principal transaction in the 2014 year of assessment.³¹

[64] In the assessment of I-cat's declaration, SARS however held a different view regarding the nature and the tax consequences of the transaction at issue and refused I-cat to account for the transaction as an allowable tax deduction under Section 11(a) of the Income Tax Act.³²

[65] Subsequent to I-cat having submitted its tax return, SARS from the 29th of October 2014 engaged I-cat with a lengthy audit in respect of the 2014 year of assessment. This culminated in SARS having issued I-cat with an additional assessment on the 16th of July 2015, from which assessment it appears that SARS disallowed I-cat's claim that the above

³¹ See: para. 143 and 144 of Founding Affidavit, Case line, p. 002 – 41;

³² See: Tax opinion annexed as Annexure "W14" to Founding Affidavit, Case line, p. 003 – 210 to 003 – 214;

amount was an expense incurred in the production of its income and revenue of nature which allowed I-cat to claim the amount as a deduction under the provisions of Section 11(a) of the Income Tax Act, Act 58 of 1962.

[66]

[66.1] In SARS' letter containing its audit findings SARS informed I-cat as follows:

"An amount of R17 170 433.00 was claimed as a deduction under purchases this amount relates to the cancellation fee paid on a distribution agreement entered into. A distribution agreement usually confers a 'right' to an individual, the 'right' is linked to the income earnings structure and not income operations, hence it will be regarded as capital in nature".

[66.2] In addition with reference to Section 11(a) and (i) of the Income Tax Act SARS further informed I-cat that:

"In terms of Section 11(a) of the Income Tax Act for an amount to be allowed as deduction, the amount should be incurred in the production of income and not be capital in nature, as a distribution agreement it confers a 'right' this is capital in nature and thus not an allowable deduction. Reference can be made to Stellenbosch Farmers Winery v CSARS. Therefore it SARS's intention to disallow the amount."

[67] It is important to note that SARS disallowed the whole amount as a deduction in view thereof that it was of the opinion that the **nature** of the amount was capital and not an allowable deduction. Nowhere in the audit findings did SARS have an issue with the amount or a portion thereof not being actually incurred in the 2014 year of assessment.

[68] Section 104 of the Tax Administration Act which resorts under chapter 9 (dispute resolution) *inter alia* provides in sub-paragraphs 1 and 2 as follows:

"104 Objection against assessment or decision

(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.

(2) The following decisions may be objected to and appealed against in the same manner as an assessment:

(a) a decision under subsection (4) not to extend the period for lodging an objection;

(b) a decision under section 107 (2) not to extend the period for lodging an appeal; and

(b) any other decision that may be objected to or appealed against under a tax Act.”

[69] Pursuant to this audit findings I-cat proceeded and on the 11th of September 2015 submitted its objection³³. In this objection the **nature** of the amount claimed as a deduction was duly addressed by I-cat. Nowhere within this objection is the issue addressed whether or not the amount claimed to be deducted was actually incurred within the 2014 year of assessment, as this was not an issue which was raised by SARS at that time, at all.

[70] On the 20th of January 2007, SARS issued its notice in terms of Section 106(2) wherein they notified I-cat that I-cat’s objection was disallowed.³⁴ The reason that was offered was merely formulated as follows:

“Tax period 2014

- Objection disallowed in terms of Section 106(2) of the TA Act. SARS’s is of the opinion that the amount relates to the acquiring of an income earning structure and is therefore capital in nature and not deductible in terms of section 11(a) of the IT Act.

If you are not satisfied with the outcome of your objection you have the right to appeal against this decision by completing and submitting the prescribed notice of appeal (NOA) form within 30 business days from date of this letter.

...”

[71] Again SARS solely relies upon the nature of the amount deducted.

[72] At the time when SARS conducted the audit and particularly at the time when SARS provided I-cat with its findings pursuant to the said audit, it not only knew about the entries in I-cat’s ledger accounts indicating when the amounts were actually incurred, but was also in possession of the legal opinion upon which I-cat relied for including the whole of the relevant amount within its 2014 assessment. Notwithstanding, SARS in not allowing the said amount did not allow the amount premised thereon that the amount or portion thereof

³³ *Uploaded onto case line, p. 007 - 9*

³⁴ *See: Section 106(2) letter of disallowance by SARS on Case line, p. 007 - 168*

was not incurred within the 2014 year of assessment, but disallowed the amount in that it was of the opinion that the amount was capital in nature and not an expense.

[73] It was also pursuant to this ground which I-cat proceeded to formulate its grounds of appeal.³⁵

[74] The issue in respect of when the amount, or a portion thereof was actually incurred came to the fore for the first time when Mr Bekker on behalf of SARS filed the Rule 31 declaration in the TAX appeal proceedings aforementioned.

[75] Mrs Dreyer argues that at this time, at the latest, I-cat should have realised their potential mistake and *ex abundanti cautela* objected to the 2015 assessment. This may have been an option but I do not deem it that I-cat acted unreasonably in not commencing those procedures at that time. SARS never before raised this issue and only now raised it as an *alternative defence*. I-cat was acting on the strength of a legal memorandum obtained in deducting the whole amount in the 2014 year of assessment and in all probabilities believed in its case.

[76] Mrs Dreyer also argued that the issue now before this court in respect of the 2015 year of assessment did not serve before the Tax court. Ms Dreyer argued that the Tax Court is a court of revision and reconsideration. It is not a Court of Appeal in the ordinary sense. The Court is established in terms of the provisions of the Tax Administration Act and has jurisdiction of appeals lodged and is a Court of record.

[77] Premised upon the aforementioned Ms Dreyer argued that the issue before the Tax Court on the 28th of October 2019 related solely and only to the income tax appeal of the I-cat in respect of the I-cat's 2014 year of assessment. I-cat did not object and appeal against its income assessment for the 2015 year of assessment. The Tax Court did not have the jurisdiction to enquire into any issues relating to the 2015 year of assessment. As such the

³⁵ See: *grounds of appeal on Case line, p. 007 - 164*

ruling of the Tax Court on the 28th of October 2019 did not and could not bind the Commissioner to make a decision relating to the 2015 income tax assessment. All that the Tax Court Order recorded was that I-cat could approach the Commissioner in terms of Section 93 to issue a recused assessment.

- [78] Ms Dreyer argued once regard is had to the correct interpretation and application of the Tax Administration Act, it is clear that I-cat's review proceeding are ill-founded. The Commissioner's decision to refuse to make a reduced assessment for the 2015 income tax year of assessment was correct. The assessment had become prescribed. The Commissioner, as a creature of statute, is bound by the empowering provisions of legislation, which preclude the issuance of a reduced assessment after a period of 3 years after the original assessment is made. I-cat's application falls to be dismissed with costs.
- [79] Although I agree with Mrs Dreyer's submissions that the Tax Court is a court of revision and reconsideration and it is not a Court of Appeal in the ordinary sense, I do not agree with Mrs Dreyer conclusions.
- [80] SARS in particular, in respect of its alternative defense in the tax appeal, stated as follows in the Rule 31 statement dated the 28th of September 2018:³⁶

"21. *The ledger accounts provided by the Appellant reflected that it paid an amount of R7 997 633.05 only during the 2014 year and the **balance thereof was paid in the 2015 year of assessment**".*

"57. *Alternatively, if the (tax) court accepts the Appellant's version that the amount of R17 171 433.00 qualifies as a deduction in terms of Section 11(a) of the Income Tax Act, which the Respondent denies, then the Respondent pleads that the Appellant would only be entitled to claim an amount of R7 997 663.05, which was actually incurred in the 2014 year".*

- [81] This was the case SARS brough before the Tax Court. In order to arrive at a decision in respect of the alternative defence, part of the issues before the Tax court was which portion

³⁶ See: para. 21 and 57 of statement on Case line, p. 006 – 028;

of the amount, if any, was incurred in 2015 and not 2014. At least indirectly the court would have had to make a finding on this issue. If the court agreed with SARS' alternative defense, an inevitable result of the Tax court's finding would be that the balance of the amount was actually incurred in the 2015 year of assessment.

[82] The same reasoning applies to the nature of the amount in the main defence. It was not SARS case that a portion of the amount was deductible *as having been incurred in the production of income* and a portion was not deductible as being *capital in nature*. It was either the one or the other. If the Tax court would have found that the amount was indeed deductible as having been incurred in the production of income such a finding would affect the nature of the whole amount, not only a portion thereof. The converse is also applicable. Thus a finding that only the amount of R7 997 663.05 was actually incurred in the 2014 year of assessment as having been incurred in the production of income, by implication would have resulted in a finding that the balance of R10 154 940.00 had also been incurred in the production of income, albeit during the 2015 year of assessment. This would have been an inevitable result of the Tax court findings on SARS defences.

[83] In the premises although the Tax court would only be seized with the dispute relating to the 2014 year of assessment, in arriving at its findings it would also provide certainty, albeit indirectly, in respect of the said deduction for the 2015 year of assessment, both in respect of the nature of the deduction and the amount.

[84] For reasons unbeknown to this court, both parties decided to compromise their dispute before the Tax court and not to have the proceedings run their course before the Tax Court. SARS was able and competent to enter into such a compromise.³⁷

³⁷ *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste (314/1992) [1993] ZASCA 181; 1994 (2) SA 265 (AD); [1994] 2 All SA 111 (A) (26 November 1993).*

[85] The practice of making settlement agreements is well established and has existed for a long time in South Africa. In **Van Schalkwyk v Van Schalkwyk** the court said '(t)he tradition of such orders is very strong in our legal system'.³⁸

[86] It is apparent that the parties reached a settlement, which settlement was thereafter incorporated in a consent order by the Tax Court³⁹. Part of the settlement agreement, as contained in paragraph 6 of the consent order, provided:

"6. That the issues pertaining to the deductibility of the amount referred to in paragraph 4 above, as it may relate to the 2015 year of assessment, being R10 154 940.00, fall outside of the issues in this tax appeal. The appellant may endeavour to address such issues in terms of section 93 of the ITA;"

[87] Having regard to what I have stated above one can understand that this paragraph was included. In reaching their compromise the parties at the very least indirectly resolved the nature of the deduction, the amount of the deduction and that the said amount (as the balance) was incurred in 2015, which issues were directly linked to the same issues between the parties in respect of I-cat's 2014 year of assessment. The same reasoning as referred to in paragraphs 77 to 79 above applies.

[88] In view of the fact that the Tax Court was only seized with I-cat's 2014 year of assessment and in view thereof that the Tax court could not formally make any finding in respect of I-cat's 2015 year of assessment, I can understand why the parties as part and parcel of their compromise agreed that the door remained open for I-cat to approach SARS in respect of his 2015 year of assessment for a reduced assessment in terms of section 93 of the Tax Administration Act and formulated the paragraph as they did. As I have indicated these issues were directly or indirectly linked to what served before the Tax Court.

³⁸ *Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O), at 95 referred to with approval by the Constitutional Court in *EKE v PARSONS* 2016 (3) SA 37 (CC) par 8

³⁹ Consent order on page 003-101

[89] It is also not a strange occurrence that parties agree to include something in a settlement and consent order that is only indirectly linked to the issues. In **EKE v Parsons supra** the Constitutional Court *inter alia* stated as follows:

"[19] ..In certain instances, agreement — or lack of it — on certain **B** terms may mean the difference between an end to litigation and a protracted trial. Negotiations with a view to settlement may be so wide-ranging as to deal with issues that, although not strictly at issue in the suit, are related to it — whether directly or indirectly — and are of importance to the litigants and require resolution. Short of mere formalism, it does not seem to serve any practical purpose to suggest that **C** these issues should be excised from an agreement that a court sanctions as an order of court.

[20] That formalistic approach may have at least two consequences. The parties may be forced to have a separate agreement containing the **D** rejected terms, which is not part of the court order. Worse still, the settlement agreement may have been conditional upon being made an order of court. Upon the rejection of some of its terms by the court, the entire agreement may crumble. The result may well be the resumption of contested litigation. Does that benefit anybody? Not the parties and not the court. **E**

[21] *Claassens* captures the essence of a settlement and what may inform it well:

'Agreements governing maintenance often cover other topics too. They are frequently compromises over hotly contested issues of all sorts, and **F** the product of hard and protracted bargaining. Everyone with experience of negotiations in matrimonial cases is well aware of that. Questions of guilt and innocence, fundamental to the wife's claim for alimony while the 1953 Act lasted and not entirely irrelevant to it since then, may have been disputed. So may the amount she needed, and how much of that the husband could afford. Property had perhaps **G** to be settled or divided, maintenance for children to be resolved. The alimony eventually agreed can seldom be isolated from such surroundings. Like the rest of the compromise, it is the result of give and take. Sometimes it is more than the court is likely to have awarded the wife had there been none and, in return for a concession elsewhere, she has won by contract what she could not have expected from the litigation. On other occasions it is less, but some contractual benefit the **H** court would never have decreed has compensated her for the difference.'

Although this was said in the context of maintenance in matrimonial disputes, it applies with equal force to other types of suits. **I**

[22] Surely then, an expedited end to litigation may not only be in the parties' interest, it may also serve the interests of the administration of justice. This finds support at common law. Le Grange quotes Huber with approval:

'A compromise once lawfully struck is very powerfully supported by the **B** law, since nothing is more salutary than the settlement of lawsuits.' ³¹

[23] Le Grange says:

(T)he policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of **C** avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on the judicial system. By disposing of cases without the need for a trial, the case load is reduced. This gives the court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently.

D ...

If one is then to proceed from the premise that the wider interests under consideration [are those] of the administration of justice, then the court is required, when exercising its discretion whether to make a settlement agreement an order of the court, to give consideration not only to the need to make orders that are readily enforceable, but also to assess the **E** wider impact which its order may potentially have.' "

[90] This court cannot merely ignore the provisions of par 6 of the consent order referred to in paragraph 86 above. In the premises this court need to attach an interpretation to this paragraph. In *Eke v Parsons* supra the following was held in respect of the interpretation of a consent order;

"[29] Once a settlement agreement has been made an order of court, it is **B** an order like any other." It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:

'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation **C** of

documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.' ⁴⁴

[30] This is equally true of court orders following on settlement agreements, of course with a slant that is specific to orders of this nature:

'The court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement.

...

*The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There **E** are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the genesis of the transaction or its factual matrix. Its aim is to put the court in the armchair of the author(s) of the document. Evidence of surrounding circumstances is admissible only if a contextual **F** interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide sufficient certainty.'* ⁴⁵ [Footnotes omitted.]

[31] *The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, 'a matter judged').* ⁴⁶ *It changes the terms of a settlement agreement to an enforceable court order.*

[91] In addition in **Natal Joint Municipal Pension Fund v Endumeni Municipality**⁴⁰ the Supreme Court of Appeal again reiterated the correct approach to be followed in the interpretation of documents:

"[18]The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision

⁴⁰ (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)

or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. **A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.** Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. **The 'inevitable point of departure is the language of the provision itself',¹⁶ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.**

[19] All this is consistent with the 'emerging trend in statutory construction'.¹⁷ It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and another*,¹⁸ namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate."

(own emphasis)

[92] At the time the compromise was entered between the parties SARS knew that the balance of the amount was incurred in 2015. On the contrary this was their alternative defence. What is clear from the last sentence of paragraph 6 of the consent order is that both parties agreed that I-cat will have the right to approach SARS again in respect of the 2015 year of assessment. Although the parties made it clear that SARS could not bind itself as to the outcome of such approach, by using the term "endeavour", at least I-cat had the right to apply. I can hardly imagine that SARS would be able to successfully raise the

aforementioned defences again in respect of the 2015 assessment, but I make no finding to this effect as this is something that SARS will need to decide upon when it adjudicates upon I-cat's application for a reduce assessment in respect of 2015.

[93] If SARS' submissions are to stand, it follows that at the time they entered the compromise with I-cat, which compromise was made a consent order, SARS knew that I-cat's right to apply for a reduce assessment in respect of this balance amount in terms of Section 93 of the Tax Administration Act had already prescribed. In the premises SARS knew that I-cat would no longer possess any right to approach SARS. Notwithstanding SARS agreed to include such a clause in their compromise and consent order full well knowing that such provision served no purpose, was superfluous and insignificant.

[94] In ***Commissioner For Inland Revenue v Golden Dumps (Pty) Ltd***⁴¹ the Appellate Division reiterated that words inserted in a statute *per incuriam* is contrary to the well-approved canon of construction. The court referred with approval to Craies on *Statute Law* that made the principle applicable on private documents as well:

"If the implication is that the word 'actually' is mere surplusage and can be ignored, that would be contrary to the firmly established rule of statutory construction that a meaning must be given to every word. See Steyn Die Uitleg van Wette 5th ed at 17-19. In Attorney-General, Transvaal v Additional Magistrate for Johannesburg 1924 AD 421 Kotze JA said at 436 G that to regard words occurring in a section as having been inserted per incuriam is contrary to the well-approved canon of construction:

"A statute", says Cockburn CJ, "should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." The Queen v Bishop of Oxford (4 QBD at 261). To hold certain words occurring in a section of an Act of Parliament as H insensible, and as having been inserted through inadvertence or error, is only permissible as a last resort. It is, in the language

⁴¹ 1993 (4) SA 110 (A) from page 116 to 117

of Erle CJ: "the ultima ratio, when an absurdity would follow from giving effect to the words as they stand." *R v St John* (2 B and S 706), in the Exchequer Chamber affirming the judgment of the Queen's Bench.'

See also Craies on Statute Law 7th ed at 103-4:

I "It is a good general rule in jurisprudence," said the Judicial Committee in *Ditcher v Denison*, "that one who reads a legal document whether public or private, should not be prompt to ascribe - should not, without necessity or some sound reason, impute - to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use." And this is as justly and even more tersely put by Lord Bramwell, who said in *Cowper-Essex v Acton L B*: "The words of a statute never should in interpretation be added to or subtracted from, without almost a J necessity."

A The learned author acknowledges that surplusage, or even tautology, is not wholly unknown in the language of the Legislature, but continues:

'Nevertheless, as Lord Brougham said in *Auchterarder Presbytery v Lord Kinnoull*, "a statute is never supposed to use words without a meaning".'

[95] In ***Wellworths Bazaars Ltd v Chandler's Ltd and Another***⁴² the Appellate Division dealt with the presumption against superfluous words in an agreement and held as follows:

"But a Court should be slow to come to the conclusion that the words are tautologous or superfluous. It was said by the Privy Council in *Ditcher v Denison* (11 Moore P.C. 325, at p. 357): -

'It is a good general rule in jurisprudence that one who reads a legal document whether public or private, should not be prompt to ascribe - should not, without necessity or some sound reason, impute - to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.'

Cf. also per KOTZE, J.A., in *Attorney-General, Transvaal v Additional Magistrate* (1924 AD 421, at p. 436); *Minister of Justice and Another v Breytenbach* (1942 AD 175, at p. 183); Craies, *Statute Law* (4th ed. pp. 99, 100). Here I can find no reason cogent enough to lead me to do so."

[96] I agree with this principle. In particular I agree that there is no reason why the said principle should not be applied to the agreement entered into between the parties in the present matter and the subsequent consent order.

⁴² 1947 (2) SA 37 (A) on page 43

- [97] I am satisfied that the parties did not include the said paragraph 6 in their agreement and subsequent consent order of the 28th October 2019⁴³ in error or to serve no purpose.
- [98] I therefor find that it was in the parties' contemplation with paragraph 6 of the consent order that as part of their compromise, I-cat could approach SARS in terms of section 93 of the Tax Administration Act in respect of the 2015 year of assessment with an application for a reduce assessment. It was part and parcel of their resolution of the dispute which they dealt with under chapter 9. This would, however, only be possible if the 3-year prescription period as provided for in section 99(1) was not applicable.
- [99] In view thereof that it is necessary to give effect to the resolution of the dispute under chapter 9 as contained in the consent order, the 3 year prescription period as provided in section 99(1) cannot not apply.
- [100] In arriving at this finding this court had due regard to the language of paragraph 6 of the consent order itself,¹⁶ read in context and having had regard to the purpose of the provision and consent order and the background to the preparation and production of the document as referred to above. I also had regard to the issues that served before the Tax court whether directly and indirectly as discussed above.
- [101] In addition, the interpretation which this court ascribes to the relevant clause provides a sensible and business-like meaning. The interpretation contended for by SARS leads to an insensible or unbusinesslike result.
- [102] In the premises SARS' finding that the 2015 assessment had prescribed in terms of Section 99 of the Tax Administration Act and therefor that I-cat's application for a reduced assessment had been declined in terms of section 99(3) of the Tax Administration Act read with section 99(2) of the Tax Administration Act⁴⁴, should be reviewed and set aside.

⁴³ Consent order on page 003-101

⁴⁴ SARS decision dated 26 January 2021 presently under reviewPage 003-104

[103] In view of the court's finding, it is not necessary to deal with the other grounds that were argued before this court.

[104] The issues argued before the court were complicated. I am satisfied that the application justified the appointment of both Senior and Junior counsel.

The following order is made:

- [1] Condonation is granted to the Applicant for the late filing of this application for review;
- [2] The Respondent's decision dated 26 January 2021, the subject of the present application, is herewith reviewed and set aside;
- [3] The Applicant's request for a re-assessment dated the 13th of December 2015 in respect of its 2015 year of assessment is remitted back to the Respondent for reconsideration on the merits of the request, with the Respondent to give the Applicant notice of its decision and outcome of the request within 30 (thirty) days from date of this order;
- [4] The Respondent is to pay the costs of this application on a party and party scale which costs shall include the costs incumbent upon the appointment of both Senior and Junior Counsel.



P. VERMEULEN
 Acting Judge of the High Court
 Gauteng Division, Pretoria

Appearances

Counsel appearing on behalf of Applicant:

ADV. S J VAN RENSBURG SC ASSISTED
 BY ADV. H COETZEE
 HECKROODT AND ASSOCIATES

Attorney for applicant:

Counsel appearing on behalf of Respondent:

ADV. C J DREYER
 FOURIE FISMER INCORPORATED
 2nd MARCH 2023
 24 APRIL 2023

Attorney for respondents:

Date of Hearing:

Judgment delivered: