




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 56820/2021

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| (1) | REPORTABLE: YES / N X |
| (2) | OF INTEREST TO OTHER JUDGES: YES/N X |
| (3) | REVISED. ✓ |
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| 01/08/2023 |  |
| DATE | SIGNATURE |

In the matter between:

KUSASA REFINING (PROPRIETARY) LIMITED

Applicant

and

THE COMMISSIONER FOR THE

Respondent

SOUTH AFRICAN REVENUE SERVICES

JUDGMENT

SARDIWALLA J:

[1] The Applicant seeks to review and set aside the decision of the Respondent for its failure to take a decision to finalise the value added tax (“VAT”) audit of the Applicant’s 01/2019 to 02/2021 VAT Periods.

Background Facts

[2] The following is regarded as common cause:

2.1 The audit commenced on 31 July 2020.

2.2 On 9 September 2020 the Applicant submitted all requested information and documents in terms of SARS request of 31 July 2022.

2.3 By 10 November 2020 the Applicant submitted all requested information and documents pursuant to requests by SARS auditors during a field audit conducted from 02 November 2020 to 06 November 2020.

2.4 The Applicant submitted all requested information and documents timeously during January 2021, March 2021 and April 2021 in terms of various requests by the Respondent pursuant to having extended the scope of the audit to include additional tax periods.

2.5 On 26 May 2021 and 4 June 2021 the Applicant provided all information and documents sought by the Respondent. The Respondent raised an objection to the unlawful interrogations of the Respondent under the guise of an “interview” in terms of section 47 of the Tax Administration Act, the Applicant’s representatives cooperated and answered all questions.

2.6 No further questions were to put to the Applicant’s representatives by the SARS Auditors after 7 June 2021.

2.7 On 23 June 2021 the Applicant provided information requested by SARS being an enquiry regarding certain fields in data reports i.e a transaction tracker report on 22 June 2021.

2.8 After 22 June 2021 and until the present application was instituted on 11 November 2021, no further information, documents, or records were sought by the Respondent from the Applicant.

2.9 Despite requests on 13 September 2021 and 21 October 2021 by the Applicant to finalise the audit, the Respondent has failed to do so and has failed to provide any feedback or progress of the audit.

2.10 The delay in the finalisation of the audit results in VAT refunds of the Applicant from being timeously paid to the Applicant, which

prejudices the Applicant's ability to secure financing of its VAT obligations from its VAT loan financier.

[3] The Applicant brought the present application seeking the following relief in terms of section 8(2) of PAJA alternatively on the principle of legality:

"1. That the Respondent's failure to take a decision whether to finalise the value-added tax ("VAT") audit of the applicant's 01/2019 to 02/2021 VAT periods ("the audit") be reviewed and set aside;

2. The matter be referred back to the respondent with the direction that he must within ten (10) days finalise the audit;

3. In the alternative to prayer 2:

3.1 That the above matter be referred back to the respondent with direction that he must within ten (10) days take a decision whether or not to finalise the audit; and

3.2 that the applicant be authorised to set the application down for hearing (in future, on an urgent basis or in the normal course, as may be applicable in the circumstances) on the same papers, duly supplemented, for further and/or alternative ancillary relief in the event of

the respondent failing to take a decision as contemplated in prayer 3.1 above;

4. Alternatively (to the relief sought in prayer 3) that such relief be granted as the honorable court deems just and equitable in the circumstances.

5. Costs of the application, only in the event of the respondent opposing any of the relief sought herein;

6. Further and/or alternative relief.”

[4] It is the Respondent’s failure to take a decision to finalise the audit which the Applicant in these proceedings seeks to have reviewed and set aside. .

Grounds of Review

[5] The Applicant’s grounds of review are that:

5.1 Failure to provide progress on the finalisation of the audit in terms of section 42(2) of the Tax Administration Act 28 of 2011;

5.2 Failure of to make a decision on the finalisation of the audit is administrative action contemplated by Section 1 read together with section 6(2)(g), 6(3)(a) and 8(2) of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as “PAJA”);

5.3 The Applicant’s right to lawful, reasonable and procedurally fair administrative action as enshrined in section 3 of the Promotion of Justice Act and section 33 of the Constitution; and

5.4 That the failure to take a decision has a direct, external legal effect on the Applicant.

The Applicant’s submission in support of the relief

[6] The Applicant submitted that the failure to take a decision on the finalisation of the audit within a reasonable time is an administrative decision as contemplated in the definition of “decision” in PAJA. The review does not pertain to the decision of the Respondent to conduct an audit of the Applicant’s tax in terms of section 40 of PAJA affairs nor it is seeking a specific outcome of the audit, rather that it is the failure to take the decision to finalise the audit that is being sought to be reviewed and set aside. This failure to take the decisions has the capacity to affect the Applicant’s rights and has already severely prejudiced the Applicant’s

rights in that, in delaying his decision on the finalisation of the audit, the Respondent had unlawfully withheld the Applicant's VAT refunds of some R164,354,650.20 for a period of 6 months until February 2021. That this unlawful conduct led to the severe and ongoing commercial and financial prejudice currently being suffered by the Applicant. Further that the Respondent is aware of financial prejudice to the Applicant and continues to fail (refuses) to take a decision to finalise the audit without a valid reason. The Respondent has failed to give meaningful progress updates and has raised for the first time in this application that it will first audit other VAT vendors in the gold supply chain, before it will finalise the audit in respect of the Applicant.

[7] The Applicant avers that its financier Valcambi Suisse has, as a direct result of the Respondent's conduct of not finalising the audit and withholding the VAT refunds due to the Applicant, has terminated its revolving VAT loan facility to the Applicant. That the Applicant's business operations have been severely curtailed by the fact that it could not conduct business, had to sell core assets, retrench its staff, some of which resigned due to the untenable situation and is unable to pay commission to its agents. The Applicant submits that it has a right to have certainty regarding its tax position and continue its business and

the unreasonable delays by the Respondent in failing to take a decision to finalise the audit has materially and adversely affected the Applicant's rights.

[8] The Applicant contends that the proposition that only a final decision is capable of being considered to be administrative action to which PAJA applies is rigid and formalistic as the failure to take a decision by the Respondent has become the final position which the Applicant finds itself in as there is a stalemate. This failure to take a decision to finalise the audit therefore constitutes administrative action and is subject to judicial review in accordance with the provisions of PAJA.

[9] The Applicant further submitted that in the event that this Court finds that the provisions of PAJA are not applicable with regards to the Respondent's failure, based on the narrow interpretation of what constitutes administrative action, then the Respondent's failure to finalise the audit stands to be reviewed and set aside in terms of the principle of legality. This so because the Respondent has no statutory entitlement to refuse to take a decision to finalise the audit in respect of

a taxpayer and is therefore ultra vires and not authorised in terms of the empowering provisions of the Tax Administrative Act. The Respondent's conduct is arbitrary, irrational and mala fide in causing the Applicant's business operations to shut down.

The Respondent's version

[10] The Respondent's contention is that the Applicant can only seek a finalisation of the audit in terms of the Tax Administration Act. Therefore, the current application is circumventing the judicial position that a decision to conduct an audit in terms of section 40 of the Tax Administration Act does not constitute administrative action. It therefore raised a *point in limine* that the relief sought was incompetent. It stated that there was no administrative action to be reviewed by this Court, as the Respondent is empowered to select a person for audit on any considerable relevant basis and the power and manner given to SARS is broad and not limited. It submitted that a decision to conduct an audit is not administrative action as there is no decision that is taken that adversely affects the rights of the taxpayer which has a direct external effect. There is also no statutory obligation imposed on SARS or a functionary in SARS employ to make a decision. It averred that the only

statutory obligation was to inform the taxpayer within 21 days whether the audit or investigation was inconclusive or identified potential adjustments of a material nature. In instances where it is inconclusive the taxpayer is notified but this is not confirmation that the taxpayers obligations have been met and SARS reserved the right to conduct further audits. Where potential material adjustments have been identified a letter is issued to the taxpayer which it may respond to. Therefore, in the absence of a statutory duty to decide that an audit is finalised there is no administrative action that can be reviewed either by PAJA or the principle of legality.

[11] The Respondent submits that even if the Respondent is statutorily obliged to make a decision whether or not to finalise the present audit, the remedy is not to review the non-decision but to compel the Respondent to make a decision through a mandamus and on this basis the relief sought is incompetent.

[12] The Respondent indicated that the Applicant's motive behind present application was to prevent SARS from auditing the Applicant and future in its VAT affairs which is not permissible. In any event it

states that the initial complaint by the Applicant related to the release of its VAT refunds which the Respondent despite its concerns released and therefore the prejudice complained of no longer exists but the Applicant is now attempting to compel SARS to finalise the audit due to its off-shore arrangements. It accepts that in most instances an audit may affect the commercial interests of the taxpayer and cause inconvenience but that to grant the order would prevent SARS from auditing the Applicant.

[13] The Respondent went on to argue that the Respondent follows the approach in the Carte Blanche matter, that when dealing with merits, it is assumed, without any admission, that a failure to take a decision to finalise the audit can potentially be reviewed. The Respondent however contends that there are valid grounds to continue with the audit and that a reasonable period to do so has not yet expired. It further argued that SARS has reasonable grounds to believe that the fiscus is suffering severe financial prejudice as a result of the manner in which the various participating vendors in the second hand gold industry operate and their modus operandi and the illegal smelting of Krugerrands into gold-bearing bars.

This creates an unlawful margin and is directly attributable to the unlawfully claimed input VAT. The unlawfully claimed input tax reduces liability to pay tax, reduces the purchase considerations payable by the vendors in the supply chain and gives rise to an unlawful VAT refund claim. Therefore on this basis before making any determination in this regard, the entire supply chain must be audited and investigated.

Therefore, the Applicants contention that there is no need to further audit and investigate the Applicant is entirely invalid as SARS has concerns relating to the supply to the Applicant specifically in respect of one of its main suppliers Millennium.

[14] The Respondent contends that the Applicant has failed to respond to the averments made by SARS that Mr Akoojee refused to participate in the section 47 interview process and that the tax enquiry is imperative in order to conclude the audit as Metals in Action supplies to Millennium and Millennium in turn supplies to the Applicant, then there may be reason to believe that the Applicant was aware and the VAT refunds paid out to the Applicant should not have been paid.

[15] It submits that there has been various delays in the audit and executing the audit of the Applicant's supply line and therefore the only viable means to obtain the relevant information is by means of a tax enquiry and that it had enquired from the Applicant on 15 November 2021 whether it would consent to such enquiry which was denied on 17 November 2021 and therefore SARS intends launching an ex parte application for an enquiry. Lastly that the SARS auditors have expert skills to audit the Applicant's VAT refunds and also to decide the manner in which the audit should be conducted and what is required for it to conclude the audit which should not be readily discounted by a court of law. The Applicant therefore has failed to make out a case that the Respondent has been delaying and the matter should be dismissed as the relief sought is incompetent in law.

THE APPLICABLE LAW

[16] Section 42 of the Tax Administration Act 28 of 2011 states the following:

"42. Keeping taxpayer informed

(1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit.

[S 42(1) subs by s 48(a) of Act 21 of 2012 wef 1 October 2012, s 16 of Act 22 of 2018 wef 17 January 2019.]

(2) Upon conclusion of the audit or a criminal investigation, and where—

(a) the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or

(b) the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104(2).

(3) Upon receipt of the document described in subsection (2)(b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by

SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.

(4) The taxpayer may waive the right to receive the document.

(5) Subsections (1) and (2)(b) do not apply if a senior SARS official has a reasonable belief that compliance with those subsections would impede or prejudice the purpose, progress or outcome of the audit.

(6) SARS may under the circumstances described in subsection (5) issue the assessment or make the decision referred to in section 104(2) resulting from the audit and the grounds of the assessment or decision must be provided to the taxpayer within 21 business days of the assessment or the decision, or the further period that may be required based on the complexities of the audit or the decision.”

[17] Trend Finance (Pty) Ltd and another v Commissioner for SARS and another [2005] 4 All SA 657 (C) concerned the seizure of a shipment of shoes imported by the first and second applicants by the Commissioner for SARS and the Cape Town Controller of Customs (second respondent) for non-compliance with customs and duty requirements laid out in the Customs and Excise Act 91 of 1964. The

applicants sought review of the respondents' actions in the alternative on the basis of PAJA. Van Reenen J summarised the argument as follows:

“The review of the determination is being sought on the following grounds:

Firstly, that the respondents did not follow a fair procedure or afford the applicants a fair hearing before making the determination;

Secondly, in the alternative, that the respondents did not afford them a fair hearing before demanding payment of an amount equal to the value thereof for duty purposes, namely R695 508; and

Thirdly, that the determination was arbitrary and capricious as it was made on inadequate and insubstantial grounds.” (at para 73)

[18] Turning to the first two grounds of challenge, the judge began by noting that the challenge raised the requirements of procedural fairness set out in section 3 of PAJA. It is to be noted in this respect that the judge considered the application on this ground even though the applicants “fell somewhat short” of the obligation to identify clearly on which sections of PAJA reliance is placed (at para 68). The judge stated:

“Content is given to the concept ‘procedurally fair administrative action’ by section 3(2)(b) of PAJA which provides as follows:

‘(b) In order to give effect to the right to procedurally fair administrative action, an

administrator, subject to subsection (4), must give a person referred to in subsection (1)–

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.’

Those five requirements, which are considered to constitute the core elements of procedural fairness, may be departed from in the circumstances set out section 3(4) which provides as follows:

(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.'

Section 3(3) of PAJA provides that an administrator, in order to give effect to the right of procedurally fair administrative action, in his discretion, may give the person whose rights or legitimate expectations are materially and adversely affected thereby an opportunity to:

- ‘(a) obtain assistance and, in serious or complex cases, legal representation;
- (b) present and dispute information and arguments; and
- (c) appear in person.’

There is no evidence that the Controller, as delegate of the Commissioner, considered or was required to consider the discretion reposed in him by sections 3(3) and (4).” (at paras 77-78).

[19] The judge then set out the facts relevant to the determination of whether the applicants had been subject to unfair administrative processes. He drew from this factual exposition that the Controller had failed to notify the applicants that he was intending to exercise his discretion against the applicants, and failed to afford them any opportunity to make representations to the Controller prior to the exercise of that discretion. This, he concluded, “clearly offended against the mandatory requirements of subsections 3(2)(b)(i) and (ii) of PAJA”.

[20] Van Reenen J also considered the argument that the Controller had complied with the principles of procedural fairness after the action

complained against had been taken. He relied on *Nortjé en 'n ander v Minister van Korrektiewe Dienste and andere* 2001 (3) SA 472 (SCA) for the proposition that “Although the general rule is that natural justice must be observed before a decision is taken, subsequent compliance may suffice in exceptional circumstances” (at para 82). The judge rejected this argument, holding that no exceptional circumstances had justified such a course:

“[N]one of the considerations that are regarded as sufficient to justify the subsequent compliance with the requirements of just administrative action, such as urgency; impracticability because of the number of persons involved; the possibility that prior compliance will defeat the purposes of the action; and that the decision is merely provisional and relevant to the enquiry whether the requirements of procedural fairness have been complied with, are present in the communications enumerated in paragraph 81 above” (at para 82)

[21] The failure to observe principles of procedural fairness could not therefore be remedied after the administrative action was taken.

[22] Section 34 of Constitution guarantees the right to a fair trial which includes affording parties to the litigation a fair opportunity to adequately address material issues in the papers, by evidence or during argument. A basic rule of fairness is that a person who will be adversely affected by an act or a decision of the administration or authority shall be granted a hearing before he suffers detriment. Peach sums up the audi rule as follows:

“The audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party.”

[23] Section 6 of PAJA sets out when a person can institute Judicial review of administrative action as follows:

“6

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

- (i) for a reason not authorised by the empowering provision;
- (ii) for an ulterior purpose or motive;
- (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
- (iv) because of the unauthorised or unwarranted dictates of another person or body;
- (v) in bad faith;
- (vi) arbitrarily or capriciously;
- (f) the action itself-
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection

(2) (g) , he or she may in respect of a failure to take a decision, where-

(a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.”

The Audi Alteram Partem Rule

[24] In a number of decisions in South Africa, including in such cases as *South African Football Union v President of South Africa* 1998 (10) BCLR 1256 and the *South African Roads Board v Johannesburg City Council* 1991 (4) I (A) the view was expressed that the audi alteram partem rule should not necessarily depend on whether proceedings were administrative, quasi-judicial or judicial.

[25] In a number of decisions in South Africa, including in such cases as *South African Football Union v President of South Africa* 1998 (10)

BCLR 1256 and the South African Roads Board v Johannesburg City Council 1991 (4) I (A) the view was expressed that the audi alteram partem rule should not necessarily depend on whether proceedings were administrative, quasi-judicial or judicial.

[26] In *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (Du Preez) the court held that the Commission was under a duty to act fairly towards those implicated by the information received during the course of its investigations or hearings.

[27] The court indicated that it was instructive that the Committee's findings in this regard and its report to the Commission could accuse or condemn persons in the position of the Appellants. The court also noted that, subject to the granting of amnesty, the ultimate result could be criminal or civil proceedings against such persons. The court noted that the whole process was potentially prejudicial to them and their rights of personality. They had to be treated fairly. Procedural fairness meant they had to be informed of the substance of the allegations against them, with sufficient detail to know what the case was all about.

[28] In the case of SARFU, cited above, the question was whether the President, in appointing the Commission, acted in accordance with the principles and procedures which in that particular situation or set of circumstances were right and just and fair. Accordingly, the principle of natural justice should have been enforced by the court as a matter of policy irrespective of the merits of the case.

[29] The Commission's emphasized that the fact that a Commission is an advisory body does not, detract from the fact that it is likely in the ordinary course of events, to make findings would cause prejudice to SARFU, and its officials.

[30] A basic rule of fairness is that a person who will be adversely affected by an act or a decision of the administration or authority shall be granted a hearing before he suffers detriment. Peach sums up the audi rule as follows:

"The audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and

freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the adverse decision by the decision-maker, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party.” (See Peach, VL (2003) “The application of the audi alteram partem rule to the proceedings of commissions of inquiry” Thesis (LL.M. (Public Law))—North-West University, Potchefstroom Campus (Accessed at <http://hdl.handle.net/10394/58>), 8.)

[31] The requirement that in certain circumstances decision-makers must act in accordance with the principles of natural justice or procedural fairness has ancient origins.

[32] In general terms, the principles of natural justice consist of two component parts; the first is the hearing rule, which requires decision-makers to hear a person before adverse decisions against them are taken. The second and equally important component is the principle which provides for the disqualification of a decision-maker where

circumstances give rise to a reasonable apprehension that he or she may not bring an impartial mind to the determination of the question before them. The latter aspect is not relevant in this matter.

[33] The principles of natural justice are founded upon fundamental ideas of fairness and the inter-related concept of good administration. Natural justice contributes to the accuracy of the decision on the substance of the case.

[34] The rules of natural justice help to ensure objectivity and impartiality and facilitate the treatment of like cases alike. Natural justice broadly defined can also be seen as protecting human dignity by ensuring that the affected individual is made aware of the basis upon which he or she is being treated unfavorably, and by enabling the individual to participate in the decision-making process. The application of the principle of natural justice has proved problematic.

[35] The challenge is always how to strike the right balance between public and private interest. Whilst this court, in the circumstances of this

matter seems compelled to respond to the vulnerability of the Applicant facing the pervasive power of Commissioner of the South African Revenue Services, I am at the same time aware that the court has to avoid a situation where the unconstrained expansion of the duty to act fairly threatens to paralyse its effective administration.

[36] In my respectful view, the public interest necessarily comprehends an element of justice to the individual. The competing values of fairness and individual justice on the one hand and administrative efficiency on the other hand constitute the public and the private aspects of the public interest.

[37] It seems plain to me that the principles of natural justice are intended to promote individual trust and confidence in the administration. They encourage certainty, predictability and reliability in government interactions with members of the public, irrespective of their stations in life and this is a fundamental aspect of the rule of law.

[38] In a delicate balancing act, it is the duty of the courts to uphold and vindicate the constitutional rights of the Applicant to its good name cannot have the effect of precluding the Commissioner from discharging duties and responsibilities exclusively assigned to it by the relevant legislation. However, such an inquiry may only proceed in a manner which strictly recognises the right of the applicant to have the inquiry conducted in accordance with natural justice and fair procedures.

[39] In a matter involving similar facts regarding implication **De Vos J in Muzikayifani Andrias Gamede v The Public Protector (99246/2015) [2018] ZAGPPHC 865; 2019 (1) SA 491 (GP)** held that;

“[51] When it appears to the respondent, during the course of an investigation, that a person is implicated by the investigation and that such implication may be to his/her detriment, or that an adverse finding may be made against such person, the respondent will inform the affected person of the implication and provide him/her with an opportunity to respond. Taking into account that the complaint was lodged in June 2015, it must be accepted as a fact that the applicant was informed of- and requested to respond to- the complaint very soon after it was received. Therefore, I can safely conclude that on 17 June

2015 the investigation process was in a preliminary stage before any provisional or final decision was taken. The respondent, will after completion of the preliminary investigation and if it appears to her that the applicant may be implicated to his detriment, by way of a letter communicate her preliminary findings based on the information sourced during the investigation process, and will propose remedial action in light of these findings. The affected individuals are thereby provided with a further opportunity to present any additional evidence to the respondent. The respondent also provides the complainant with an opportunity to submit any further comments on the matter being investigated, should he/she wish to do so.

[52] After considering the comments and/or additional information received, the respondent, with the assistance of her staff, integrate the comments and evaluates them, following which the respondent edits and completes the final report. Subsequent to that event the final report is published and made accessible to the public, unless there are special considerations that require that it be kept confidential.

[53] The investigation is still in the preliminary stage and essentially comprises of an information gathering exercise. The investigative process is a fact finding mission which includes personal interaction and engagement with the complainant, the applicant, and factual witnesses.”

Principle of Legality

[40] In *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council* (1999 (1) SA 374 (CC)) – where the Constitutional Court held that the exercise of public power is only legitimate when it is lawful. The principle of legality has expanded and encompasses several other grounds of review, including lawfulness, rationality, undue delay and vagueness (see **Hoexter “Administrative Justice in Kenya: Learning from South Africa’s Mistakes” 2018 62(1) Journal of African Law 105 123**).

[41] In the case of **Law Society of South Africa v President of the Republic of South Africa (2019 (3) SA 30 (CC))** the Court in dealing with the point of irrationality referred to the case of **Masetlha v President of the RSA (2008 (1) SA 566 (CC))** (Masetlha). It was held that the principle does not encompass the requirement of procedural fairness. It was, therefore, essential to distinguish between these two requirements. Procedural fairness provides that a decision-maker must grant a person who is likely to be adversely affected by a decision a fair opportunity to present his or her views before any decision is made. Procedural rationality provides that there must be a rational relation not

only between a decision and the purpose for which the power was given, but also between the process that was followed in making the decision and the purpose for which the power was given (par 63). The Court held the following at paragraph 64:

“The proposition in Masetlha might be seen as being at variance with the principle of procedural irrationality laid down in both Albutt and Democratic Alliance. But it is not so. Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that, there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power.”

[42] The critical issue in this case was not whether a fair hearing was given or not. Instead, the critical issue was whether the process followed before the deciding effectively to suspend the Tribunal and deprive it of its existing jurisdiction to hear individual complaints was rationally

connected to the purpose for which the power to amend the Treaty had been given to him. The Court found that it was not.

Analysis and findings

[43] It is clear from the reading of section 42 of the Tax Administration Act that it was the legislature intention to keep a taxpayer informed of the process. In specific there is a statutory duty in terms of section 42 (1) that the SARS official involved in or responsible for an audit must provide the taxpayer a report indicating the stage of completion of the audit. The Applicant's submission is that after 22 June 2021 together with requests for an update by the Applicant on 13 September 2021 and 21 October 2021 until the launch of this application on 11 November 2021, no feedback by the Respondent was provided. This fact remains undisputed. Notably, the Respondent argues that it then approached the Applicant on 15 November 2021 to consent to a Tax enquiry which was denied. It is important to note that the first communication was only after the review application was instituted. The Respondent has offered no explanation why progress on the audit was not provided to the Applicant.

[44] The Applicant was clear that the review was on the grounds of failure to take a decision and not to steer the decision in a particular direction, as the failure to finalise the report led to financial prejudice being suffered by the Respondent withholding the Applicant's VAT refunds. The fact that the VAT refunds were subsequently released does not in my opinion, remedy the action taken.

[45] Turning on whether the failure to take the decision to finalise the audit constitutes administrative action for the purposes of PAJA I am mindful of that the ground for review is not related to the decision to audit the Applicant, but rather the failure to provide feedback on the audit and/or to finalise the audit. I am of the view, that the Respondent is misguided as to which decision or failure to take a decision is under review. It is the Respondent's version that the decision to audit a person under section 40 of the Tax Administration Act is not administrative action as has been decided by various precedents in recent times. However, this is not the action the Applicant seeks to review, it is the failure to arrive at a decision in terms of section 6(2)(g) where no decision has been taken and there is no prescribed period in law that dictates the period in which such decision must be made. Whilst the Respondent in this application sets out the reasons for the delay in

finalising the audit, this was not communicated to the Applicant, as it should have been through a progress report contemplated in terms of section 42(1). Had the Respondent done this, it would not have necessitated the present application. Whilst the Respondent is entitled to conduct investigations in the manner in which it may find appropriate, it is undisputed that there was a delay on the finalisation of the audit and that it failed to advise the Applicant accordingly. Whilst I am cognisant of the complexity of the matter, I find no reason why the present application does not fall under this section on the grounds of an unreasonable delay.

[46] It seems plain to me from the papers that the Respondent intended finalising other VAT Vendors due to possible illegalities which the Applicant may or may not be connected to and therefore such decision adversely affected the Applicant as set out in section 3(3) of PAJA, and at the very least advised the Applicant of the progress of the audit and/or provide the Applicant with this information or an opportunity to dispute it as set out in *Trend Finance (Pty) Ltd and another v Commissioner for SARS and another*. The Respondent although clearly entitled to conduct an investigation and determine procedures relating to it at its own discretion, it is also prudent in a fact-finding investigation to

inform and interact with a person whose rights may be adversely affected. In the present matter the Respondent did not at any stage of its investigation find it necessary to engage with the Applicant, who by the Respondent's version and information may be clearly implicated, until the institution of this application 11 November 2021. This goes against the principles of natural justice and fair procedure. At this stage I am satisfied that this failure to do so renders the conduct administrative action. It cannot be denied that the decision adversely affected the Applicant in having the VAT refunds suspended and that if the Applicant is not granted the relief that he seeks that the finalisation of the audit could continue for a protracted period, the results of which will interfere with the rights of the Applicant in the future.

[47] Turning on the Respondent's contention that the motive of the current application was to prevent the Respondent from auditing the Applicant and future in its VAT affairs, I find no basis for this reasoning. The Applicant has complied with all requests for documentary evidence by the Respondent and went a further step to prove its cooperation and intention by requesting updates on the audit. This is my opinion expressly showed good faith on part of the Applicant to ensure compliance with the processes. If anything the Applicant's requests for a

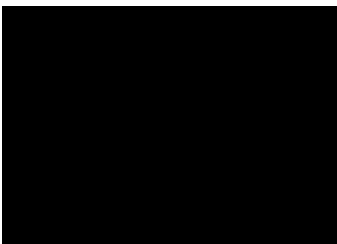
progress report is in line with section 42(1) of the Tax Administration Act to which the Applicant is entitled and confirms that the failure to provide same cannot be rational in relation to the process. Nevertheless, I have already found that the failure to take a decision on the finalisation of the audit is administrative action and therefore there is no need to consider the principle of legality.

[48] I see no reason why the costs should not follow the result. I grant the following order:

- 1. That the Respondent's failure to take a decision whether to finalise the value-added tax ("VAT") audit of the Applicant's 01/2019 to 02/2021 VAT periods is hereby reviewed and set aside;**
- 2. That the above matter is referred back to the Respondent with direction that he must within ten (10) days take a decision whether or not to finalise the audit;**
- 3. That the Applicant be authorised to set the application down for hearing (in future, on an urgent basis or in the normal course, as may be applicable in the circumstances) on the same papers, duly supplemented, for further and/or alternative ancillary relief in the**

event of the Respondent failing to take a decision as contemplated in prayer 3 above; and

4. The Respondent is to pay the costs if the application including the cost of Counsel.



**SARDIWALLA J
JUDGE OF THE HIGH COURT**

APPEARANCES

Date of trial : 19 April 2022

Date of judgment : 20 April 2022

Plaintiffs' Counsel : Adv. PA Swanepoel SC
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Plaintiffs' Attorneys : ENS Africa Inc.

Defendants' Counsel : Adv E. Coetzee SC
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