

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

CASE NO: 15703/22

- 1. REPORTABLE: NO**
2. OF INTEREST TO OTHER JUDGES: NO
3. Revised: Yes
10 AUGUST 2023

In the matter between:

**JOSIAS ANDRIES AGENBACH N.O. AND
OTHERS**

Applicants

And

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

Respondent

JUDGMENT

CILLIERS AJ

A. INTRODUCTION:

1. The Applicants, the trustees of the Nano Trust ("the Trust") instituted review proceedings against the Commissioner for the South African Revenue Service ("SARS") in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

B. BACKGROUND FACTS:

2. The Trust was established in 2005 with its main purpose and object, the investing and transacting in and holding of strategic, global and diversity property

investments.

3. Prior to 13 July 2017 the Trust was a South African Tax resident and held a share portfolio consisting of listed and unlisted shares.

4. On 15 June 2017 a Namibian Trust the Dyer Trust was established - resident in Namibia for tax and exchange control purposes. The Dyer Trust had the same beneficiaries as the Trust and itself became a beneficiary of the Trust. The Dyer Trust further acquired the sole shareholding in Dyer Investments (Pty) Ltd (a Namibian company).

5. On the 10th of July 2017 the Trust concluded a Forward Sale Agreement ("FSA") with Dyer Investments (Pty) Ltd. In terms of the FSA the Trust disposed of its entire share portfolio and certain claims to Dyer Investments (Pty) Ltd for an amount of almost R2 billion.

6. On the 13th of July 2017 the First to Third Applicants were appointed, together with the Fourth Applicant, as trustees of the Trust pursuant to the resignation of 2 of the previous trustees of the Trust. At the same meeting a resolution was passed that, with effect from the date of that meeting, the Trust would be tax resident in Namibia by virtue of the newly appointed trustees in Namibia and that the Trust would no longer be tax resident in South Africa.

7. Letters of Authority were issued by the Master to the 3 new trustees on the 4th of September 2017.

8. Pursuant to an audit conducted in 2021 relating to the 2018 Income Tax period of the Trust SARS addressed a letter of audit findings to the Trust on the 12th of July 2021. In the audit findings, SARS informed the Trust of proposed adjustments on the basis that a capital gain on the disposal of the shares and claims in terms of the FSA had been declared by the Trust, and indicated an intention to make a tax adjustment of more than R241 million.

9. A dispute ensued relating to the question whether the Trust was still a South African resident taxpayer at the disposal date of the assets of the Trust.

10. After an initial extension of time was granted to the Trust to consider its position a further request for an extension to file an objection was refused by SARS on the 2nd of March 2022.

11. The Trust issued this review application in this Court on the 16th of March 2022.

12. On the 17th of March 2022 the Trust lodged its objection against the impugned decisions on the 17th of March 2022.

13. On the 13th of April 2022 SARS disallowed the objection.

14. On the 1st of June 2022 the Trust lodged an appeal to the Tax Court against the disallowance of the objections by SARS. This appeal is still pending but is apparently suspended pending the outcome of the present review application before this Court.

C. RELIEF SOUGHT IN REVIEW APPLICATION:

15. The subject of the review is the decision by SARS to:

15.1 Assess the Trust for a capital gain of R671 775 965.00 for the 2018 year of assessment.

15.2 Impose a penalty in terms of Chapter 16 of the Tax Administration Act 28 of 2011 ("the TAA") in the amount of R24183 934.74 (10% penalty).

15.3 Impose a further penalty in terms of paragraph 20 of the Fourth Schedule of the Income Tax Act 58 of 1962 ("the ITA") in the amount of R38

694 295.53 relating to the alleged provisional tax under-estimation.

15.4 Levy interest on the said amounts for the late payment in terms of the TAA and the ITA.

16. The main relief sought by the Trust is that the additional assessment be reviewed and set aside based on an alleged error of law committed by SARS by finding that there had been an immediate accrual of proceeds to the Trust on the conclusion of a Forward Sale Agreement ("the FSA").

17. In opposing papers SARS raised the following defences:

17.1 It is denied that SARS committed an error of law in their finding against the Trust, by finding that there had been an immediate accrual of proceeds to it on the conclusion of the FSA.

17.2 The Trust failed to exhaust its internal remedies as contemplated in the TAA and as requires by Section 7(2) of PAJA.

17.3 The Trust has failed to make out a case that justifies a deviation from the default objection and appeal process contemplated under Section 105 of the TAA.

18. At the commencement of the proceedings, I indicated to counsel that I require them to first address me on the two points *in Jimine* raised by SARS:

18.1 The Trust has not exhausted the internal remedies available to it, particular the appeal process under Section 104 of the TAA as provided for in Section 7(2) of PAJA; and

18.2 The Trust has not made out a case under Section 105 of the TAA for a deviation from the default process.

D. PAJA - THE DUTY TO EXHAUST INTERNAL REMEDIES:

19. Section 7(2) of PAJA specifically provides as follows:

"7. ***Procedure for judicial review***

(1) ...

(2) (a) *Subject to paragraph (c), no court or tribunal shall review and administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*

(b) *Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*

(c) *A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.*

(3) 11

20. On a proper interpretation of Section 7 of PAJA it is clear that a Court should not entertain a review of administrative action where internal remedies have not been exhausted, unless it is found that there are exceptional circumstances and the Court grants an exemption to exhaust any internal remedy on application by the party concerned - if it is found to be in the interest of justice to grant such exemption.

21. In **Nichol a A. v Registrar of Pension Funds a O**.¹ it was found that exceptional circumstances which might justify an exemption in terms of Section 7(2)(c) of PAJA would exist where the available internal remedy would not be able to provide the Applicant with effective redress for his or her complaint.

¹ 2008 (1) SA 383 (SCA), par (18].

22. It will therefore be necessary to examine the nature of the internal remedy provided under the TAA in the present case in order to establish whether the Trust had an internal remedy available that could effectively redress its complaint.

23. The rationale for the duty to exhaust internal remedies has been evaluated and explained by the Constitutional Court in **Koyabe v Minister for Home Affairs**². The following factors were specifically mentioned by the Constitutional Court in this regard:

23.1 Internal remedies were designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation.³

23.2 Approaching a Court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process and renders the judicial process premature, effectively usurping the executive role and function.⁴

23.3 Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that the reviewing courts do not ordinarily engage in fact finding and hence require a full developed factual record.⁵

23.4 The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law.⁶

24. In **Koyabe** the Constitutional Court did warn that the requirement should not be rigidly imposed, nor should it be used by administrators to frustrate the efforts of an aggrieved person to shield the administrative process from judicial scrutiny. The requirement that a party exhaust internal remedies is therefore not absolute.⁷

² 2010 (4) SA 327 (CC).

³ Par [35].

⁴ Par [36].

⁵ Par [37].

⁶ Par [38].

⁷ Par [38].

25. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs a O**,⁸ it was also emphasised that a Court should take care not to usurp the functions of administrative agencies in the above regard.⁹

E. THE TAA-FORUM FOR DISPUTES RELATING TO ASSESSMENTS OR DECISIONS

26. Section 105 of the TAA provides that a taxpayer may only dispute an assessment or decision as described in Section 104 in proceedings under Chapter 9, unless a High Court otherwise directs.

27. This Section therefore also requires from an aggrieved taxpayer to seek assistance in resolving disputes of the present nature in the manner prescribed by Section 104 of the TAA - unless a High Court otherwise directs.

28. This Section therefore also lays down a default rule that disputes should be resolved by means of the objection and appeal process provided for in Section 104 of the **TAA**.

29. It is also of some significance that Section 105 of the TAA previously permitted a taxpayer to dispute an assessment by application to the High Court for review. This Section was, however, amended in 2016 and now provides that a taxpayer may **only** dispute an assessment or decision as described in Section 104 in proceedings under this Chapter, unless a High Court otherwise directs.

30. The SCA found in **The Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd**¹⁰ that a deviation in terms of section 105 of the TM should only be permitted in exceptional circumstances:

[17] Section 105 is an innovation introduced by the TAA from 1 October 2011. It has moreover been narrowed down by an amendment made in 2015.

⁸ 2004 (4) SA 490 (CC).

⁹ Par [45].

¹⁰ [2023] ZASCA 28

*Its purpose is to make clear that the default rule is that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA and may not resort to the high court unless permitted to do so by order of that court. The high court will only permit such a deviation in exceptional circumstances. This much is clear from the language, context, history and purpose of the section. Thus, a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA, unless a high court directs otherwise."*¹¹

31. It appears to be common cause between the parties that the Tax Court does indeed constitute an internal remedy within the ambit of Section 104 of the TAA for purposes of the resolution of disputes of the present nature.

32. From the argument on behalf of the Applicant it appeared that Applicant only relies on two aspects that constitute exceptional circumstances in the present application and would justify an exemption from the requirement to exhaust internal remedies:

32.1 The dispute between the parties only involves a point of law (this is, however, not common cause between the parties as will be illustrated hereinafter).

32.2 It would be more convenient to approach this Court in terms of PAJA because the process before the Tax Court may take longer to be resolved.

33. For the argument that the mere fact that a dispute involves only a point of law will constitute exceptional circumstances Applicant's counsel heavily relied on the decision of **ABSA Bank Ltd a O. v Commissioner for the South African Revenue Service**¹² where it was found that an attribute which would satisfy the element of exceptionality is where the dispute is entirely about a point of law.¹³

¹¹ Par [17]

¹² 2021 (3) SA 513 (GP).

¹³ Par [27].

34. The passage relied on by counsel on behalf of the Trust from the **ABSA Bank** decision provided as follows:

*"[25] When a dispute is entirely a dispute about a point of law, that attribute, in my view, would satisfy exceptionably."*¹⁴

35. I further understood the argument on behalf of the Trust to be that it would therefore satisfy the requirement of exceptional circumstances if the relevant dispute only relates to a point of law.

36. I understand the further submissions in the above regard that this Court is bound by the findings in the **ABSA Bank** case *supra* unless I can find that it was incorrectly decided.

37. I am not in agreement with the submissions by counsel on behalf of the Trust that the abovementioned findings by the Court in **ABSA Bank** stand uncontested by subsequent decisions.

38. The SCA found in the **Rappa** case *supra*¹⁵ that it is not desirable nor possible to lay down a precise rule or definition as to what would constitute exceptional circumstance and further emphasised that each case must be considered on its own facts:

'[22] It has been held that it is neither desirable nor possible to lay down a precise rule or definition as to what would constitute exceptional circumstances and that each case is to be considered on its own facts. Thring J in MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas remarked that:

'1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule

¹⁴ ABSA Bank, par [25].

¹⁵ Par [22]

does not apply to it; something uncommon, rare or different ...

2. To be exceptional the circumstances concerned must arise out of. or be incidental to. the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."

39. The SCA further emphasised that the circumvention of the appeal procedure provided for in the TAA should not be allowed without reason:

'[12] Rappa contends that it may circumvent the appeal procedure under the TAA by taking the assessments on review to the high court because its attack is directed at the legality of the assessments on grounds of review and not on their merit. But, as I shall endeavour to show, that is no reason, without more, to simply circumvent the appeal procedure, which involves a complete reconsideration of the assessments. This is apparent from the language of the provisions of the TAA applicable to tax appeals: "

40. In **Forge Packaging (Pty) Ltd v The Commissioner for the South African Revenue Service**¹⁶ the Court found that although a Court will have the jurisdiction to entertain a review despite the fact that there is already an appeal pending before a Tax Court it should be considered very carefully:

¹⁶ Judgment delivered by the Western Cape Division on the 13th of June 2022 (Case No 21634/2021) by Binns-Ward J

'[41] What I am saying is that the course that the applicant seeks to pursue in the peculiar context of the current matter strikes me as inappropriate and pregnant with undesirable complications. It seems to me that it would be inappropriate in such circumstances for this court to give the direction in terms of s 105 of the TAA that the applicant needs to be able to proceed with the review application in this court.'

41. In **Trustees of the CC Share Trust a O. v Commissioner for the South African Revenue Service**¹⁷ this Court unequivocally found:

*'[49] Post Rappa the law is now clear. The default rule is that disputes are to be heard in the tax court. This means the applicant must make out a case for exceptional circumstances and the mere fact that the case simply raises a question of law does not suffice to constitute an exceptional circumstance.'*¹⁸

42. I am of the view that a finding that the only dispute between parties involves a point of law will be one of the factors, indeed a material factor, to be taken in consideration in the enquiry whether exceptional circumstances exist. I, however, cannot agree with an approach that such finding, will on its own, in all cases satisfy the relevant enquiry relating to the question whether there are exceptional circumstances.

43. I therefore find myself in disagreement with the **ABSA Bank** judgment, insofar as it was held that when the dispute between the parties only relates to point of law that it would satisfy exceptionably in all cases.

F. APPLICATION OF THE FACTS OF THE PRESENT APPLICATION TO THE REQUIREMENTS OF PAJA AND THE TAA

44. It is common cause in the present case that the Trust did not exhaust the internal remedies available in terms of the TAA.

¹⁷ (38211/21) (2023) ZAGPPHC 597 (24 July 2023)

¹⁸ Par [49]

45. As mentioned above there is indeed a pending appeal lodged by the Trust to the Tax Court against the disallowance of the objections raised by the Trust. This appeal was already lodged on the 1st of June 2022, but it was apparently suspended following this review application in this Court.

46. The Trust in the present case relied on 2 aspects that would, according to the Trust, justify an exemption from the obligation to exhaust internal remedies on the basis that there are exceptional circumstances:

46.1 The allegation that the only dispute between the parties concerns a point of law.

46.2 It will be convenient to grant an exemption in terms of Section 7(2) of PAJA because the review process may be more expeditious than an appeal.

47. It appears, however, not to be common cause that the dispute between the parties only involves a point of law. SARS disputed this allegation in the opposing papers, and it was also raised and denied by counsel on behalf of SARS during argument.

48. There can be no doubt that the Tax Court is in a much better position to adjudicate the dispute between the parties if there are or may be factual disputes between the parties. It is common cause that such an appeal is a *wide appeal* and that the Tax Court will have all powers that this Court has.

49. The Tax Court is also presided by a Judge of the High Court and further has the power to involve assessors in the event that there may be factual disputes between the parties.

50. I have also difficulty to follow the reliance on the issue of convenience raised by counsel on behalf of the Trust. The appeal to the Tax Court was already lodged

during March 2022, almost 17 months ago. This appeal could probably have been finalised, was it not for the review application to this Court that caused the suspension of the appeal to the Tax Court.

G. CONCLUSION:

51. I am therefore not persuaded that there are exceptional circumstances in the present application that justify the exemption of the Trust from the obligation to exhaust any internal remedy.

52. I also find that the Trust did not make out a case for the exercise of my discretion to direct otherwise as is contemplated in Section 105 of the TAA.

53. I wish to emphasise that the order that I am going to make is not based on any finding relating to the merits of the Trust's case and should in no way be construed as any indication of a finding that the Trust does not have merit in its objections against the decisions and/or determinations by SARS. That is an issue for the Tax Court to determine.

H. ORDER:

54. The application is dismissed with costs, the costs to include the cost of two counsel.

55. I direct the Trust to first exhaust the internal remedy available provided for in the TM before instituting proceedings for judicial review in terms of PAJA.

JG CILLIERS

Acting Judge of the High Court Gauteng Division, Pretoria

Date of Hearing: 3 August 2023

Judgment delivered: 10 August 2023

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