IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 7559/2024

In the matter between

JAYMAT ENVIRO SOLUTIONS CC **APPLICANT**

And

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE **RESPONDENT**

Date of hearing: **21 November 2024**

Date of judgment: **Judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for handdown is deemed to be 13 December 2024**

JUDGMENT

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[1] This is a review application of a decision by the Commissioner of the South African Revenue Service ("SARS"). The applicant is seeking a judicial review of SARS's decisions dated 22 September 2021, 28 September 2021 and 27 September

2021 respectively. It is the applicant's case that the decisions amount to a failure on the part of SARS to record so-called ETI credits on the applicant's statement of account. On 15 August 2023, the applicant directed to SARS a notice per s11(4) of the Tax Administration Act 28 of 2011("the TAA"). SARS responded on 15 September 2023, providing a comprehensive response on why the ETI credits were not recorded on the applicant's statement of account. The applicant does not seek to set aside the decision recorded in SARS's reply dated 15 September 2023, but rather the decisions or, more precisely, the indecisions of 22 September 2021, 28 September 2021 and 27 September 2021.

[2] This review application presents certain distinct features, including the choice of the applicant not to follow the procedure outlined in uniform rule 53, and the fact that although the applicant is seeking the review of SARS's decisions, it did not object or appeal against SARS's assessment, nor did the applicant approach the Tax Court as stipulated in Chapter 9 of the TAA. The applicant contends that SARS did not raise any objections to the (self) assessments it submitted. However, SARS decided not to incorporate the assessments into the applicant's statement of account. This review application centres on SARS's choice to neither act upon nor acknowledge the assessments submitted by the applicant. Although this application presents its own distinct features, it represents yet another decision in the ongoing series of rulings concerning the dual jurisdiction of the High Court and the Tax Court.

A RELIEF APPLIED FOR

[3] In its notice of motion the applicant applies for an order in the following terms:

> [a] Reviewing and setting aside the respondent's decisions dated 22 September 2021, 28 September 2021, and 27 September 2021 ("the impugned decisions") respectively.
>
> [b] Declaring the impugned decisions to be unlawful, inconsistent with s 165(3)(f) of the Tax Administration Act 28 of 2011 (as amended) and invalid.

[c] To direct the respondent to capture the ETI Credits pursuant to the revised EMP501 declarations in terms of s 165(3)(f) of the TAA, within five business days of this order.

[d] To direct the respondent to amend the ETI claimed by the applicant for 1 March 2020 to 28 February 2021 to R3 097 135,94, as per the revised EMP501 declarations.

[e] That the respondent be required to make full payment of the following amounts due to the applicant pursuant to the revised EMP501 declarations together with interest thereon at the applicable legal rate from the date of filing to the date of final payment, within 21 business days of the date referred to in paragraph [d] above:

Period	Amount
2018/02 period	R80 420,44
2019/02 period	R763 821,05
2020/02 period	R1 832 723,73
Total	R2 676 965,22

[f] To confirm that the 180-day period in terms of s 7(1)(b) of the Promotion of Administrative Justice Act, 3 of 2000 begins to run from 15 September 2023.

[g] That the respondent be ordered to pay the costs of this application including the cost of two counsel where so being employed, …'

[4] The Commissioner opposed the relief applied for and raised two preliminary but critical issues. Firstly, in terms of s 105 of the TAA, the applicant, as a taxpayer, can only bring an application of this nature in the High Court if they are able to demonstrate *"exceptional circumstances"* for avoiding the *"default route"* of approaching the Tax Court. It was submitted by Mr Sholto-Douglas SC on behalf of the Commissioner that under s 105 of the TAA the High Court lacks jurisdiction to

hear this matter. It would also imply that the applicant has not used any of the internal remedies outlined in Chapter 9 of the TAA. Secondly, and in the alternative, the respondent contended that in accordance with s 7(1) of PAJA, proceedings for judicial review must be initiated without unreasonable delay, and in any case, no later than 180 days after the applicant is notified of administrative action, or became aware of the action and the reasons for it, or might reasonably have expected to have become aware of the action and the reasons for it. It is uncontested that the aforementioned period only commences after the applicant has exhausted all the available internal remedies timeously. Accordingly, it was submitted on behalf of the respondent that the applicant failed to exhaust its internal remedies and that the delay in launching this application was manifestly unreasonable and exceeded the 180-day period provided for under s 7(1) of PAJA.

[5] Notwithstanding the dispute resolution provisions provided in Chapter 9 of the TAA and the existence of the Tax Court, the High Court's jurisdiction is not ousted. Both the High Court and the Tax Court retain jurisdiction. The essential question for decision in this matter concerns whether the relief claimed by the applicant constitutes a review or appeal in terms of the TAA or a review in terms of the Promotion of Administration of Justice Act 3 of 2000 ("PAJA").

[6] At the commencement of the proceedings, the Court heard argument from both parties about the convenience of addressing the mentioned preliminary points first. The Constitutional Court held In the Competition Commission of South Africa v Standard Bank of South Africa Limited[1] that when a Court is confronted with a jurisdictional challenge, such a challenge must be decided by the court at the outset.[2] As a result, I determined that the parties would only present argument regarding the preliminary objections, and the Court proceeded accordingly. The difficulty with the aforementioned approach is that isolating the contextual

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[1] Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Ltd and others 2020 (4) BCLR 429 (CC) para 200.

[2] Id para 200 *"Where the jurisdiction of the court before which a review application is brought is contested, a ruling on this issue must precede all other orders. This is because a court must be competent to make whatever orders it issues. If a court lacks authority to make an order it grants, that order constitutes a nullity. Scarce judicial resources should not be wasted by engaging in fruitless exercises like making orders which cannot be enforced."*

background from the preliminary points to be decided is not always practical. Therefore, it will be necessary to provide a concise summary of the facts that were uncontroversial, if not common cause, and that gave rise to this review application.

B THE EMPLOYMENT TAX INCENTIVE ACT 26 OF 2013 AND THE APPLICANT'S ASSESSMENTS

[7] The Employment Tax Incentive Act 26 of 2013 ("the ETI Act") seeks to incentivise employers to employ young individuals between the age of 18 and 29 by providing a tax incentive that enables employers to reduce the amount of employment tax due by them in respect of qualifying employees.

[8] The Employment Tax Incentive Act 26 of 2013 came into effect on 1 January 2014 and the purpose of the ETI Act, as set out in the long title, is:

> "To provide for an Employment Tax Incentive in the form of an amount by which employees' tax may be reduced; to allow for a claim and payment of an amount where employees' tax cannot be reduced; and to provide for matters connected therewith."

[9] The preamble to the ETI Act provides as follows:

> *"SINCE the unemployment rate in the Republic is of concern to the government;*
>
> *AND SINCE government recognises the need to share the costs of expanding job opportunities with the private sector;*
>
> *AND SINCE government wishes to support employment growth by focusing on labour market activities, especially in relation to young workers;*
>
> *AND SINCE government is desirous of instituting an employment tax incentive,*

BE IT THEREFORE ENACTED by the parliament of the Republic of South Africa as follows:"

[10] The ETI is an incentive that eligible employers may claim and is aimed at encouraging such employers to employ young persons between the ages of 18 and 29, and employees of any age in special economic zones and in any industry identified by the minister by notice in the Government Gazette. Payment of the incentive is contingent upon eligible employers being able to reduce the employees' tax due by them by the amount of the ETI that they may claim, provided that they meet the requirements of the ETI Act.

[11] The Fourth Schedule to the Income Tax Act 58 of 1962 (hereinafter referred to as "the Fourth Schedule") requires every employer to submit a monthly return to SARS, which includes, among others details, the amount of employees' tax deducted or withheld from employees' remuneration for that month. The ETI is deductible from the total employees' tax payable by the eligible employer and is claimed by submitting a monthly EMP201 return. The employer is permitted to include any amounts rolled over from previous months to the ETI for a current month, subject to certain specific limitations outlined in s 9(4) of the ETI Act. In terms of s 10(1) of the ETI Act, at the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(a) of the Fourth Schedule, the employer can claim from SARS an amount ("the refund") that corresponds to the excess contemplated in s 9(1) of the ETI Act, in the form and manner prescribed by SARS.

[12] In respect of the present matter, SARS prescribed that the refund must be claimed by way of an EMP501 declaration, which was required to be submitted by 31 May 2018 in respect of the 2018/02 EMP501 declaration, by 31 May 2019 in respect of the EMP501 2019/02 declaration and by 31 May 2020 in respect of the EMP501 2020/02 declaration. It is common cause that the EMP501 declarations are self-assessments as defined in s 1 of the TAA . It is also common cause that the applicant filed its EMP501 declarations (hereinafter referred to as "the original declarations") for the periods in question and claimed as follows:

[a] R6 259.00 – 2018/02 period;

[b] R nil – 2019/02 period; and

[c] R nil – 2020/02 period.

[13] During September 2021, the Applicant submitted revised EMP501 declarations in respect of the periods in question (hereinafter referred to as "the revised declarations") in terms of which it claimed:

[a] R80 420,44 – 2018/02 period ;

[b] R763 821,05 – 2019/02 period ; and

[c] R1 832 723,73 – 2020/02 period .

[14] On 9 November 2021, SARS conducted a verification of the 2019/02 revised declaration. On 21 April 2022, they advised that the verification had been finalised and that no adjustments had been made. The revised assessments do not reflect on the applicant's statement of account. On 15 August 2023, the applicant issued a notice in terms of s 11(4) of the TAA, demanding that the ETI credits be reflected on the applicant's statement of account and that payment of the refunds due to the applicant be processed.

[15] SARS responded on 15 September 2023, and the gist of its response is to the effect that: First, by virtue of the provisions of s 9(4) of the ETI Act, the applicant was precluded from submitting revised assessments; and, secondly, by virtue of s 9(4) of the ETI Act, any ETI refunds that may have been due to the applicant were forfeited. Under the circumstances, SARS contended that 'the ETI will not be allowed as SARS stand by our interpretation of Section 9(4) of the ETI Act'. The aforementioned statutory provisions and facts are undisputed. The primary dispute in the review application revolves around the interpretation of the relevant provisions of the ETI Act.

C THE TAX ADMINISTRATION ACT

[16] The TAA provides inter alia for the effective and efficient collection of tax, the alignment of the administration provisions of tax acts as well as any related processes. In generic terms, the TAA's provisions in this review application are procedural, whereas the ETI's provisions are substantive.

[17] According to s 1 of the TAA, *'"**assessment**" means the determination of the amount of tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS.'* Sections 91 to 95, in Chapter 8 of the TAA, provide for 'original assessments', 'additional assessments', 'reduced assessments', 'jeopardy assessments', and 'estimated assessments'. Section 91(2) provides that *'"if a tax Act requires a taxpayer to submit a return which incorporates a determination of the amount of a tax liability, the submission of the return is an original self-assessment of the tax liability"'*. It is sufficient to state that all other assessments provided for in s 91 to 95 of the TAA relate to SARS conducting an assessment rather than the taxpayer.[3] Furthermore, s91(2) relates to 'the amount of a tax liability', not a credit.

[18] Sections 104 and 105 of the TAA read as follows:

> **"104 Objection against assessment or decision**
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> (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:
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> (a) a decision under subsection (4) not to extend the period for lodging an objection;

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[3] 's **91 Original assessments**
(1) If a tax Act requires a taxpayer to submit a return which does not incorporate a determination of the amount of a tax liability, SARS must make an original assessment based on the return submitted by the taxpayer or other information available or obtained in respect of the taxpayer.'
Section 92 provides for Additional assessments, s 93 for Reduced assessments, s 94 for Jeopardy assessments and s 95 for Estimation of assessments.

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

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

(3) A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'.

(4) A senior SARS official may extend the period prescribed in the 'rules' within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection.

(5) The period for objection must not be so extended-

(a) for a period exceeding 30 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection;

(b) if more than three years have lapsed from the date of assessment or the 'decision'; or

(c) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the 'decision'.

105 Forum for dispute of assessment or decision

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.'"

D FIRST POINT *IN LIMINE* - SECTION 105 AND JURISDICTION OF THE TAX COURT

[19] Mr. Sholto-Douglas SC submitted that the court lacks jurisdiction to hear the review application for two reasons. First, the applicant ought to have approached the Tax Court as contemplated in s 105 of the TAA. Second, the applicant furthermore, has not exhausted its internal remedies as required by s 7 of PAJA. However, the applicant argues that SARS's failure and refusal to record what the applicant contends to be final assessments in the applicant's statement of account and process payment of the refund allegedly due to the applicant constitutes a *"decision"* as defined in s 1 of PAJA, subject to the review of the High Court.

[20] The applicant argues that it submitted a revised (self) assessment, and since SARS consequently did not issue any additional assessment, it (SARS) is bound to accept, record and act upon the revised (self) assessment. The applicant does not intend to dispute or appeal an assessment or decision as provided in s 104 of the TAA. In this regard, the applicant relies upon the provisions of s 92 to the effect that if at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the Fiscal, it must make an additional assessment to correct the prejudice. If SARS is dissatisfied with the revised (self) assessment submitted by the applicant, it cannot simply ignore the revised (self) assessment. It is statutorily obliged to issue additional assessments if it did not agree with the revised (self) assessment. Mr Wilkin, who appeared on behalf of the applicant, submits that SARS's conduct in refusing to give effect to the revised (self) assessment does not trigger the provisions of s 104 read together with 105 of the TAA.

[21] The applicant relies upon the judgment in Taxpayer M v Commissioner of South African Revenue Services IT 45585 an unreported judgment by Dippenaar J in the Tax Court held at Megawatt Park, Johannesburg, in which the Tax Court held

that the taxpayer was entitled to recover an understated amount in terms of the ETI.[4] In paragraph 5 of Taxpayer M the following facts are recorded:

> ". . . The appellant objected to its self-assessment and submitted a revised EMP501 on 19 July 2018 ("the revised EMP501"), in order to correct the determination of its tax liability or refund as contained in the original EMP501. In the revised EMP501, the appellant included the understated amount of R1 413 130 and requested the respondent to refund that amount. The appellant further requested a reduced assessment of the employees' tax payable by it for the relevant period in terms of section 93(1)(d) of the TAA . . . .".

[22] In contrast hereto, SARS submits that s91(2) provides that if a taxpayer is to submit a return which incorporates a determination of the amount of tax liability, such a submission is an *"original self-assessment of tax liability"*. Only SARS has the power to issue an additional assessment or a reduced assessment. A reduced assessment, according to s 93, relates to instances where a taxpayer successfully disputes the assessment under Chapter 9. This reduced assessment reflects a settlement or judgment pursuant to an appeal, or occurs when SARS is convinced that there is an obvious, undisputed error in an assessment. None of the provisions of s 93 are applicable to the facts in this review application.

[23] If the applicant lodged an objection to compel SARS to accept the applicant's self-re-assessment, it could have been addressed on an evidentiary basis following the usual verification process by SARS. The TAA does not allow a taxpayer to revise an assessment independently. The applicant could not as a matter of law revise assessments irrespective of the provisions of the ETI. In GB Mining and Exploration SA (Pty) Ltd v Commissioner for South African Revenue Service[5] the Supreme Court of Appeal held that:

> "[22] A taxpayer my seek a reduction in the Commissioner's assessment in terms of s79A without objecting to the assessment in terms of s 81. The

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[4] *Taxpayer M v Commissioner for the South African Revenue Service (IT 45585) [2022] ZATC 6; 85 SATC 53 (14 January 2022)*

[5] 76 SATC 347

Commission's powered to reduce the assessment exists "notwithstanding the fact that no objection has been launched or appeal noted". In addition, the power of the Commissioner is not restricted to it's mero motu exercise, because the error in the assessment has to be 'proved to the satisfaction of a commissioner'. To discharge this burden of proof, a taxpayer must place information before the Commissioner to substantiate the error relied upon. In doing so, it may rely upon an error that it made in its return.

[23] The Commissioner may therefore act in terms of s 79A to reduce and assessment in the absence of an objection in terms of s 81 of the Act and my do so even where it flows from incorrect information provided in the taxpayers return. Can the taxpayer who has been the cause of the incorrect assessment by Commissioner instead claim to be "aggrieved" thereby and object to an assessment in terms of the s 81?.

[24] The statement that the powers of the Commissioner under s79A can be exercised "notwithstanding the fact that no objection has been made", suggests that an alternative route for the taxpayer to follow is by way of objection, and, If necessary, appeal. That was the conclusion of Hurt. J in JTC 1785 67 SATC 98, where he said:

> "… The fundamental object of tax legislation is to exact from each citizen his due. What is "due" is, in each case (questions of penalty aside) strictly prescribed by statute and the amount of the taxpayer's taxable income must, in the process of assessment, be accurately determined preparatory to the calculation of the amount which he (or she) is required to hand over to the *fiscus*. In that light, it is clear that a taxpayer whose taxable income has been determined on an erroneous basis is always "*aggrieved"*, even if a source of error is entirely attributable to him."

[24] In Barnard Labuschagne v CSARS[6] the Constitutional Court held that a tax judgment was susceptible to rescission and that the High Court should have

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6 2022(5) SA 1 (CC)

considered the rescission if a case for rescission was made out. At para [44] and [45] Rogers, AJ, as he was then states:

> '…The question posed by this court's directions focused not on disputes concerning the initial tax liability but on disputes as to whether the tax liability remained outstanding. In this case Sars evidently considered that the tax liability had not subsequently been paid, hence the filing of the certified statement, but BLI contended otherwise. If the payment dispute is not a matter required to be dealt with by way of objection in terms of ch 9, it is one of those "defences" which the court in Kruger II and Metcash had in mind as being available to a taxpayer in rescission proceedings.
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> [45] In the Minister's submissions the issue is said to be whether an objection to a taxpayer's own self-assessments is a grievance falling within the scope of ch 9. Clearly the answer to that question is yes, but it is not the question which this court asked the parties to address. The question framed by this court was whether a grievance to the effect that a certified statement disregarded payments allegedly made in respect of self-assessment fell within the scope of ch 9.'

[25] The finding that an objection to a taxpayer's own self-assessments constitutes a grievance falling within the scope of ch 9, maybe obiter, yet it parallels the findings in GB Mining mentioned above. Furthermore, the facts in this matter stand to be distinguished from the judgment in Taxpayer M v The Commissioner SARS[7] in which it was common cause that there was a bone fide error and s 93(1) was relevant. Mr. Sholto-Douglas SC argued that the applicant should have objected to its own assessment and referred to paragraph 5 of the Taxpayer M judgment, in which it is recorded that '…The appellant objected to its self-assessment and submitted a revised EMP501…'.

D(i) The default route

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7 2019 JDR 2667 (TC) also referred to as 2017 Tax Court case 5493.

[26] In Forge Packaging (Pty) Ltd v Commissioner for the South African Revenue Service[8] Justice Binns-Ward with reference to the judgment in Absa Bank Limited and another v Commissioner SARS,[9] held as follows at para [36]:

> 'As Sutherland ADJP pointed out in Absa Ban, the concurrent jurisdiction of the High Court is now confirmed in terms by the provisions of Part B of Chapter 9 of the TAA. Those provisions, read with s 117 (which is in Part D of the Chapter), establish that the Tax Court has jurisdiction only in respect of tax appeals lodged unders s 107. Appeals lodged under s 107 are appeals against assessments or any of the "decisions" referred to in s 104(2). Section 105 of the TAA provides that [a]taxpayer may only dispute an assessment or "decision" as described in section 104 in proceedings [in the Tax Court], unless [the] High Court otherwise directs". There does no seem to me to be any cogent basis to question the validity of Sutherland ADJP's construction of s 105 to the effect that while the Tax Court is the "default route" for appeal against assessment and "decisions" the High Court may direct otherwise if it deems meet.'

[27] The High Court should deem it meet to 'otherwise direct' only when it is evident that the 'default route' would be less appropriate. The current legislation gives a stronger indication that the equivalent preceding provisions did, that resort to the Tax Court in seeking redress when the setting aside of an assessment is sought is the ordinarily indicated course. Good cause should be shown why an exception should be allowed from the ordinarily indicated course. One such an exception case would be when the question for determinations turns wholly on the point of law[10].

[28] The applicant did not apply for a direction in terms of s 105 of the TAA for this court to hear the matter. The applicant seeks relief in the form of an order to set aside SARS's decision, which it contends does not require the High Court to give a direction as provided for in s 105. Binns-Ward, J in Forge held that the Court in the Absa Bank matter did not regard it as necessary to file a substantive application in

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8 [2022] JOL 54036 (WCC) at para [26]. Also see *Forge Packaging (Pty) Ltd v The Commissioner for the South African Revenue Service 2022 JDR 1634 (WCC)*

9 [2021] ZAGPPHC 127 (11 March 2021) 2021 (3) SA 513 (GP).

10 Forge ebit at [37]

terms of s 105 holding that such an application for a direction could be brought concurrently with the application to the High Court for substantive relief. It is evident from the judgments in ABSA and Forge that nothing in the TAA ousts the jurisdiction of the High Court to decide tax matters, notwithstanding the establishment by the Act of the Tax Court as a specialised court specifically to deal with them. This is further founded upon the judgment by the Constitutional Court in Metcash Trading Limited v Commissioner for the South African Revenue Services and another[11]. It is quite evident from these judgments that if a party wishes to have an assessment set aside, an application for a direction in terms of s 105 is a jurisdictional factor to pursue in order to prosecute proceedings to that end in any jurisdiction other than in the Tax Court.[12]

D(ii) Exception Circumstances

[29] The words 'exceptional circumstances' appear both in s 105 of the TAA and s 7(2)(b) of PAJA. In Erasmus v Commissioner for South African Revenue Services[13], Sher, J held that PAJA does not define exceptional circumstances. The court in Erasmus examined different authorities in which the term 'exceptional circumstances' was interpreted and concluded that:

> "…Ultimately, and by way of summary, it has been held that what needs to be shown is that the circumstances are out of the ordinary, such that they render it inappropriate to require that the applicant should first exhaust any alternative remedies that may be available to them and justify the intervention of the Court rather than of an alternative, available forum.
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> Finally, it should be pointed out that in endorsing the test espoused in MV Ais Mamas both the Constitutional Court and the Supreme Court of Appeal implicitly adopted two corollaries that flow from it (as is apparent in the extract they quoted from it) viz that 1) whether or not exceptional circumstances exist is not a decision which depends on the exercise of a judicial discretion, but it

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11 2001 (1) SA 1109 (CC) at para 43 to 47.
12 Forge *ibid* at [32].
13 [2024] 1 All SA 153 (WCC)

is a matter of fact to be determined on the evidence and 2)where a statutory provision directs that a fixed rule shall be departed from only in "exceptional circumstances" effect will, generally speaking, best be given to the intention of the legislature by applying a strict rather than a liberal meaning of the phrase, and by carefully examining the circumstance relied upon as allegedly being exceptional.'*14*

D(iii) Conclusion regarding joint jurisdiction.

[30] In the case of Commissioner, SARS v Rappa Resources (Pty) Ltd,[15] the Supreme Court of Appeal similarly confirmed five key propositions. First, a taxpayer cannot circumvent the appeal procedure under that TAA by bringing an assessment on review to the High Court merely because the attack is directed to the legality of the assessment. Second, an appeal to the tax court entails a complete reconsideration of the assessment during which the taxpayer may raise objections on the grounds of any grievance of whatever kind. Third, the authority of the tax court to revise assessments encompasses the ability to evaluate the legality of an assessment based on review grounds. Additionally, the tax court may, in accordance with section 105, address any legal issues that emerge from tax disputes, including the review of assessments or other decisions. Fourth, a deviation from s 105 will only be permitted in exceptional circumstances, and the High Court lacks jurisdiction in tax disputes unless it directs otherwise. Fifth, it is neither advisable nor possible to establish precise rules or definitions as to what would constitute exceptional circumstances. Each case must be decided based on its own unique facts.

[31] The Supreme Court of Appeal reaffirmed this in Commissioner, South African Revenue Service v Absa Bank Ltd and Another[16] when the Court referred with approval to the following as stated by Ponnan JA in Rappa:

"The purpose of s 105 is clearly to ensure that, in the ordinary course, tax disputes are taken to the tax court. The High Court consequently does not

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14 Erasmus ibid at [41] to [42]
15 2023 (4) SA 488 (SCA)
16 2024(1) SA 361 (SCA)

have jurisdiction in tax disputes unless it directs otherwise. In Wingate-Pearse it was put as follows:

> "Tax cases are generally reserved for the exclusive jurisdiction of the tax court in the first instance. But it is settled law that a decision of the Commissioner is subject to judicial intervention in certain circumstances. . . . In its amended form, s 105 thus makes it plain that unless a High Court otherwise directs, an assessment may only be disputed by means of the objection and appeal process.'

[32] It would lead to uncertainty and injustice if the applicant's submission was correct, suggesting that unless SARS raises an objection to, or issues, or provides an additional assessment in terms of s 92, any self-assessment would automatically, or by default, become final and binding in the absence of an additional assessment issued by SARS. Moreover, this argument misses the point. Section 91(2) refers tax liability and not a credit. On this basis, I cannot accept that the relief applied for in this review application does not fall within the alternative dispute and appeal procedure envisaged in the TAA.

[33] I enquired from both parties regarding the applicant's preference to pursue relief in the High Court rather than the Tax Court. Mr. Sholto-Douglus SC submitted that it could be argued that the procedure in the Tax Court is more protracted and expensive compared to a review application before the High Court. He submitted, however, that if an appeal to the Tax Court involves a matter of law only, the president of that court is required to make the decision independently. If the facts are common cause there is no barrier preventing the Tax Court so constituted, from dealing with the appeal on a stated case[17]. If the applicant is correct that this review relates only to a matter of law, the Tax Court can entertain the application as expeditiously and effectively as the High Court. The nature of the dispute and the relief applied for in the specific context of the current matter is inappropriate for the High Court. This is particularly so given that the applicant did not even use the advantage afforded to an applicant in terms of r 53 of the Uniform Rules.

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[17] Section 118(3) of the TAA and Forge *ibid* at para [24] to [43]

[34] In South African Human Rights Commission v Standard Bank of South Africa Ltd and Others[18] the Constitutional Court held regarding the concurrent jurisdiction of the High Court over matters that could also be heard in the Magistrate's Court as follows:

> "[29] The assumption of jurisdiction should not be confused with the manner in which a court decides to exercise its jurisdiction. There is no discretionary power to decline the assumption of jurisdiction over a matter within the jurisdiction of a court. But how a court decides to exercise the jurisdiction it enjoys is a separate issue. That issue includes considerations as to whether in exceptional circumstances jurisdiction is not exercised by reason of, for example, abuse of process or the stay of proceedings pending some other form of dispute resolution, or on grounds of comity. In certain special circumstances, a South African court may take the view that considerations of comity dictate that a matter is best left for adjudication by a foreign court which has a closer connection to the matter.'

[35] There are no exceptional circumstances justifying a departure from the default route. The subject matter and the relief applied for is best left for adjudication to the Tax Court, which has a closer connection to the matter. I am further unconvinced that the review exclusively deals only with a legal issue. The review does not concern only an issue of legality. By submitting "replacement" returns, the applicant, in effect, objected to its own self-assessment, which objection was not upheld by SARS. If the correct default route had been followed, the usual objection and appeal processes would have been triggered, the factual outcome of which we would never know. In order to succeed, the applicant must, in addition, persuade the court of exceptional circumstances that warrant the substitution of SARS decision with that of its own. I will return to this aspect hereunder.

[36] This has two ramifications for the applicant. Its failure to have objected to its own self assessment consequently means that it did not adhere to the internal

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[18] 2023 (3) SA 36 (CC)

remedies provided for in the TAA. Secondly, there is no application or case made out for any direction in terms of s 105. If the correct procedure had been to object to its self-assessment, it would have been inescapably so that it would have formed the subject of an assessment, objection or appeal as envisaged in terms of s 104 of the TAA. Moreover, the applicant has not demonstrated the existence of exception circumstances as envisaged in s 105 of the TAA or utilised the internal remedies as provided for in the TAA and no relief is sought in terms of s 105. Binns-Ward, J refused the application in Forge for a direction in terms of s 105 of the TAA and struck the application from the roll. I intend to grant a similar order.

SECTION 7(2) OF PAJA

[37] The second preliminary point must be resolved if I am mistaken in my assertion that the High Court lacks jurisdiction. The applicant contends that SARS's letter of 30 January 2023 was not a final decision by SARS, since it is self-evident from the letter that the applicant's assessment was subject to an audit. On 15 September 2023, the applicant received a letter from SARS informing them of the decision and reasons behind it. The applicant contends that this was the first time they had knowledge of the decision. SARS contended, however, that the onus fell on the applicant to demonstrate that the application was launched within a reasonable time. Despite the fact that the letter by SARS on 31 January 2023 referred to a different time period, the subject matter was related to a similar decision based on the same reasoning. The applicant did not request any reasons in its s 11(4) notice, since it knew SARS's reasons. This is evident from the fact that the applicant relied on the judgement in the Taxpayer M matter in the s11(4), which, according to the applicant, supports its contention on the merits of the review application. Thus, the applicant had sufficient reasons to allow it to either file an objection or launch review proceedings earlier.

[38] The applicant calculates the 180-day period from the date on which SARS responded to the applicant's s 11(4) notice on 15 September 2023. On the other hand, SARS submits that this contention is untenable for the reason that, as a matter of logic, the applicant could not institute a s11 notice until it knew what relief it

intended to pursue and on the applicant's version, it ought reasonably to have been aware of the reasons.

[39] The Constitutional Court in Sasol Chevron Holdings Limited v C,SARS[19] quoted the following passage from the judgment of the SCA in the same matter, with approval:

> "[28] However, the counter-argument advanced by counsel for Sasol Chevron and the reasoning of the [High Court] on this score must be tested with reference to the following fundamental considerations. First, as was submitted on behalf of the Commissioner, SARS' letter of 26 March 2018 was no more than a recapitulation of the position that SARS had consistently adopted since 2016. The letter itself makes explicit reference to the earlier decision – termed the ruling – made on 6 December 2017, as are virtually all the subsequent letters from SARS to Sasol Chevron. SARS' letter of 6 December 2017, in turn, makes reference to the ruling made on 7 November 2016 in which the background facts are comprehensively set out, Sasol Chevron's request summarised, the relevant statutory framework set out and, finally, the decision (ruling) – supported with comprehensive reasons – is articulated.
>
> [29] In contending that the impugned decision was not taken on 26 March 2018, counsel for the Commissioner called into his aid the decision of this Court in Aurecon South Africa (Pty) Ltd v City of Cape Town[20] in which Maya ADP said the following:
>
> > 'The decision challenged by the City and the reasons therefor were its own and were always within its knowledge. Section 7(1) unambiguously refers to the date on which the reasons for administrative action became known or ought reasonably to have become known to the party seeking its judicial review. The plain wording of these provisions simply does not

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19 2024 (3) SA 321 (CC) at para [19].

20 Aurecon South Africa (Pty) Ltd v City of Cape Town [2015] ZASCA 209; 2016 (2) SA 199 (SCA) (Aurecon) at para 16.

> support the meaning ascribed to them by the court a quo, i.e. that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity. That interpretation would automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to the respondent (the appellant here) and the public interest in the finality of administrative decisions and the exercise of administrative functions. Contrary to the court a quo's finding in this regard, the City far exceeded the time frames stipulated in section 7(1) and did not launch the review proceedings within a reasonable time. In that case, it clearly needed an extension as envisaged in section 9(1)(b) without which the court a quo was otherwise precluded from entertaining the review application.'"

[40] The relief applied for in this application is a "package deal" despite spanning more than three tax periods. The status of the assessments turns on the same issue regarding SARS and the applicant's different interpretation of s 9(4) and 10(3) of the ETI Act. The applicant was made aware of SARS's reasons for the decision in correspondence to the applicant dated 16 May 2022. SARS's position and reasons for it remained unchanged. Therefore, the delay in instituting the application is manifestly unreasonable and, in any event, exceeds the maximum 180-day period allowed as a maximum under section 7(1) of PAJA.

JUDICIAL REVIEW AND REMEDIES

[41] Section 8 of PAJA provides that the Court may grant an order that is just and equitable. This includes the provision in s 8(1)(c)(ii)(aa) that allows for substitution or variation of the administrative action correcting the defect arising from it, but only in *"exceptional cases"*. The applicant does not address any exceptional circumstances in its founding affidavit, but deals with this only superficially on the basis that should

this Court agree with its interpretation of the ETI, that it is a foregone conclusion that relief should be granted.

[42] The SCA in Gauteng Gambling Board v Silverstar Development Ltd and others[21] held that a case was deemed exceptional when upon proper consideration of all the relevant facts, a court was persuaded that a decision to exercise a power had not to be left to the designated functionary. How that conclusion was reached was not statutorily dictated, but rather, it would depend on established principles guided by the constitutional imperatives that administrative action had to be lawful, reasonable and procedurally fair.

[43] The Constitutional Court in Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another[22] held that even if exceptional circumstances exist, substitution can only be ordered if it is deemed just and equitable. This necessitates a consideration of the fairness of substitution to all the parties involved. The applicant does not allege the existence of any exceptional circumstances in the founding affidavit. In reply, the applicant alleges that the stance adopted by SARS in its answering demonstrates that if the matter were remitted back to SARS, the outcome would be a 'foregone conclusion'.

[44] The court is not in as good position to determine the accuracy of the revised EMP 501 returns, and thus, substitution relief would not be appropriate. First, this court is thus unable to determine whether the revised EMP 501 reconciles with the EMP 201 forms submitted for the relevant periods, particularly in circumstances where the EMP 201 returns do not form part of the papers filed. Secondly, prayer 5, the notice of motion, seeks an order for SARS to make payment of certain amounts to the applicant. The relief goes beyond a mere declaration that the applicant should be allowed to revise its EMP 501 returns. It presupposes that the amounts the applicant wishes to submit in the revised EMP 501 are correct. The relief if granted, would deprive SARS of the opportunity to audit and revise. The court simply lacks the evidence required to arrive at such a conclusion.

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21 2005 (4) SA 67 (SCA)
22 3025 (5) SA 245 (CC)

[45] Given that the matter only proceeded in respect of the preliminary points, I am precluded at this stage from making any final determination regarding the applicant's entitlement to what is commonly referred to as a substitution order. However, the nature of the relief applied for is a relevant and vital factor in deciding how the court should exercise its jurisdiction. The relief applied for by the applicant is couched in the form of a review application, but, in reality, the applicant seeks declaratory relief and a monetary judgment. The relief that the applicant seeks, which aims to substitute SARS's decision, in as far as a decision was taken, falls within the jurisdiction of the Tax Court. The complexity of the arguments raised before this Court regarding the correct process of submitting re-assessments and raising objections thereto and the consequence flowing from it only emphasises why this application should have been brought before the Tax Court.

COSTS

[46] The parties were ad idem that the costs should follow the result. I believe that the engagement of senior counsel was justified given the complexity of the matter, the amount involved and the importance of the issues to be decided. A cost order on scale C in terms of Rule 67A read together with Rule 69(3) is appropriate.

[47] Considering the aforementioned I therefore grant the following order:

(1) The application is struck from the roll for a lack of jurisdiction.

(2) The applicant is ordered to pay the costs of the respondent on scale C.

VAN DEN BERG AJ

Applicant	**Adv KD Williams**
	Pieterse Sellner Erasmus TRM TAX
Respondent	**Adv A R Sholto-Douglas SC**

State Attorney, Cape Town