



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 1205/2021

In the matter between:

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

APPELLANT

and

RAPPA RESOURCES (PTY) LTD

RESPONDENT

Neutral citation: *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* (Case no 1205/2021) [2023] ZASCA 28 (24 March 2023)

Coram: PONNAN, MOLEMELA, GORVEN and MEYER JJA and MALI AJA

Heard: 23 February 2023

Delivered: 24 March 2023

Summary: Section 105 of the Tax Administration Act 28 of 2011 – a taxpayer may only dispute an assessment by objection and appeal in terms of ss 104 to 107, unless the high court directs otherwise. Prior to making such a decision the high court has no jurisdiction and cannot make an order compelling delivery of a record in a review.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Dippenaar J, sitting as court of first instance):

- 1 The appeal is upheld with costs, including those of two counsel.
 - 2 The order of the court below is set aside and replaced with one dismissing the application with costs, including those of two counsel.
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JUDGMENT

Ponnan ADP (Molemela, Gorven and Meyer JJA and Mali AJA concurring)

[1] On 29 March 2021, the appellant, the Commissioner for the South African Revenue Service (SARS), issued assessments to the respondent, Rappa Resources (Pty) Ltd (Rappa), for the payment of Value Added Tax (VAT), penalties and interest. Rappa was advised 'should [it] wish to lodge an objection against the assessments the objection must comply with all of the requirements of section 104 of the Tax Administration Act'.

[2] Rappa chose instead to launch an urgent application out of the Gauteng Division of the High Court, Johannesburg (the high court) on 28 April 2021 for relief in two parts (the review application). Part A is not relevant to the appeal. Under Part B, Rappa sought an order in the following terms:

1. Reviewing and setting aside the decision of the Commissioner to issue the Assessments ("the decision");
2. Reviewing and setting aside the Assessments;
3. Declaring the decision of the Commissioner to issue the Assessments to be in conflict with the constitutional principle of legality and accordingly unconstitutional, unlawful and invalid.'

[3] Rappa also demanded that SARS disclose the record of its decision under review in terms of Uniform rule 53(1)(b). When SARS refused, Rappa launched an

application on 3 June 2021 in terms of Uniform rule 30A for an order compelling SARS to do so (the compelling application). In answer to both applications, SARS denied that Rappa's application for review was competent because it had not been sanctioned by the high court in terms of s 105 of the Tax Administration Act 28 of 2011 (the TAA). That section provides:

'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.'

[4] Rappa did not in either application seek an order in terms of s 105. It initially took the view that 's 105 of the TAA does not stand in the way of the review application'. Rappa later asserted in its replying affidavit filed in the compelling application that:

'14.5 The section, in any event, allows the High Court to direct otherwise. To the extent necessary and to the extent that section 105 of the TAA applies (which is denied), Rappa refers to its amended notice of motion which amendment will be moved at the hearing of this application. A copy of the amended notice of motion is attached hereto as "RA1". In seeking leave in terms of section 105, Rappa, of course, does not in any way concede that SARS is correct in raising section 105 of the TAA. Rappa does so simply out of an abundance of caution and in order to avoid the dilatory and obstructive tactics adopted by SARS in delaying the advancement of the review application.'

[5] Thereafter, in terms of an amendment to its notice of motion in the compelling application filed on 22 June 2021 Rappa sought an order in terms of s 105 'insofar as it might be necessary'. The compelling application came before Dippenaar J. According to SARS, Rappa did not press for an order under s 105 because, so it was contended, such an order was not necessary. On 16 September 2021, the learned judge granted an order in the following terms:

'[1] The applicant's notice of motion is amended by the introduction of prayer 1 which provides: "Insofar as might be necessary and to the extent that s105 of the TAA applies, it is directed in terms of that section that this court hears and determines the compelling application and the review application of which it forms part".

[2] The relief sought in prayer 1 pertaining to the applicability of s105 of the Tax Administration Act 28 of 2011 and whether a directive should be issued thereunder is postponed sine die, to be enrolled for hearing together with the main review application.

[3] The respondent is directed to comply, within 15 days of granting of this order, with uniform r 53(1)(b) by dispatching to the registrar and the applicant, a complete record containing all

documents and all electronic records (including correspondence, contracts, memoranda, advice, recommendations, evaluations, internal deliberations and the like) that relate to the decision which is the subject of the review application under case number 21/21045, together with such reasons as the respondent is by law required or desires to give or make.

[4] The record must contain, subject to [5] below, (i) all documents that served before the relevant decision maker in relation to the decision to issue the additional assessments made on 29 March 2021; (ii) all reports, submissions, memoranda and other records which were placed before the person or committee who took the decision to issue the additional assessments; (iii) all working papers, schedules, notes, memoranda and minutes prepared by the respondent pertaining to: (a) the matters recorded in the letter of audit findings dated 11 December 2020; and (b) the finalisation of audit letter dated 29 March 2021.

[5] The respondent is afforded a period of fifteen days to object to the production of any documents forming part of the record and in such objection must provide comprehensive grounds for the basis of such objection.

[6] In the event that the respondent fails to produce the record or objects to the production of certain documents, and the applicant does not accept the grounds of objection raised, the applicant is authorised to approach the court, on the same papers, duly supplemented, for appropriate relief within 15 days of receipt of the objection.

[7] The respondent is directed to pay the costs of the application.'

[6] On 8 November 2021, and in granting leave to SARS to appeal to this court, the high court observed:

'Central to this application is [SARS'] contention that [Rappa's] right to review only vests once a directive is issued in terms of s105 of the TAA and that this court had no jurisdiction to order the production of the record, absent making a determination on whether the high court has jurisdiction to consider the appeal. [SARS'] sole basis for opposition to the r 30A application was that [Rappa] had no right to see the record absent a directive in terms of s 105 of the TAA, which directive it contended should be refused.'

[7] The high court added:

'[7] During argument, extensive reliance was placed by [SARS] on a judgment of the Constitutional Court in *Competition Commission v Standard Bank of South Africa Ltd and related matters* ("*Standard Bank*"), to which I had not been referred in the interlocutory application.

[8] In *Standard Bank*, the majority of the Constitutional Court held that where jurisdiction is contested a ruling must be made on that issue preceding other orders. It was also held that

an order for production of the record under r 53(1)(b), is appealable as it is final in effect and based on the interests of justice tests.

...

[12] In light of the import of s105 and its effect in challenging the jurisdiction of the high court, the issue of jurisdiction had to be determined before any further order could have been granted. Considering all the facts and the relevant factors requiring consideration, I am persuaded that there are reasonable prospects of success on appeal as envisaged by s 17(1)(a)(i) of the Act and that it is in the interests of justice that leave to appeal be granted.’ (Footnotes omitted.)

[8] The broad thrust of SARS’ case is: First, the high court does not have the power to order the production of the record of a decision under review unless it has jurisdiction in the review. It must accordingly first determine its jurisdiction in the review before making a compelling order. Second, and this is linked to the first, in terms of s 105, a taxpayer may only dispute an assessment by objection and appeal in terms of ss 104 to 107 of the TAA, unless the high court directs otherwise. Before it makes such a direction, the high court has no jurisdiction in the review and can accordingly not make an order compelling SARS to deliver the record of its decision.

[9] Preliminarily, as the high court correctly observed in the judgment on the application for leave to appeal, the Constitutional Court had indeed held in *Competition Commission of South Africa v Standard Bank*¹ (*Standard Bank*) that an order compelling a respondent in a review to deliver the record of its decision in terms of rule 53, is appealable. Writing for the minority, Theron J stated:

‘Standard Bank contends that the order of Boqwana JA is interlocutory and therefore not appealable. The test for appealability has, however, been developed to accord with “the equitable and more context-sensitive standard of the interests of justice”. What is paramount is not whether the order is final or interim but whether it is in the interests of justice to grant leave to appeal.

The rule 53 order is final in effect and determinative of the relevant rights of the Commission and Standard Bank. This is because the order requires the Commission to disclose the record – which would have the final effect of furnishing Standard Bank with the information it seeks

¹ *Competition Commission of South Africa v Standard Bank of South Africa* [2020] ZACC 2; 2020 (4) BCLR 429 CC (*Standard Bank*).

to pursue its review under rule 53. The handing over by the Commission of the record under rule 53 would be irrevocable. Standard Bank would have access to the information contained in it, and no subsequent court order could materially change that.²

[10] The majority judgment (per Jafta and Khampepe JJ) agreed with the minority judgment on the review appeal, which included the ruling on appealability.³ Accordingly, the high court's order compelling SARS to deliver the record of its decision is appealable on the authority of the Constitutional Court.

[11] Both the majority and minority⁴ held that the court may only order the production of the record of a decision under rule 53 after it has determined that it has jurisdiction in the review. The majority put it as follows:

'Therefore, [rule 53] enables an applicant to raise relevant grounds of review and the court adjudicating the matter to properly perform its review functions. However, for a court to perform this function, it must have the necessary authority. It is not prudent for a court whose authority to adjudicate a review application is challenged to proceed to enforce rule 53 and order that disclosure should be made, before the issue of jurisdiction is settled. The object of rule 53 may not be achieved in a court that lacks jurisdiction.

For these additional reasons, we agree with the first judgment [of Theron J] that Boqwana JA erred in ordering that the Commission should disclose its record of investigation before the question of jurisdiction was determined. Once carried out, and in the event that the Competition Appeal Court concluded that it has no jurisdiction, what is to be done in terms of the order cannot be undone.'⁵

[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

² Ibid paras 46 - 47.

³ Ibid para 1.

⁴ Ibid paras 118 -119.

⁵ Ibid paras 202 - 203.

appeals: First, s 104(1) provides that a taxpayer ‘who is aggrieved by an assessment’ may object to it. The language is clearly very wide. The taxpayer may object on the ground of any grievance of whatever kind. Second, SARS may allow or disallow the objection under s 106(2). If SARS disallows the objection, the taxpayer may appeal against the assessment or decision to the tax board or tax court under s 107(1). Section 107(1) does not in any way limit the grounds upon which the taxpayer may do so. Third, the tax court determines the appeal in terms of s 117(1). It has jurisdiction to determine all the issues raised in such an appeal. The tax court determines ‘the matter’, that is, the entire appeal, in terms of s 129(1). It may, in terms of s 129(1), confirm the assessment; order the assessment to be altered; refer the assessment back to SARS or ‘make an appropriate order in a procedural matter’.

[13] Importantly, in this regard, a tax appeal is an appeal in the widest sense of the word, namely a complete rehearing of the matter. It has been described as a ‘revision’ and not an appeal in the ordinary sense.⁶ This Court recently put it as follows in *Africa Cash and Carry v Commissioner, SARS*:

‘The point of departure should always be that a tax court is a court of revision and, “not a court of appeal in the ordinary sense”. The legislature “intended that there could be a re-hearing of the whole matter by the Special Court and that the Court could substitute its own decision for that of the Commissioner”, if justified on the evidence before it. A tax court accordingly rehears the issues before it and decides afresh whether an estimated assessment is reasonable. It is not bound by what the Commissioner found. In rehearing the case it can either uphold the opinion of SARS or overrule it and substitute it with its own opinion. The powers of the tax court and its functions are unique. It places itself in the shoes of the functionary and re-evaluates the facts and circumstances of the subject matter on which the assessments were based.’⁷

⁶ *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1942 AD 142 at 150; *Metcash Trading v Commissioner, SARS* 2001 (1) SA 1109 (CC) (*Metcash*) paras 32 and 47; *Commissioner, SARS v Pretoria East Motors* [2014] ZASCA 91; 2014 (5) SA 231 (SCA) para 2; *Africa Cash and Carry v Commissioner, SARS* [2019] ZASCA 148; 2020 (2) SA 19 (SCA) (*Africa Cash and Carry*).

⁷ *Africa Cash and Carry* para 52.

[14] This wide power of revision of the tax court includes the power to determine the legality of an assessment on grounds of review. In *Transvaalse Suikerkorporasie*,⁸ which concerned an appeal to a Full Court of the then Transvaal Provincial Division against a judgment of the Special Tax Court that had upheld a taxpayer's appeal against an additional income tax assessment, SARS contended that it was not competent for a taxpayer to invoke grounds of review in a tax appeal. The Full Court rejected SARS' argument. It held that, save in respect of decisions in relation to which a right of appeal was expressly excluded by the tax legislation, the tax court was empowered to take into consideration whether or not SARS had properly exercised its discretion in respect of the making of the assessments that were subject to appeal. In that context, so the court held, where the exercise of a discretion is pertinent to the making of the impugned assessment, the 'appeal' is in reality a 'review' of the decision on customary review grounds.⁹

[15] *Transvaalse Suikerkorporasie* was followed by a Full Court of the Western Cape High Court in *South Atlantic Jazz Festival*.¹⁰ The reasoning in *Transvaalse Suikerkorporasie* was there described as 'compelling' and 'conceptually consistent in all material respects' with an earlier judgment of Van Winsen J in the Cape Income Tax Special Court.¹¹ In *Wingate-Pearse*, which followed and applied *South Atlantic Jazz Festival*, it was stated:

'The fact that the determination of Mr Wingate-Pearse's tax appeal might entail the tax court considering the legality of an administrative decision, that was integral to the making of the additional estimated assessments, does not deprive that court of its jurisdiction to decide the tax appeal.'¹²

[16] The TAA does not disqualify the high court from determining tax disputes. It may, subject to s 105, determine any legal issues arising from tax disputes including reviews of assessments or other decisions. The Constitutional Court noted in *Metcash*

⁸ *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie* 1985 (2) SA 668 (T).

⁹ *Ibid* at 676C.

¹⁰ *South Atlantic Jazz Festival v Commissioner, SARS* 2015 (6) SA 78 (WCC).

¹¹ *Ibid* para 22 referring to ITC 936 (1962) 24 SATC 361.

¹² *Wingate-Pearse v Commissioner, SARS* [2019] ZAGPJHC 218; 2019 (6) SA 196 (GJ) (*Wingate-Pearse*) para 47.

that 'it has for many years been settled law that the Supreme Court has jurisdiction to hear and determine income tax cases turning on legal issues'.¹³ *United Manganese of Kalahari v Commissioner, SARS* recently referred to, cited *Metcash* and confirmed that:

'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. One such circumstance is that the High Court has jurisdiction to hear and determine tax cases turning on legal issues.'¹⁴

[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. 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.

[18] This is reinforced by the amendment of s 105 in 2015. The original version read as follows:

'A taxpayer may not dispute an assessment or "decision" as described in section 104 in any court or other proceedings, except in proceedings under this Chapter or by application to the High Court for review.' (underlining for emphasis)

Pre-amendment, the taxpayer could elect to take an assessment on review to the high court instead of following the prescribed procedure. That is no longer the case. The amendment was meant to make clear that the default rule is that a taxpayer had to follow the prescribed procedure, unless a high court directs otherwise.

¹³ *Metcash* para 44.

¹⁴ *United Manganese of Kalahari v Commissioner, SARS* [2017] ZAGPPHC 628; 2018 (2) SA 275 (GP) paras 17 and 18.

[19] This understanding is reinforced by the explanatory memorandum that accompanied the Tax Administration Law Amendment Bill of 2015. It described the purpose of the amendment of s 105 as follows:

‘The current wording of section 105 creates the impression that a dispute arising under Chapter 9 may either be heard by the tax court or a High Court for review. This section is intended to ensure that internal remedies, such as the objection and appeal process and the resolution thereof by means of alternative dispute resolution or before the tax board or the tax court, be exhausted before a higher court is approached and that the tax court deal with the dispute as court of first instance on a trial basis. This is in line with both domestic and international case law. The proposed amendment makes the intention clear but preserves the right of a High Court to direct otherwise should the specific circumstances of a case require it.’¹⁵

[20] 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 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.’¹⁶

[21] The same understanding was articulated in *ABSA Bank v Commissioner, SARS*:

‘It was contended that the provisions of s 105 indicate a confined arena in which to conduct any disputations over tax liability. However, plainly, if a court may “otherwise direct”, that results in an environment for dispute resolution in which there is more than one process. A court plainly has a discretion to approve a deviation from what might fairly be called the default route. In as much as the section is couched in terms which imply that permission needs to be procured to do so, there is no sound reason why such approval cannot be sought simultaneously in the proceedings seeking to review, where an appropriate case is made out.

¹⁵ Tax Administration Law Amendment Bill (2015) Explanatory Memorandum para 2.52.

¹⁶ *Wingate-Pearse* fn 12 above para 45.

It was common cause that such appropriate circumstances should be labelled “exceptional circumstances”. The court would require justification to depart from the usual procedure, and this, by definition, would be “exceptional”.¹⁷

[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.¹⁸ 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 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.’¹⁹

[23] It is not strictly necessary to enter into the debate as to whether, in this case, a departure from s 105 might be justified. The high court did not make an order under s 105 and Rappa has not cross-appealed its decision in that regard. The important point, for present purposes, is that not having made such an order, the court accordingly did not have jurisdiction in the review application. Because it did not have jurisdiction in

¹⁷ *ABSA Bank v Commissioner, SARS* [2021] ZAGPPHC 127; 2021 (3) SA 513 (GP) para 27.

¹⁸ *Liesching and Others v S* [2018] ZACC 25; 2019 (4) SA 219 (CC) para 132.

¹⁹ *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H-157C.

the review, it also did not have the power to issue the compelling order which was incidental to the review.

[24] In an endeavour to escape this logical consequence, there was some attempt to suggest at the Bar in this court that as the issues raised in the review application did not implicate s 104 of the TAA, s 105 did not find application. However, as the affidavits filed in the review application and the relief sought make perfectly plain, Rappa was aggrieved by the assessments issued by SARS, which it sought to have set aside. That squarely implicated s 104 and, in turn, s 105. That aside, it was open to Rappa to make out a proper case on the papers that the dispute raised was such as to warrant the high court issuing the necessary direction in the exercise of its discretion under s 105. On this score, it self-evidently chose not to make out such a case – a choice that is not without its consequence. Even as late as the appeal, Rappa continued to vacillate between: on the one hand, asserting that because of the nature of the issues raised, it was not necessary to obtain a direction in terms of s 105; and, on the other, to the extent necessary, it was entitled to such an order. An order under s 105, it bears noting, is not simply to be had for the asking. A case has to be made out for the high court to authorise a departure from the default rule in the proper exercise of its discretion on a conspectus of all of the facts before it. It cannot be, as seems to have been suggested, that the mere say-so of the taxpayer that the dispute is not one contemplated by s 104 or over which the tax court lacks jurisdiction can, without more, simply carry the day. Whether a direction under s 105 should issue remains a decision for the high court.

[25] Finally, it was suggested that were we to reach the conclusion that a direction under s 105 was indeed necessary then, like the Constitutional Court in case number CCT 179/18 in the *Standard Bank* matter, we ‘should not pre-empt the [high court’s] decision on its jurisdiction, and it would be in the interests of justice to remit the matter’.²⁰ It seems to me that such a course is not open to us here. In that matter, in the face of Standard Bank’s review application, the Commission had counter-applied for an order that the Competition Appeal Court (CAC) lacked jurisdiction to hear the

²⁰ *Standard Bank* fn 1 above para 122 read with para 123 and the order in para 206.

review. The CAC compelled production of the rule 53 record, whilst leaving open the question of whether it had jurisdiction to hear the review. The logically anterior enquiry raised by the counter application, which pertained to jurisdiction, ought to have been adjudicated prior to the review and compelling applications. As the CAC had not entered into the counter-application, the issue remained a live one before it. This formed a central plank of the Commission's appeal to the Constitutional Court. In those circumstances, a remittal to the CAC was both necessary and unavoidable.

[26] Here, as I have pointed out there is no cross appeal. A court must have jurisdiction for its judgment or order to be valid. The high court appears to have lost from sight that the time for determining whether a court has jurisdiction is at the commencement of the proceeding.²¹ Having postponed that question, the high court was not empowered to issue the orders that it did. Those orders, including paragraph 1, amending the notice of motion, and paragraph 2, postponing sine die whether a directive under s 105 of the TAA should issue, are nullities.²² In granting prayers 1 and 2, the high court, no doubt, inclined to the view that relief under s 105 was necessary. It was thus mutually incompatible for it to have formed that view and, at the same time, deferred a decision on that question to the court hearing the review application. And, what is more, in the meanwhile, to have exercised coercive powers to compel production on possible pain of contempt.

[27] In the result:

- 1 The appeal is upheld with costs, including those of two counsel.
- 2 The order of the court below is set aside and replaced with one dismissing the application with costs, including those of two counsel.

V M PONNAN
JUDGE OF APPEAL

²¹ *Communication Workers Union v Telkom SA Ltd* 1999 (2) SA 586 (T) at 593G-H.

²² *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA).

APPEARANCES

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