




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
23/9/15	
<u>DATE</u>	<u>SIGNATURE</u>

CASE NO: 16408/2013

23/9/2015

In the matter between:

ACKERMANS LIMITED

Applicant

and

**COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

Respondent

JUDGMENT

MOTHLE J

1. Before me is an application brought by the Applicant ("Ackermans") for leave to appeal the judgment and order dated

20 February 2015 (*“the main judgment”*). The Respondent (“SARS”) is opposing the application and has simultaneously launched an application for leave to cross appeal the cost order in the main judgment.

2. Ackermans, in the main application sought relief to have the decision of the Commissioner for SARS to issue Additional Assessments, reviewed and set aside. In support of that application, Ackermans contended that the Commissioner for SARS took an unreasonable delay in deciding to issue the Additional Assessments, having regard to sections 237 of the Constitution.¹ The section provides that all Constitutional obligations must be performed diligently and without delay. It is further contended for Ackermans that this constitutional provision must be read with Section 33 of the Constitution which provides for just administrative action and in particular the right of a party to seek review of a decision which affects its rights and interests.
3. In the main judgment I found, amongst others, that the sections of the Constitution referred to above cannot be read and applied

¹ The Constitution of the Republic of South Africa Act 1996. In paragraph 31 of the main judgment reference is erroneously made to “Section 273 of the Constitution.” It should read “section 237 of the Constitution.”

in isolation to the relevant provisions of the Income Tax Act² (ITA). Additional Assessments are raised in terms of the provisions of ITA. In particular, Section 79 sets out the time frames for the Commissioner to raise additional assessments, against which the reasonableness or otherwise of the delay should be considered.

4. Ackermans contend that the two provisions of the law should be separated and that the Court should determine the reasonableness or otherwise of the delay, only in terms of the Constitutional provision.
5. I found, in paragraphs 34 up to and including 40 of the main judgment, that the determination of the question whether the delay was reasonable or otherwise should be placed before the Tax Court. I made this finding after concluding that there are disputes of facts which may require oral evidence. I further found that the issuing of Additional Assessments in this specific case raises complex tax disputes that require the expertise of the Tax Court to adjudicate. I then concluded that the Tax Court is suitably placed to deal with the disputed facts in resolving the question of delay within the context of Issuing Additional Assessments as provided for in Section 79 of ITA.

² Act 58 of 1962.

6. I then gave the order as follows:

“1. This application in its present form before this Court is dismissed.

2. Each party is to pay its own costs.”

7. Ackermans contends in essence that I erred in not separating Sections 237 and 33 on the one hand from Section 79 of ITA on the other. Having dismissed their application for review based on section 237 of the Constitution, I should grant them leave to appeal in that another Court might reasonably find differently.

8. Commissioner for SARS on the other hand contends the following:

8.1 That I did not traverse the merits of the dispute between the parties and therefore my judgment is not appealable in terms of Section 17(1) of The Superior Court act, 10 of 2013;

8.2 That the issues raised by Ackermans can all be resolved in the Tax Court which is scheduled to sit in November 2015;
and

8.3 That in the event I am inclined to grant leave to appeal to Ackermans, I should also consider granting them leave to cross appeal the cost order in the main judgment.

9. Section 17(1) of the Superior Court Act provides thus:

"17. Leave to appeal

(1) Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that –

(a) (i) The appeal will have a reasonable prospect of success; or

(ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) The decision sought on appeal does not fall within the ambit of Section 16(2)(a); and

(c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal will lead to a just and prompt resolution of the real issues between the parties."

10. It is common cause that the dispute between the parties arises out of the decision by SARS to issue Additional Assessments on Ackermans. The question whether the Additional Assessments were correctly made or not still remains. A hearing is scheduled for November 2015 in the Tax Court.

11. The order that I have given in the main judgment is on form and not substance. The merits relating to the dispute between the two parties on whether SARS delayed in issuing the Additional Assessments, or whether the Additional Assessments themselves are valid, are issues that fall within the purview of the Tax Court. The Tax Court is a specialist court established to deal with tax related disputes.

12. I am further of the opinion that:
 - 12.1 Leave to appeal, if granted, will only be on the question whether the reasonableness or otherwise of the delay may be dealt with separate from the provisions of section 79 of ITA. The answer to that question, either way, will not finally decide the dispute between the parties. See section 17 of the

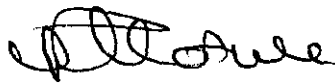
Superior Courts Act,³ as well as the Supreme Court of Appeal authorities.⁴

- 12.2 In adjudicating the question whether the delay to issue Additional Assessments is reasonable or not, the Tax Court has jurisdiction and is suitably placed to deal with the complex facts and assess them in terms of the provisions of section 79 of ITA. After all, that is what the Tax Court has been established for; and
- 12.3 Consequently there are no reasonable prospects of success that another court on appeal might decide that the disputes regarding the delay in issuing the Additional Assessments may be dealt with exclusively in terms of Section 237 the Constitution.
13. I am therefore not persuaded that the appeal would have reasonable prospects of success. Consequently, this application for leave to appeal should under the circumstances be refused.

³ Act 10 of 2013.

⁴ Zweni v Minister of Law and Order 1993 (1) SA 523 (A); Jacobs and Others v Baumann NO and Others 2009 (5) SA 432 (SCA) and Grancy Property Ltd v Manala and Others 2015 (3) SA 313 (SCA).

14. Counsel for SARS submitted that in event I do not grant the application for leave to appeal, the cross appeal will fall away. There is therefore no need for me to deal with the cross appeal.
15. However, in regard to the costs of this application for leave to appeal, I am of the view that the costs must follow the Court's decision in this instance.
16. In the premises I make the following order:
1. The application for leave to appeal is refused; and
 2. The Applicant is to pay the costs of the Respondent including the costs of Respondent's counsel.



S P MOTHLE
Judge of the High Court
Gauteng Division
Pretoria

For the Applicant:

Adv. P A Solomon SC
Assisted by Adv. J Boltar

Instructed by:

Edward Nathan Sonnenbergs
Sandton, Johannesburg

For the Respondent:

Adv. D Fine SC

Assisted by Adv. G D Goldman
 Adv. S Budlender

Instructed by: Klagsbrun Edelstein Bosman De Vries Inc
 Groenkloof, Pretoria.

Date of Hearing: 17 September 2015

Date of Judgment: 23 September 2015