

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

Case No. 21634/2021

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 25 August 2022

Date of judgment: 26 August 2022

In the matter between:

FORGE PACKAGING (PTY) LTD

Applicant

and

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

Respondent

JUDGMENT

(Application for leave to appeal)

BINNS-WARD J:

[1] The applicant, which is a taxpayer that is seeking to have set aside revised assessments of its taxable income issued by the South African Revenue Service in respect of its 2014, 2015 and 2016 financial years, has applied for leave to appeal against the judgment of this court refusing to entertain its application to challenge the Commissioner's decisions in review proceedings.¹ The history of the applicant's endeavours to challenge the revised assessments in review proceedings is set out in the principal judgment. I do not understand the applicant to take issue with that

¹ *Forge Packaging (Pty) Ltd v The Commissioner for the South African Revenue Service* [2022] ZAWCHC 119 (13 June 2022).

account, and it is therefore not necessary to revisit it in detail. It is nevertheless appropriate for present purposes to give a potted recapitulation of the background.

[2] Part B of Chapter 9 of the Tax Administration Act 28 of 2011 ('the Act') regulates objections and appeals by taxpayers who are aggrieved by an assessment. In summary, it provides for a series of steps. The taxpayer first lodges an objection to the assessment (s 104). SARS must inform the taxpayer of its decision in respect of the objection. The notice of the decision by SARS must state the basis for the decision and provide a summary of the procedures for appeal (s 106). If still aggrieved, the taxpayer may appeal either to the tax board or to the tax court established in terms of Part D of Chapter 9 of the Act (s 107). The objection and appeal procedures are prescribed in the rules made under s 103 of the Act. Section 107(5) provides that the SARS and the taxpayer may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the rules.

[3] The applicant duly advanced its objections in the manner contemplated in Part B of Chapter 9 of the Act. It (i) objected to the revised assessments (without first requesting better or additional reasons, as allowed in terms of Rule 6), (ii) was provided with SARS's decision in respect of the objections, (iii) accepted SARS's decision in part, (iv) lodged an appeal against those aspects of the revised assessments in respect of which it persisted with its objections and (v) unsuccessfully attempted to resolve the disputes through alternative dispute resolution.

[4] The applicable rules provide for an exchange of documents akin to pleadings for the purposes of defining the issues in an appeal under the Act. SARS is required to deliver a 'Statement of grounds of assessment and opposing appeal', as prescribed in terms of Rule 31 of the rules. The aggrieved taxpayer is thereupon required, in terms of Rule 32, to deliver its statement of grounds of appeal, in which it must set out the grounds upon which it is appealing and state the legal grounds and facts in the rule 31 statement that it admits and those that it contests.

[5] SARS duly delivered its statement in terms of Rule 31 in the Tax Court. The applicant, however, failed to respond with a statement in terms of Rule 32. Instead, it

brought a substantive application for judicial review in the Tax Court. The Commissioner then applied in the Tax Court for the striking out of the review application as an irregular step. The Tax Court struck out the review application but stayed further proceedings in the pending appeal for 30 calendar days to allow the applicant, if so advised, and with the required leave, to institute a review application in the High Court within that period.²

[6] The stay granted by the Tax Court required the applicant to institute proceedings in the High Court by 18 November 2021, failing which the hold on the appeal pending in that court would fall away. The applicant did not institute proceedings in the High Court within the period afforded to it by the Tax Court. It did so only on 17 December 2021. It sought the relief described in paragraph 1 of the principal judgment. In the meantime, it also delivered its statement of grounds of appeal in the Tax Court.

[7] Section 105 of the Act provides that '[a] taxpayer may only dispute an assessment or "decision" as described in section 104 in proceedings under this Chapter, unless a (sic) High Court otherwise directs'. It is noteworthy that, prior to being substituted by s 52 of Act 23 of 2015, s 105 of the Tax Administration Act used to read '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 supplied for emphasis. The underlined words were excised in the amendment.) Thus, whereas a taxpayer previously could mount a review challenge to an assessment in the High Court as of right, it now can do so only if it obtains an appropriate direction from the High Court permitting it to deviate from 'the default route'.

[8] The applicant, however, failed to seek a direction in terms of s 105 of the Act permitting it to challenge the revised assessments in review proceedings in its notice of motion. The omission occurred notwithstanding the express reminder in the Tax Court's judgment that it would require such leave.³ Its legal representatives appeared to labour under the misconception that it enjoyed a free-standing

² *Commissioner for the South African Revenue Service v FP (Pty) Ltd* [2021] ZATC 8 (19 October 2021).

³ In para 57 of the Tax Court's judgment.

entitlement under s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') to institute review proceedings. The Commissioner took the point that, in the absence of a direction in terms of s 105, the taxpayer was precluded from challenging the assessments other than in proceedings under Part B of Chapter 9 of the Act. It was only when it became evident during argument that the jurisdictional point taken by the Commissioner found favour with the court that the applicant's counsel, at my prompting, moved orally from the bar for the required direction.

[9] For the reasons fully set out in the principal judgment, this court declined to grant relief in terms of s 105 of the Act. The effect is that the disputes about the revised assessments, including any questions concerning their legality, fall to be determined not in a judicial review application, but in the already pending appeal in the Tax Court.

[10] It is firmly established that issues susceptible to challenge in judicial review proceedings may competently be decided by the tax court in the context of appeal proceedings in that court; see the full court judgments in *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T) at 671H-676E and *South Atlantic Jazz Festival (Pty) Ltd v Commissioner, South African Revenue Service* 2015 (6) SA 78 (WCC) at para 21-24 and the judgment of Van Winsen J in *ITC 936* (1962) 24 SATC 361, to which extensive reference was made in *Transvaalse Suikerkorporasie*. The full court's judgment in *Transvaalse Suikerkorporasie* was confirmed on further appeal on grounds that are not currently pertinent, but it was nevertheless noteworthy that the Appellate Division's judgment did not demur from the views expressed in the passage of the full court's judgment to which I have referred, see *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1987 (2) SA 123 (A).

[11] It is apparent from the judgment of the Tax Court⁴ that the applicant - apparently not appreciating that the Commissioner's objection went to the *procedural* means by which the applicant sought to prosecute its objections to the legality of the impugned decisions in that court, not to its right to rely on their alleged *substance* - relied on *South Atlantic Jazz Festival* loc. cit. to contend that the Tax Court should

⁴ Note 2 above, at para 34-37.

dismiss the Commissioner's objection to its review application in that court.⁵ The applicant was then content to argue strenuously that the Tax Court should decide the issues that it now argues should appropriately be heard only in the High Court. Its change of stance has not been explained.

[12] This court's refusal to give a direction in terms of s 105 of the Act that would have resulted in the possible hearing (subject to delay issues⁶) of a challenge to the impugned assessments on review in this court while parallel proceedings in the Tax Court on the same issues remained current implied that the taxpayer was held to what Sutherland ADJP, in *Absa Bank Ltd and Another v Commissioner, SARS* [2021] ZAGPPHC 127 (11 March 2021), 2021 (3) SA 513 (GP) in para 25, aptly described as '*the default route*'. The question was not whether this court had the jurisdiction to determine any of the issues in the appeal already pending in the Tax Court (that it does have jurisdiction is settled; *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* [2000] ZACC 21 (24 November 2000); 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC), especially at para 43-47); it was whether the applicant, *exceptionally*, should be permitted to avail of this court's jurisdiction instead of using the tailor-made mechanisms provided in Part B of Chapter 9 of the Act.

[13] This court's approach in principle to the question was encapsulated in para 37 of the principal judgment. This court then applied the principle stated there to the peculiar facts of the current matter in para 38-46 and 50 of the principal judgment.

[14] The questions now before the court in the application for leave to appeal are those posited by the potentially two-fold enquiry prescribed in s 17(1)(a) of the Superior Courts Act 10 of 2013, *viz.* whether the contemplated appeal would have a reasonable prospect of success; or whether there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. If I am unable to form a positive opinion in respect of either of those questions, I am bound by the provision to refuse the application.

⁵ See para 42 - 43 of the Tax Court's judgment.

⁶ See para 47-51 of the principal judgment.

[15] The application is brought on a multitude of grounds. Taken together, they, in essence, amount to a reiteration of the argument advanced by the taxpayer in the principal case, and I therefore do not propose to address them point by point. The central pillar of the argument is that proceedings in the Tax Court inhibit the applicant's entitlement to vindicate its right to administrative justice under s 33 of the Constitution and PAJA. For the reasons explained in the principal judgment and in the cases mentioned in paragraph 10 above, as well as in the applicant's own argument before the Tax Court mentioned earlier,⁷ there is no substance in the argument.

[16] In any event, as noted in the principal judgment, the applicant faces delay-related problems in mounting a review under PAJA that it does not face when raising the same grounds in its tax appeal. The applicant sought in the application for leave to appeal to argue that it would not need to obtain condonation in terms of s 9 of PAJA for a review in terms of s 6 of the Act because its appeal in the Tax Court was an '*internal remedy*' within the meaning of s 7 of PAJA and the time spent prosecuting it fell to be omitted from the 180-day time bar computation. There is no merit in the argument. It is not only wrong, but self-defeating. It is evident from s 105 of the Tax Administration Act that review proceedings in the High Court, if permitted, exceptionally, are an alternative to appeal proceedings in the Tax Court. And, in any event, were the pending appeal in the Tax Court indeed properly characterised as an '*internal remedy*', a PAJA review would ordinarily not be entertainable until the applicant had exhausted that remedy, which in this case it has not.

[17] The determination whether to give a direction in terms of s 105 of the Act is of a discretionary nature. Accepting that the character of the discretion is of the wide sort, rather than one involving the exercise of discretion in the narrow or strict sense, the position remains that another court would, on appeal, be circumspect about interfering with the decision unless it was clearly wrong. The principal judgment canvasses in detail how this court came to its decision. A dispassionate reconsideration of those reasons has left me unpersuaded that there is a reasonable prospect that an appellate court would hold that the decision was wrong. The real issue in this case is the extent of the applicant's contested tax liability, and the Tax

⁷ In para 11 above.

Court is the forum best equipped to determine that; cf. *Africa Cash & Carry (Pty) Ltd v CSARS* [2019] ZASCA 148 (21 November 2019); [2020] 1 All SA 1 (SCA); 2020 (2) SA 19, in para 52-53.

[18] I am also unpersuaded that there is any other compelling reason why an appeal against this court's judgment should be entertained, and none was contended for in the written grounds for the application for leave to appeal. There is nothing in the principal judgment that prevents the applicant from pursuing all its objections to the impugned decisions in the already pending appeal in the Tax Court. There are no conflicting judgments in point.⁸ The case does not involve any undecided point of important legal or public interest.⁹ Furthermore, and in any event, as noted by Cachalia JA in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17 (25 March 2020); 2020 (5) SA 35 (SCA) in para 2, 'the merits remain vitally important and are often decisive' when evaluating whether there is a compelling reason why an appeal should be heard.

[19] The application for leave to appeal is therefore refused with costs, including the fees of two counsel.



A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel: **Ruan Kotze**

Applicant's attorneys: **Theron & Partners**
Stellenbosch

⁸ The applicant's counsel referred to *A Way to Explore v Commissioner for South African Revenue Services* [2017] ZAGPPHC 541 (23 August 2017); 80 SATC 211. That is not a conflicting judgment; see note 2 in para 4 of the principal judgment.

⁹ In argument, the applicant's counsel sought to argue that the matter did give rise to questions of important legal or public interest. When I asked why, if he believed that to be the case, the applicant was seeking leave to appeal to the full court rather than the Supreme Court of Appeal, he replied that that was 'for strategic reasons'. He was not forthcoming with any particularity as to what such 'strategic reasons' might be.

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