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

Case No: 15899/2023

In the matter between:

KERBYN CAPE 2 (PTY) LTD Applicant

and

THE COMMISSIONER: SARS Respondent

Neutral citation: Kerbyn Cape 2 (Pty) Ltd vs The Commissioner: SARS (15899/2023) [2025] ZAWCHC (11 July 2025)

Coram: MANTAME J

Heard: 11 March 2025

Delivered: 11 July 2025

Summary: The applicant brought a review application under PAJA to challenge SARS' refusal to condone the late filing of tax objections relating to VAT (April 2011-February 2014 audit period) and Corporate Income Tax audits (2012-2014 audit period). In its opposition, SARS raised two points *in limine:* that the tax matters are exclusively reserved for Tax Court, and that the applicant has failed to exhaust internal remedies as contemplated in section 7 (2) (a)

(b) and (c) of PAJA. The High Court lacked jurisdiction over tax disputes governed by the Tax Administration Act (TAA), and that the applicant should have exhausted internal remedies contemplated in Chapter 9 Dispute Resolution mechanism of the TAA. Tax disputes should first be resolved through the objection and appeal process in the Tax Court which has exclusive jurisdiction - unless the High Court expressly directs otherwise under section 105 of the TAA. The applicant argued that internal remedies were no longer available due to the lapse of time but failed to apply for such a directive or prove exceptional circumstances justifying its circumvention of the Tax Court process. The Court upheld the points in *limine* and found that the applicant had not properly exhausted internal remedies, and that the High Court lacks jurisdiction to hear the matter. Consequently, the application for review was dismissed in its entirety.

ORDER

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1 The respondent's points *in limine* succeeds.

2 The review application is dismissed

3 The applicant is ordered to pay costs on Scale B.

(DRAFT)JUDGMENT ON 08 JULY 2025

MANTAME J

Introduction

[1] The applicant brought a review application in terms of the Promotion of Administration Justice Act 3 of 2000 (PAJA) for the refusal of the South African Revenue Services (SARS/ respondent) to condone the late lodgement of an objection relating to VAT and Corporate Income Tax audits for April 2011 — February 2014 audit period. The applicant asserted that the respondent's refusal of an application for condonation was said to be irrational, unreasonable and procedurally unfair in terms of PAJA.

[2] The respondent opposed this application and raised two points *in limine* that, (i) tax matters are generally reserved for the exclusive jurisdiction of the tax court; and that (ii) the applicant has failed to exhaust internal remedies as contemplated in section 7 (2) (a) (b) and (c) of PAJA. The applicant was required to exhaust internal remedies under Chapter 9 of the Tax Administration Act 28 of 2011 (the TAA). Further, if the applicant relied on the provision of Section 105 of TAA, it has to seek a direction that the High Court "otherwise directs", which then would enable this Court to deal with the impugned decision.

Background Facts

[3] On 20 October 2015, SARS selected the applicant for an audit and issued notices in terms of Section 40 read with Section 42 of the TAA for both Value Added Tax (VAT) and Corporate Income Tax (CIT). This became a long, drawn-out process that resulted in a series of disputes.

VAT Audit and Objections

[4] The VAT audit covered the periods April 2011 to February 2014. Following a Letter of Audit Findings issued on 11 December 2015, SARS finalised its audit on 5 February 2016 and issued additional assessments, including understatement penalties and interest. Due to the applicant's director being overseas during the relevant period's, critical documents relevant in the lodgement of an objection were not immediately obtained as it was stored in the director's residence in Cape Town. The director was the sole director of the applicant and no other person had access to his premises. The absence of the applicant's director resulted in the applicant's inability to file its objection within the 30-day period. The necessary documents were retrieved upon his return and he then sought expert tax advice.

[5] On 26 October 2016 the applicant submitted the 'first objection' and requiring an outcome to be delivered to the applicant by 07 December 2016. This objection was in relation to the additional assessment raised for VAT for the period June 2011 VAT period (the first VAT objection). On 21 February 2017 SARS issued the applicant with a notice of invalid objection in respect of the first VAT objection (the first VAT notice of invalid objection).

[6] The applicant filed a 'second objection' ❑n 7 August 2017 (the second VAT objection). SARS responded with a notice of invalid objection letter. On 29 August 2017, SARS issued a Late Submission of Objection Declined Letter, declining the submission of the applicant's second VAT objection.

[7] At this point, the applicant decided to escalate the dispute to the Office of the Tax Ombud based on the SARS's repeated failure to allow condonation for the late filing of the objection. It does not appear that the Office of the Tax Ombud entertained this complaint significantly other than to refer it back to SARS for its attention. On 6 March 2019, the applicant filed a consolidated VAT/CIT objection. SARS in its response, issued a late submission of Objection Declined letter informing the applicant that exceptional circumstances were not demonstrated and that the assessments had prescribed under Section 99 (1) of the TAA.

CIT Audit and Objections

[8] SARS audited the applicant for Corporate Income Tax and issued a letter on 20 October 2015 for the audit of 2012 to 2014 assessment years. As it happened with the VAT audit, SARS issued its Finalisation of Audit Letter on 5 February 2016 imposing additional assessments and understatement penalties. Essentially, the total adjustments made amounted to R2 285 024.00 as the capital amount and 8172 732.00 as understatement penalties imposed. Certain CIT's debts were raised by the respondent.

[9] On 27 May 2016, and beyond the 30-day stipulated period the applicant submitted a notice of objection in respect of the additional assessments for CIT, issued by SARS for the 2012 year of assessment (CIT's first objection). The applicant believed that SARS misdirected itself in relying upon Section 10 (4) of the VAT Act 89 of 1991 and Section 22 (8) of the Income Tax Act 58 of 1962 (ITA) in its reasons with regard to the assessment. On 30 June 2016 the applicant addressed a letter to SARS providing reasons why an objection was not timeously submitted. On 21 July 2016,

SARS informed the applicant that the objection was invalid as the first objection was lodged outside the prescribed timeframe. The applicant continued to file further objections and SARS rejected them on the basis that no exceptional circumstances were provided.

[10] The applicant stated that in October 2016 and by invitation from SARS to file a further objection, the applicant proceeded to file a third objection, reiterating its exceptional circumstances. SARS once more declined this objection on 21 February 2017. The applicant filed a fourth objection on 17 August 2017 following a further invitation from SARS to object. Similarly, this was declined by SARS. On 21 September 2017 SARS issued a Late Submission of Objection Declined Letter and stated that the reasons provided for the condonation of late filing were not exceptional.

[11] After the applicant submitted a complaint to the Office of the Tax Ombud in June 2018 for both audits, the Ombud concluded that SARS should be provided 60 business days to conclude the applicant's objection. In the event the applicant not receiving the response, a complaint be lodged with SARS Complaints Management Office.

[12] As stated above, on 6 March 2019 the applicant submitted the VAT/CIT consolidated objection. SARS declined the objection on the basis that the exceptional circumstances were not demonstrated and that the assessments had prescribed under Section 99 (1) of the TAA.

[13] Central to the objections raised by the applicant is the incorrect classification of the scale of ERF 2810 Constantia that was sold by the applicant for R13 million. The applicant stated that SARS incorrectly treated the sale as revenue receipt rather than capital in nature resulting in an inflated tax liability. The applicant alleged that SARS incorrectly stated that the Constantia property was a trading stock and that the sale was part of a profit — making scheme when the decision to sell was based on the failure of a rental agreement and the discovery of latent defects that rendered the property unsuitable for its intended purpose.

Application for condonation for late filing of this review application

[14] The applicant made an application for condonation as it was patently clear that this review application was woefully out of time. It was contended that this Court has discretionary authority under Section 9 (2) of PAJA to extend the 180-day period prescribed in Section 7 (1) of PAJA provided that the interest of justice warrants such extension. The Court's attention was drawn to *Van Wyk v Unitas Hospital* (Open Democratic Advice Centre as *Amicus Curiae* where it was stated that an explanation must not merely set out the duration of the delay but must demonstrate why the delay occurred, why it was unavoidable, and why it should be excused in the interest of justice.

[15] The applicant contended that it has furnished an explanation why it was late in its submission of its objection, there were constant engagements with SARS and at some point, there were settlement negotiations. Should a condonation be granted

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[2007] ZACC 24; 2008 (2) SA472 (CC) at para 20, *Nair v Telkom SOC Ltd and Others* (JR 59/2020) [2021] ZALCJHB 449 (7 December 2021) para 11

there is no prejudice to SARS and the interests of justice favoured the granting of condonation, the applicant said.

[16] The respondent did not oppose this application. Although the reasons for lateness are not fully set out and this Court cannot gauge the degree of lateness as none has been put before this Court for consideration, this Court will condone the unspecified timeframe for lateness for the reason that this matter was fully argued before this Court for determination.

[17] Before proceeding to the main issues for determination, this Court will first deal with the points *in limine* that were raised to the extent that they might be determinative of the proceedings.

Points in limine

(I) Jurisdiction

[181 SARS submitted that the Tax Court is reserved for the exclusive jurisdiction of tax matters. It is not ❑pen for the applicant to choose a Court where its dispute has to be determined. Section 105 of the TAA provides as follows:

> `A taxpayer may only dispute an assessment or decision in section 104 in proceedings under this Chapter, unless a High Court otherwise directs." [Emphasis added]

[19] The submission went on to state that reference to *"unless a High Court otherwise directs",* means first the impugned decision may only be disputed by means of the objection and appeal process as contemplated in Chapter 9 of the TAA. Thus,

a High Court will direct otherwise where exceptional circumstances exist enabling it to do so. In the context of Section 105 of the **TAA "exceptional** circumstances" means 'unusual or different...markedly unusual or specifically different:[2]

[20] SARS contended that the applicant failed in this Court to seek direction that the High Court "otherwise directs", which would enable the High Court to deal with the dispute pertaining to the impugned decision. As a result, the High Court has no jurisdiction to entertain this application. On this ground alone it has to be dismissed.

(ii) Failure to exhaust internal remedies

[21] SARS argued that any party approaching the High Court for review in terms of PAJA is bound to first exhaust his internal remedies. For instance, there is a synergy between Section 105 of TAA and the applicant's duty to exhaust its internal remedies as contemplated in Section 7 (2) (a), (b) and (c) of PAJA. Section 7 (2) (a), (b) and (c) of PAJA provides as follows:

1. a party is duty bound to exhaust internal remedies in respect of administrative action;
2. a court will not review an administrative action in terms of PAJA unless a party has first exhausted his internal remedy;

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[2] *Commissioner for the South African Revenue Services v Rappa Resources (Pty) Ltd* 2023 (4) SA 488 (SCA); *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* 86 SATC 474 (8 November 2023) and *Agenbach N.O. and Others v Commissioner for South African Revenue Services 86* SATC 125 (23 October 2023)

3. a court may, if it is not satisfied that any internal remedy has been exhausted, direct the party concerned to first exhaust such remedy before instituting proceedings in a court for judicial review in terms of PAJA; and
4. a court may, in exceptional circumstances and on application by the party concerned, exempt such person from the obligation to exhaust an internal remedy if the court deems it in the interest of justice.

[22] The applicant it was argued did not attempt to address the basis upon which it can be exempted from the aforementioned provisions of Section 7 of PAJA. For those arises, it was submitted that the review application has to be dismissed.

[23] The applicant argued that the Tax Court is a creature of statute and its jurisdiction is limited to what is expressly provided in the TAA and the Tax Court Rules. It was therefore submitted that due to lapse of time the applicant was procedurally barred from filing an appeal under Section 107 of the TAA. No valid appeal existed, and the Tax Court had no jurisdiction to entertain this matter. If no appeal exists under Section 107, the Tax Court cannot assume jurisdiction where none is granted by the statute.

[24] Rule 50(1) of the Tax Court Rules states that any application brought under Part F must be instituted within 20 business days of the cause of complaint. Rule 52 deals with condonation applications that falls under Part F. Meaning, that condonation applications under Rule 52 must be brought within 20 business days of SARS refusal to condone the late objection. The timeframe has already lapsed.

[25] In *Gold Kid Trading* CC *v Commissioner of SARS*[3], it was said that the High Court held:

> The Tax Court does not have the power to consider whether an assessment made by SARS, is reviewable on the basis of abuse of power and illegality, or any reviewable grounds envisaged under PAJA or the common law.'

[261 It was submitted that the Tax Court does not have jurisdiction to hear review applications such as this one.

[27] With regard to the allegation that the applicant has failed to exhaust internal remedies, the applicant submitted that Section 107 (2) of TAA presents strict deadlines for lodging an appeal. For instance it provides that an appeal must be filed within 30 business days of the disallowance of the objection; SARS has limited discretion to extend this by 21 business days if reasonable circumstances exist and up to 45 business days in exceptional circumstances; and beyond the total of 75 business days, SARS has no legal discretion to extend the time period for filing an appeal.

[28] It was submitted that in *CSARS v Danwee* the court dealt with whether SARS had jurisdiction to decide an objection to a refusal by SARS to extend the period within which an appeal may be lodged beyond the total of 75 business days. The court stated as follows:

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3 [20181 ZAGGRIHC 710 at Para 64
4 (399/2017) [2018] ZACSA 38 (28 March 2018)

> The appellant [SARS] would not have the legal power to uphold an objection to a refusal to extend the time for the lodging of an appeal beyond the period expressly provided for in s107(2)[5].'

[29] The applicant submitted that all those time periods referred to in Section 107 were unachievable as the appeal period had already expired.

Discussion

[30] As already stated above, the notification of audit letter was issued on 20 October 2015 notifying the applicant that SARS would be auditing the applicant for VAT periods April 2011 to February 2014 and C1T periods 2012 to 2014. On 11 December 2015, SARS issued a Letter of Audit Findings relating to VAT and informed the applicant of its intention to raise additional assessments including understatement penalties and interest. On 5 February 2016 SARS issued the finalisation of Audit letter relating to VAT and CIT which informed the applicant of its intention to raise additional assessments, including the imposition of understatement penalties and interest.

[31] The audit process started on 20 October 2015 and was concluded on 5 February 2016. The director of the applicant merely stated that he was outside the Republic during the periods that the objections were to be filed. He returned towards the end of March 2016. On his return he provided his accountants with certain documents that were contained in the safe at home and thereafter sought an opinion from Professor Haupt. No proof or evidence that served before this Court that the director of the applicant was overseas, no specific time was set out that he spent

5 !bid para 17

overseas. No specific time was set out that the accountants worked on the documents that were in the safe and at what time was Professor Haupt's opinion became relevant and was sought; when was Professor Haupt's advice received.

[321 Importantly, the objection was filed on 26 October 2016; i.e. the first objection. That SARS issued a notice of invalid objection on 21 February 2017, in my view was the proper time for the applicant to escalate the dispute to the next level — of exhausting internal remedies, rather than filing multiple objections that were inconsequential.

[33] In fact SARS submitted correctly that it was incumbent upon the applicant to challenge the first notice of invalid objection by (i) objecting to it in terms of Section 104 (2) of TAA; (ii) and should the objection be disallowed it was supposed to have lodged an appeal to the Tax Court in terms of Section 107 (1) of TAA; (iii) should an appeal be disallowed, it was supposed to proceed to launch an application in terms of the old Tax Court Rules for an order in terms of Section 107 (2) of the TAA extending the period within which an objection had to be lodged by it, and/or generally had to follow the provisions of Chapter 9 of TAA. It was not permitted or open to it to file numerous notices indefinitely from 22 July 2016 to 6 March 2019. The applicant seems to be the author of his misfortunes as he allowed time to [apse without achieving any joy with SARS.

[34] In *Koyobe v Minister of Home Affairs*[6]*,* the Constitutional Court held that:

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6 20W (4) SA 327 (CC) para 47

14/ Although the duty to exhaust defers access to courts, it must be emphasised that the mere lapsing of the time period for exercising an internal remedy on its own would not satisfy the duty to exhaust, nor would it constitute exceptional circumstances. Someone seeking to avoid administrative redress would, if it were otherwise, simply wait out the specified time — period and proceed to initiate judicial review. That interpretation would undermine the rationale and purpose of the duty. Thus, an aggrieved party must take reasonable steps to exhaust available internal remedies with a view to obtaining administrative redress.'

[351 In any event, the applicant was wrong when it computed the time-frames using the new Tax Court Rules that came into effect 10 March 2023. The rules cannot apply retrospectively to include this matter that dates back to October 2015. Surely the old Tax Court Rules apply in this regard (Rules published on 11 July 2014). To the extent that the applicant relied heavily on Section 105, in *Commissioner for South African Revenue* Services v *Rappa Resources (Pty) Ltd',* the SCA clarified that a High Court may not consider a review application without a taxpayer first having applied for the High Court's direction. The SCA held that:

'An order under s105 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 it seems to be suggested, that the mere say so of the taxpayer that the dispute is not one contemplated by s104 or over which the tax court lacks jurisdiction can, without more, simply carry the day."

[36] The assertion by the applicant that Section 105 directive in this instance was not required because Chapter 9 was already closed when this application was

[7] ZASCA 28 (2023); 2023 (4) SA 488 (SCA) para 24

launched is flawed. If indeed it was inaccessible, it allowed it to be inaccessible. In any event, in my view such assertion is misguided and/or misplaced. The SCA went on to state that:

> 'The current wording of s105 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 before the Tax Board or the tax Court, be exhausted before a higher court is a ooroache4 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 Hioh Court to direct otherwise should the specific circumstances of a case require it'[8] [Emphasis added]

[37] The SCA re-enforced that section 105 is intended to ensure that internal remedies such as the objection and appeal process are exhausted before approaching a Tax Board, Tax Court or a higher court. And in these disputes the Tax Court deals with these disputes as a court of first instance on a trial basis. Most importantly, the High Court's right to direct otherwise remain intact should the specific circumstances of a case require.

[38] In these proceedings, the applicant suggested that this Court has jurisdiction to determine this appeal as the internal remedies and the jurisdiction of the Tax Court is no longer available. First, the applicant has failed to even allege that this review application was filed within a reasonable period. However, it made an application for

[8] !bid para 19

condonation without the satisfaction of this Court, ❑r without properly explaining the reasons for the delay, length of the delay (remained unknown), prospects of success on the merits, prejudice to the respondent if a condonation is granted, and any other relevant factor.

[39] As stated above, condonation was granted for purposes of finality to these proceedings since the matter was argued to its finality — not that the applicant made a proper case for the unknown period of lateness to be condoned. Condonation is not for the mere asking. Since the applicant relied on Section 105, he ought to have asked for this Courts' directions as stated in *Rappa.*

[40] If regard is had to the changing legal landscape, the high court has jurisdiction to hear and determine income tax cases turning on legal issues. In *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Services*[9] the SCA stated that:

> '...it is important to recognise that the legislative landscape has changed significantly since the decision of the Constitutional Court in Metcash. Prior to the amendment of s105, 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." Emphasis added]

9 86 SATC 474 para [21]

[41] Plainly, the procedure is clearly set out that a taxpayer has to exhaust internal remedies, then approach the Tax Court for appeal or an order in terms of Section 107 (2) of the TAA extending the time in which the objection had to be lodged. A taxpayer is not entitled to bring review proceedings at its peril without exhausting all these procedures and/or without requesting this Court to "direct otherwise". In *Rappa* the SCA made it 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 the court. The High Court will only permit such a deviation in exceptional circumstances on which in this case do not exist. This much is clear from the language, context, history and purpose of the section.

[42] Absent a court order or a directive in these review proceedings, this Court does not have jurisdiction to hear the review application. Correctly put, in the same vain this Court was not asked for an order to "direct otherwise."

[43] The applicant seems to suggest that they do not have a redress at the Tax Court since it is a creature of statute. Be that as it may, if a proper case can be made out by the applicant for condonation, there is a condonation procedure similar to the High Court one at the Tax Court. There is nothing preventing the applicant from following this procedure.

[44] For these reasons, the points *in limine* raised by the respondent should succeed. It would not be necessary to consider the main application as this Court has no jurisdiction to do so.

[45] In conclusion, the following order is granted.

45.1 The respondent's points *in limine* succeeds.

45.2 The review application is dismissed.

45.3 The applicant is ordered to pay the costs of this application on Scale B including costs of Counsel.

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Adv KD Williams

Instructed by: Pieterse Sellner Erasmus

For the Respondent: Adv A Coetzee

Instructed by: Mathopo Moshimane Mulangaphuma Inc.