

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA**

CASE NO: 38211/21

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

.....
SIGNATURE

...24/07/2023.....
DATE

In the matter between:

THE TRUSTEES OF THE CC SHARE TRUST

First Applicant

THE TRUSTEES OF THE CC INVESTMENT TRUST

Second Applicant

THE TRUSTEES OF THE LSC SHARE TRUST

Third Applicant

THE TRUSTEES OF THE LSC INVESTMENT TRUST

Fourth Applicant

THE TRUSTEES OF THE JCCD SHARE TRUST

Fifth Applicant

THE TRUSTEES OF THE JCCD INVESTMENT TRUST

Sixth Applicant

and

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

Respondent

JUDGMENT

Manoim J

Overview

- [1] The genesis of this case is a dispute between the applicant trustees who are taxpayers, and the respondent, the Commissioner for South African Revenue Service (“SARS”). The original issue in that dispute was whether the applicants had been correctly assessed by SARS. They maintained they have not. But the purpose of the present case before me is not to consider the merits of that dispute. Rather it is a prior jurisdictional dispute hence its presence in this court and not the Tax Court. The applicants want to have the assessments set aside because they argue they were made unlawfully for want of compliance by SARS with its own statutes. They had also requested the Commissioner to withdraw the assessments. This the Commissioner refused to do. This latter decision is also a subject of the review. I will from now on refer to the trustees as taxpayers.
- [2] SARS denies it has acted unlawfully. But it has taken the dispute a step further. It says the taxpayers should not be in this court as they have failed to exhaust their internal remedies. SARS seeks to have the application dismissed on this basis alone. To summarise: there are three disputes between the taxpayers and SARS;

(i) a dispute about whether the taxpayers have been correctly assessed; (ii) a dispute about whether SARS followed the correct process prior to levelling the assessments; and (iii) a dispute about whether the taxpayers were required to exhaust their internal remedies instead of coming to this court. This case concerns only the latter two disputes.

- [3] If the taxpayers succeed in their review that is the end of the adverse assessments – as the time taken for SARS to issue a new assessment has lapsed.¹ If SARS is correct in its preliminary objection, the case in this court would end and the taxpayers would have to explore their internal remedies, which effectively means following the objection process set out in terms of section 104 of the Tax Administration Act, 28 of 2011 (“TAA”) and if unsuccessful, litigating in the Tax Court.

Background

- [4] The taxpayers are trustees of six trusts. These trusts directly and indirectly own interest in companies in a group known as the Amalgamated Metals Recycling (“AMR”). In 2016, Insimbi, a JSE listed company expressed an interest in buying some of the companies that formed part of the AMR group by acquiring them from the taxpayers. To achieve this objective the taxpayers adopted what they termed a “...*disposal methodology that gave effect to their commercial objectives*”. Stripped of its jargon it meant doing the transactions in way that avoided that they

¹ I make no finding that this is the case. This is the import of one of the arguments made by the trustees’ counsel during the hearing before me.

considered avoided liability for capital gains tax. I will refer to these transactions as the AMR transactions.

- [5] The AMR transactions were implemented between July and December 2016 and thus in the taxpayers' 2017 tax year. SARS issued its original assessments for that tax year on 28 February and 9 March 2018. In February 2019 SARS sent queries to the taxpayers about entities that they collectively held a 100% interest in. The taxpayers responded to the queries. They say they did not hear from SARS again, until nearly a year later. On 21 January 2020, SARS notified each taxpayer in terms of section 42(1) of the TAA, that it would conduct an audit in respect of the tax consequences of the AMR transactions in the 2017 tax year.² SARS requested information from the taxpayers which they say they provided the next month.
- [6] But then came the events that triggered this case. On 30 July 2020 SARS issued each taxpayer with a notice in terms of section 80J (1) of the Income Tax Act, 58 of 1962 (ITA), inviting the taxpayers to give reasons to SARS, why it should not apply the general anti-avoidance Rule in Part IIA of Chapter III of the ITA.
- [7] Briefly, Part IIA of the Income Tax Act, 58 of 1962 ("ITA") deals with the general anti-avoidance rules known as GAAR. SARS applies this provision when it considers that a taxpayer has entered into an arrangement designed to avoid

² Section 42(1) states: "A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit".

anticipated tax liability. One of the tests applied is that the arrangement is conducted in a manner that '[...] *lacks commercial substance in whole or in part.*'³

[8] The letter of 30 July is one of the two letters whose contents are crucial to the case. As I explain later, this letter, on SARS version, is purportedly compliant with two sections of the statutes – section 80J of the ITA and section 42(2)(b) of the TAA. I will refer to it neutrally as the “July letter”.

[9] Since compliance with section 42(2)(b) is central to the dispute I set out its contents in full:

“(2) Upon conclusion of the audit or a criminal investigation, and where -
a) the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or
(b) the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104 (2).”

[10] The taxpayer’s right to respond to a notice in terms of section 42(2)(b) is contained in section 42(3) which states:

³ Section 80A(a)(ii).

“(3) Upon receipt of the document described in subsection (2) (b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.”

[11] Section 80J of the ITA is a longer provision, but its terms are also relevant to the dispute:

80J Notice

(1) The Commissioner must, prior to determining any liability of a party for tax under section 80B, give the party notice that he or she believes that the provisions of this Part may apply in respect of an arrangement and must set out in the notice his or her reasons therefor.

(2) A party who receives notice in terms of subsection (1) may, within 60 days after the date of that notice or such longer period as the Commissioner may allow, submit reasons to the Commissioner why the provisions of this Part should not be applied.

(3) The Commissioner must within 180 days of receipt of the reasons or the expiry of the period contemplated in subsection (2) -

a) request additional information in order to determine whether or not this Part applies in respect of an arrangement;

(b) give notice to the party that the notice in terms of subsection (1) has been withdrawn; or

(c) determine the liability of that party for tax in terms of this Part.

(4) If at any stage after giving notice to the party in terms of subsection (1), additional information comes to the knowledge of the Commissioner, he or she may revise or modify his or her reasons for applying this Part or, if the notice has been withdrawn, give notice in terms of subsection (1).

- [12] (Although the two sections seem to suggest two different routes to inform the taxpayer of a potentially adverse outcome, SARS argues that with the exception of the time periods, they are sufficiently similar to be combined in a single notice. I return to this argument later once I conclude the chronology.)
- [13] The taxpayers' attorneys, Werksmans, replied to the July letter in October that same year. The response was detailed whilst at the same time pointing out what the attorneys alleged were errors contained in the notice. SARS did not concede this. Instead, SARS described the Werksman's letter as comprehensive but flawed. The backhanded compliment seems to serve two purposes. First, that SARS did not accept the critique of its application of GAAR but at same time wanting to make the point that the taxpayers had engaged fully with SARS' contentions and thus a riposte to suggestions that they had not been given the right to be heard.
- [14] In response to the October letter, SARS requested further information in terms of section 80J (3) of the ITA. SARS says this was because it had become evident that additional information was required. These additional request were made on two occasions; on 30 November 2020 and 25 January 2021. The taxpayers responded twice; on 18 January 2021 and 11 February 2021.

- [15] Then came the second letter crucial to these proceedings. SARS wrote to the taxpayers on 25 March 2021 a letter headed *“Finalisation of audit: Restructuring and sale of AMR Group Year of assessment:2017*. I will refer to this letter from now on as the March letter.
- [16] In the March letter SARS sets out its reasons for rejecting the taxpayers’ responses and why it considered that GAAR applied to the transactions. In paragraph 6 of the letter is a table which contains a summary and explanation of the proposed adjustments. In essence the table sets out an amount for the capital gain. This is followed by a calculation of the tax liability which is expressed as a percentage of the capital gain. Finally, there is an amount for the understatement penalty, which is calculated as 75% of the tax liability. On the same day SARS sent out separately a letter of assessment to each taxpayer setting out the relevant adjustment and penalties.
- [17] After receiving these letters – dated 25 March 2021 – which the taxpayers term the “first decision”, their attorneys wrote back to SARS on 20 April 2021 requesting that the two communications received by each taxpayer i.e., the March letter and the assessment letter be withdrawn. This request was based on section 9 of the TAA which states that a decision of a SARS official may be withdrawn, inter alia, at the request of the relevant person. On 26 April 2021 SARS responded and refused the requests. The taxpayers refer to these decisions as the second decisions.

- [18] The subject of the taxpayers' review is for the court to review and set aside the first and second decisions or put differently, the March letter and the letter of 26 April 2021. The taxpayers contend that the March letter did not comply with the requirements specified in section 42(2)(b) of the TAA. That justified them asking SARS to reconsider its decision. When SARS refused to do so it thus failed to comply with section 9 of the TAA, and this gave rise to the second reviewable decision.
- [19] To support their allegations of unlawful administrative action the taxpayers rely on The Promotion of Administrative Justice Act, 3 of 2000, ("PAJA") and in the alternative raise a legality review. In relation to the first decision – the non-compliance with section 42(2)(b), the taxpayers contend that they were denied *audi alteram partem*. They say this right was compromised in these respects:
- a. Their right to receive an audit outcome letter;
 - b. The right to be able to consider an audit outcome letter;
 - c. The right to respond to the audit outcome letter; and
 - d. The right to have SARS consider their response to the letter.
- [20] What the taxpayers seek to portray is that SARS embarked on an incomplete process. But SARS does not rely on the 25th March letter as the one that complies with section 42(2)(b). Instead, it relies on the earlier July letter. This letter is headed "*Section 80J Notice*". Granted it makes no reference to section 42(2)(b). But according to Dr Marcus, who was the senior specialist from SARS responsible for the investigation, the letter was: (i) sent on the conclusion of the audit (recall this

is one of the requirements in section 42(2)(b); and (ii) was a combination of both a section 80J notice, and a section 42(2)(b) notice, despite the fact that the letter does not say so in express terms.

[21] The taxpayers dispute this and call it a *post hoc* reconstruction. Marcus however responds by saying that when performing a GAAR exercise, SARS combines both notices in one and that the taxpayers' attorneys who are specialists in this area, ought to have known this. In argument SARS counsel have performed a comparative exercise to contend that the July letter, despite not mentioning section 42(2)(b), conforms to all the requirements made out in that section. SARS thus argues that the failure to expressly indicate that letter was also issued in terms of section 42(2)(b), elevates form over substance.

[22] What distinguishes the July letter from the 25 March letter, is that the July letter invites the taxpayers to: “[..] *submit reasons why the provisions of Part IIA of the Income Tax Act should not be applied*” and further, why any understatement penalty should not be imposed. Also, SARS gives the taxpayers 60 days to respond. It points out that this period is in terms of section 80J, but it redounds to the benefit of the taxpayers as it is longer than the 21 days for a response provided by section 42(2)(b).

[23] But the taxpayers have subsequently argued that if the July letter purports to comply with section 42(2)(b) then it is deficient on other grounds.

- [24] First, it is argued that to comply with section 42(2)(b) the notice has to come after audit has been concluded. They make two arguments in this respect. Firstly, *ex facie* the letter itself it says: “SARS has completed a ‘preliminary audit in respect of certain of the transactions’”. The taxpayers state that a preliminary audit is not an audit that has been concluded.⁴ Next, they make a contextual argument. Because subsequent to the July letter SARS requested further information from them which they provided, this suggests the audit could not have been concluded in July.
- [25] The taxpayers next ground was that the July letter was deficient because it did not set out the amount that had been assessed. It was only later in the March letter, to which the taxpayers were not invited to respond, that their tax liability was set out in a table.⁵
- [26] The position of the taxpayers at the end of the argument appears to be this. Neither the March letter nor the July letter comply with section 42(2)(b). The March letter did not give them the right to respond, hence it was not compliant with the 21 day requirement of the section, and they were denied their right to be heard. The July letter whilst giving the taxpayers an opportunity to respond is also non-compliant with the section because the audit had not yet been concluded at that time, and in addition, no amount for the assessment was stipulated. Thus, irrespective of which letter purports to be the section 42(2)(b) notice they have been denied *audi*. The

⁴ The subsection refers to *conclusion* of the audit not *completion*, but I don't understand that the taxpayers make anything of this point; their focus is on the choice of the word preliminary.

⁵ This is contained in paragraph 6 of the March letter which I referred to earlier in paragraph 16.

only difference is that in relation to the March letter they were given no further opportunity to respond before the assessment and hence the denial of *audi* was absolute. While they were given an opportunity to respond to the July letter, this was inadequate because it was given to them prematurely (the investigation had not been concluded) and without all the facts (no assessment amount was stipulated) and hence was inadequate and accordingly again a denial of *audi*. But SARS does not rely on the March letter as its compliance with section 42(2)(b). The taxpayers must accept this fact. This then leads to further consideration of the July letter. That entails an examination of what constitutes adequate *audi*.

[27] Although a number of cases were cited which deal with the significance of *audi* they were not in point as the July letter cannot be construed as an outright denial of *audi*. Both sections 80J and 42(2)(b) create an iterative process. The taxpayer is given SARS' initial view and then given an opportunity to respond to it, then there are further requests for information before a final view is adopted.

[28] Here a decision that the taxpayers also relied on from the Federal Court of Australia which was cited with approval by the SCA in the *Phambili Fisheries* case⁶ has been more helpful because it deals with the test of the adequacy of *audi* in an iterative administrative process.

[29] In that case, *Ansett Transport Industries (Operations) Pty Ltd v Wraith*⁷, the court explained this in two ways. First, it explained the rationale for doing so:

⁶ *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) par 40
⁷ [1983]FCA 179; (1983)48 ALR 500, 507

“[The] decision-maker [must]) explain his decision in a way which will enable a person aggrieved to say, in effect: ‘Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.

[30] Then it explained, and hence relevant to the present case, the threshold for the adequacy of reasons:

“This requires that the decision-maker should set out his understanding of the relevant law any findings of fact on which his conclusions depend (especially) if those acts have been in dispute and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement.”

[31] But as this decision contemplates in order to determine adequacy this requires an exercise in examining the facts. SARS contends in its argument on the merits of the review that it has given adequate *audi*. However, it argues this point does not need to be decided now given its preliminary objections to which I now turn.

SARS in limine objections

[32] SARS argues that the review is incompetent on two grounds. First, the case cannot be considered without a direction from this court in terms of section 105 of the TAA. Although belatedly such a direction was sought, SARS argues that the threshold to get such a direction has not been made out in the papers. Secondly, relief is incompetent because the taxpayers have failed to exhaust their internal remedies as required in terms of section 7(2) of PAJA. Both statutes require the taxpayers to show that exceptional circumstances exist.

Section 105 of the TAA

[33] This section states:

“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”

[34] Section 105, in its current form, is relatively recent. Prior to this as the SCA explained in the leading case on this section, *Rappa Holdings*:⁸

“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

⁸ *Commissioner for South African Revenue Services v Rappa Resources (Pty) Ltd* 2023 JDR 0861 (SCA)

rule is that a taxpayer had to follow the prescribed procedure unless a high court directs otherwise.”⁹

[35] Section 105 must then be the point of departure before I consider any other issues. Without a direction as contemplated in that section the High Court does not have jurisdiction over a case of this nature. Again, in *Rappa*, the SCA followed an earlier decision of the Constitutional Court in the *Standard Bank* case which held that where there is a jurisdiction challenge this must be decided first.¹⁰

[36] The taxpayers did not deal with this section in their notice of motion or in their founding affidavit. It was raised by SARS in its answering affidavit, and it was only dealt with by the taxpayers in their replying affidavit, although it is apparent from the tone of this affidavit that this was a reluctant concession. Nevertheless, at the same time they also amended their notice of motion to include the following relief:

“To the extent necessary, the applicants are exempted, in terms of section 7(2)(c) of the Promotion of Administrative Justice Act, 2000, from exhausting their internal remedies; and it is directed that this review may proceed in terms of section 105 of the Tax Administration Act, 2011.”¹¹

[37] Even this formulation – with its ‘*extent necessary*’ qualification - exhibits the taxpayers ambivalence about the need for them to get a direction. But be that as

⁹ *Ibid* paragraphs 17- 18. *Rappa* was decided in 2023, sometime after the pleadings in this case had closed, and the initial heads of argument were filed. SARS places much reliance on this decision, and it explains why the parties arguments have shifted during the course of this litigation in response and hence the filing of several further sets of heads of argument.

¹⁰ *Competition Commission of South Africa v Standard Bank of South Africa* [2020] ZACC 2; 2020 (4) BCLR 429 CC (Standard Bank).

¹¹ This became paragraph 2A of the amended notice of motion.

it may, the reluctance is now history. Granted SARS contended that this change of direction could not be made in a replying affidavit. The taxpayers contended in response that this was not a new case being made out to justify the amended relief, as the same issues had already been raised in the founding papers. I am prepared to accept that this is the case and go on to the fundamental issue which is whether a case for a direction in terms of section 105 or under section 7(2)(c) of PAJA has been sufficiently made out.

[38] Section 105 does not stipulate what the threshold test should be. But this has now been clarified in *Rappa*.

[39] There the court held, referring to section 105 that:

“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.” (My underlining)

[40] Similarly, in terms of section 7(2)(c) of PAJA the test for a court to exempt a party from following internal remedies is “*exceptional circumstances*”. Thus, although SARS has raised both section 105 of the TAA and section 7(2)(c) of PAJA, and formally they constitute separate enquiries, the analysis under both will be the same, given the identical threshold, albeit the one emerges from case law and the other from the language of the text.

Exceptional circumstances – the law

[41] I turn now to what case the taxpayers have made out for exceptional circumstances. In their replying affidavit the taxpayers set out three grounds for exceptional circumstances. These are:

- a) The nature of the dispute is purely legal. The High Court is on this argument in as good a position to decide the matter as the Tax Court;
- b) Both parties have fully argued their legal positions; and
- c) The issue in the case are such as to have a bearing on SARS future practice and later cases.

[42] Only the first point is relevant. The second point is merely a rationale for not having made the argument in founding papers and the third, is an attempt to add some flesh to the first but is not distinctive.

[43] The nub of the argument then is that if SARS has not complied with the requirements of section 42(2)(b) of the TAA, this is a purely legal issue and hence qualifies as an exceptional circumstance. The taxpayers rely on *FP (Pty) Ltd* where Cloete J, sitting in the Tax Court held that:

“In my view the decision in Absa in fact reinforces SARS’ argument that the taxpayer’s review application to the Tax Court, when there is already an appeal pending before it, constitutes an irregular step. Even if one assumes that the taxpayer had no procedural control over the referral of the appeal to the Tax Court it remained open to it and still does to approach the High Court or leave to institute a review

*application in that court while simultaneously seeking a stay of the appeal proceedings pending the determination of the review. The taxpayer's complaint that it was deprived of fair administrative action particularly in view of the stance adopted by SARS in respect of s 42 and s 106 of the TAA should qualify as an 'exceptional circumstance' since it goes to the root of the taxpayer's constitutionally entrenched s 33 right although it is not for me but the High Court to make a determination in this regard."*¹² (My underlining)

- [44] The *ABSA* case that Cloete J refers to, is the decision in this division by Sutherland DJP in *ABSA Bank v Commissioner for the South African Revenue Services*.¹³ That case like the present one concerned the application of a section 80J letter and its aftermath in the form of an assessment. Whilst no challenge to compliance with section 42(2)(b) was raised, the taxpayer did seek the withdrawal of the 80J notice in terms of section 9 of the TAA. The court found that the dispute between the taxpayer and SARS, which turned on whether the taxpayer had knowledge of what SARS construed a tax avoidance, was a purely legal dispute. This was because SARS had accepted that the taxpayer was ignorant in its section 80J notice, hence the court found that there was no dispute of fact. The case therefore turned purely on a point of law. The court then went on to consider what constituted exceptional circumstances and concluded that: "*Exceptional circumstances*

¹² *Commissioner for the South African Revenue Service v FP (Pty) Ltd* [2021] ZATC 8; 84 SATC 321 paragraphs 57-58.

¹³ 2021(3) SA513(GP). I was advised from the Bar that this decision has been the subject of an appeal to the SCA but at the time of this decision the outcome is not known.

*include a dispute that turns wholly on a point of law.*¹⁴ The court then found it had jurisdiction to review the letters of assessment and to review the decision to refuse to withdraw the section 80J notices.

[45] But SARS argues that the *Rappa* case, decided after the ABSA decision, puts an end to this argument that a pure dispute of law amounts to an exceptional circumstance. The *Rappa* decision makes it clear that the default position is that tax disputes reside in the specialist tribunals created by the legislature. Thus, the mere fact that a dispute raises a pure point of law does not, of its own, create exceptional circumstances.

[46] As the court explained:

*“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.”*¹⁵

[47] In *Rappa* the court went on to consider the case law on the nature of the tax court. Courts have held that the tax court is not a court of appeal in the ordinary sense.

¹⁴ Ibid paragraph 49.

¹⁵ *Rappa*, supra, paragraph 12.

Instead, it is a court of revision which has powers and functions that are unique.
*(Africa Cash and Carry v Commissioner, SARS)*¹⁶

[48] This analysis led the court in Rappa to observe that:

*“This wide power of revision of the tax court includes the power to determine the legality of an assessment on grounds of review.”*¹⁷

Exceptional circumstances test post Rappa

[49] Post Rappa the law is now clear. The default rule is that disputes are to be heard in the tax court. This means the applicant must make out a case for exceptional circumstances and the mere fact that the case simply raises a question of law does not suffice to constitute an exceptional circumstance.

[50] The taxpayers as was noted earlier reluctantly made their case out in this point and then only in replying papers. For this reason, as SARS points out, their arguments have shifted during the course of the case. First, they had argued that the tax court lacked review jurisdiction over the subject matter of the reviews in this matter. That argument was not made subsequently but what then emerged in the second set of heads of argument is that even though both courts may have jurisdiction it would be appropriate for the High Court to assume jurisdiction because their review point is good. But as SARS points out prospects for success do not justify failing to exhaust internal remedies. Such an approach was rejected

¹⁶ [2019] ZASCA 148; 2020 (2) SA 19 (SCA)

¹⁷ *Rappa*, supra, paragraph 14.

by the SCA in *Nichol and Another v Registrar of Pension Funds and Others*.¹⁸ That case dealt with section 7(2) of PAJA but as a matter of principle it is equally applicable here.

[51] In *Nichol* the court stated:

*"It is based on the proposition that Nichol is entitled to be exempted from complying with the requirements of s 7(2)(a) of PAJA and exhausting his internal remedies merely because —so it is contended — his case on the merits of the main application is strong. This cannot be so. Taken to its logical conclusion, such an approach would defeat the purpose of s 7(2), which requires an applicant for judicial review to have exhausted his or her internal remedies before resorting to review proceedings. Allegations of procedural or substantive administrative irregularities per se are not 'exceptional' in review proceedings."*¹⁹ (My underlining)

[52] What then are exceptional circumstances in this case? In *Rappa* the court quotes the decision of Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas*, where the court discussed the meaning:

"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..."

¹⁸ 2008(1) SA 383 SA, paragraphs 23-24.

¹⁹ Ibid, paragraph 24.

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.*"²⁰

[53] The shifting sands of the taxpayers' arguments in this matter can be summarised as follows:

- a) If the March letter is the section 42(2)(b) notice, then it fails to comply with the section because it did not allow the taxpayers their right to respond in terms of section 42(3). Hence since it was at the same time accompanied by the assessment letter, they were denied *audi alteram partem*.
- b) But this argument must fail on the facts. SARS contends the July letter constituted the section 42(2)(b) notice although admittedly not labelled as such. SARS version on this must be accepted on a *Plascon- Evans* approach.²¹ Once this is the case any further debate on the contents of the March letter is irrelevant – it is the wrong target.

²⁰ 2002 (6) SA 150 (C) at 156H- 157C.

²¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

- c) However, this does not decide the case. This is because even if the correct candidate for the section 42(2)(b) notice is the earlier July letter, the taxpayers raise other points as to why it was not compliant with the section in two respects; (i) it was premature, because the audit had not been concluded; and (ii) most latterly, in the final note from the taxpayers, it is argued that the July letter did not specify an amount and hence was non-compliant and thus if they were correct on this interpretation, would be a pure point of law.

[54] I will deal with the last point first. This is because it is a purely legal point and it is novel as well, and hence, may, arguably, have some claim to being exceptional. The taxpayers argue that when section 42(2)(b) refers to SARS obligation in the section 42(2)(b) notice to *include "[...] the grounds for the proposed assessment or decision..."* this means the proposed amount must be specified. This was not done in the July letter, although as I indicated, was set out in a table in the later March letter. They argue that the purpose for stipulating an amount is that the taxpayer can in its response in terms of section 42(3) respond to errors without having to go through the internal objection and appeal process.

[55] SARS contends the term '*grounds*' contemplate 'reasons' not an 'amount'. As support for this it points out that where the legislature intends to state amounts it does so. Thus, in section 96(1), which deals with assessments, the various items that must be stated in the assessment are listed. Amongst these listed is that contained in sub-paragraph (d) which states "*[...] the amount of the assessment*".

This is to be clearly distinguished from *grounds* which are referenced again in section 96(2) where the following is stated:

“In addition to the information provided in terms of subsection (1) SARS must give the person assessed -

a) in the case of an assessment described in section 95 or an assessment that is not fully based on a return submitted by the taxpayer, a statement of the grounds for the assessment.” (My underlining)

[56] Thus, if in the same section of the TAA, the concepts of *amounts* and *grounds* are used distinctively, then one can assume the same approach can be taken to the interpretation of section 42(2)(b). Put simply, if the legislature had intended that the 42(2)(b) notice must include the amount it would have said so expressly. It is therefore reasonable to assume, SARS argues, that the term grounds for the assessment does not mean the amount of the assessment.

[57] I agree with this interpretation. Apart from this giving the term ‘*grounds*’ its ordinary grammatical meaning it also accords with the language of section 42(3) which provides for the response of the taxpayer to the receipt of a section 42 notice.²² Here the taxpayer is given the right to respond to the “*facts and conclusions set out in the document*”. This suggests a shade of meaning for grounds as a set of facts and conclusions, not necessarily an amount.

²² The Oxford dictionary defines ‘grounds’ as “*factors forming a basis for action or for the justification of a belief.*”

[58] Nor is the taxpayers argument that the meaning in a section concerning an assessment cannot be used to interpret a different section of the Act persuasive.

[59] As Kellaway writes in his textbook on statutory interpretation:

*“Where the legislature uses the same word in the same enactment it should be given the same meaning”*²³.

[60] As authority for this proposition, he cites what Steyn JA held in *Minister of Interior v Machadorp Investments (Pty) Ltd*:

“[...] it may reasonably be supposed that out of a proper concern for the intelligibility of its language, it would intend the word to be understood, where no clear indication to the contrary is given, in the same sense throughout the enactment”

[61] Kellaway goes on to state:

*“South African courts have also said that a word which has a meaning as used in a provision of a statute should be construed as having the same sense throughout the statute unless it is obvious that the intention of the legislature is that it should have a different or wider or restricted meaning.”*²⁴

[62] There is no reason why the legislature should have intended to give an extended meaning to the term *grounds* in section 42(2)(b) to include amount, having clearly intended to restrict its meaning in section 96 by referring to these terms separately.

²³ EA Kellaway, *“Principles of legal Interpretation of statutes, contracts and wills”*. (Butterworths), paragraph 7.4

²⁴ Ibid.

Thus, to the extent that the taxpayers raise what might be considered a pure point of law, and one arguably exceptional because of its uniqueness, I do not consider this point of interpretation to be correct and thus so decisive that it should clinch the argument in their favour of justifying a section 105 direction.

[63] The remaining points on the July letter are not pure points of law because they raise issues of mixed facts and law. Thus, the taxpayers allegation that the audit had not been concluded by the time of the July letter, is denied in the answering affidavit by SARS deponent Dr Marcus and is therefore a fact in dispute. Moreover, this is not simply a matter of what he said in the answering affidavit. In the July letter the second paragraph states: “*SARS has completed its preliminary audit*”.

[64] Granted the taxpayers relying on the *Wightman* case try to argue that the bare denial in the answering affidavit is insufficient because the subsequent correspondence between SARS and the taxpayers suggests the contrary.²⁵ Further they argue that the word ‘*preliminary*’ is antithetical to the notion of conclusion. But this is not necessarily the case. Equally valid is the point SARS makes that the term ‘*preliminary*’ merely acknowledges the nature of the iterative process, because following the notice SARS would still consider any representations made by the taxpayers.

[65] Nevertheless, whether it was genuinely final or not is a question of fact that cannot be decided on the papers. The decision on finality of an audit is one to be made

²⁵ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) par 13.

by SARS not the taxpayers. What the taxpayers are suggesting then is that SARS is not bona fide on this point. But this does not assist them in extracting a pure point of law. It still remains a mixed question of fact and law and hence does not on the case law meet the grounds of being exceptional.

[66] Finally, the point is taken that the reasons given were not adequate. Testing this proposition requires engaging with the issues SARS sets out in the July letter as well as the responses from the taxpayers and SARS final view expressed in its March letter. This what the Australian Federal Court explained in *Ansett Transport Industries*.

[67] It is precisely the type of enquiry best suited to the specialist court because the question of adequacy cannot be decided without engaging with reasoning of both sides on the core issue raised by GAAR – which is whether the arrangement ‘[...] *lacks commercial substance in whole or in part.*’ This issue then is a mixed question of fact and law and does not meet the exceptionality threshold.

[68] Nor is the burden of requiring parties to exhaust internal remedies a technical machination to deny a party their day in court. There are important policy grounds for doing so as the Constitutional Court has explained in *Koyabe*.²⁶ I mention only some of them relevant here. They are; undermining the autonomy of the

²⁶ *Koyabe v Minister of Home Affairs* 2010(4) SA 327 (CC) paragraphs 36-38.

administrative process; prematurity; and the need to benefit from specialist knowledge.

Alternative for the taxpayers

[69] All the issues raised by the taxpayers can be decided in terms of the provisions of the TAA. First the objection process and then failing that the right to appeal.

[70] Nor are the taxpayers prejudiced from having to go through a whole appeal if they might succeed on their review point. As was held by Binns-Ward in *Forge Packaging* the rules of the Tax Court allow a party to argue a point of law before the appeal is decided.²⁷

[71] Nor do the taxpayers require SARS to withdraw its decision in terms of section 9 of the TAA. That section makes it clear that an objection and appeal can be made without the need for a withdrawal because this process is excluded by the language of that section.²⁸ SARS correctly argues that there is nothing that the taxpayers could obtain from a withdrawal that they could not get from the objection

²⁷ *Forge Packaging (Pty) Ltd v The Commissioner of the South African Revenue Service* [2022] ZAWCHC 119 (13 June 2022) paragraph 44. The learned judge referred to Tax Court rule 42 read with Uniform rule 33(4).

²⁸ This section states:

9 Decision or notice by SARS

(1) A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act, excluding a decision given effect to in an assessment or a notice of assessment that is subject to objection and appeal, may in the discretion of a SARS official described in paragraph (a), (b) or (c) or at the request of the relevant person, be withdrawn or amended by-

a) the SARS official;

(b) a SARS official to whom the SARS official reports; or

(c) a senior SARS official. (my underlining)

and appeal process. I therefore do not consider there is any basis for this relief either, given the nature of the internal remedies available to them.

- [72] The concern of the taxpayers in this matter seems less about whether they have an adequate remedy by following their internal remedies in terms of the TAA than the fact, oft cited in their heads of argument, that by going that route they are prejudiced by having to follow the 'pay now argue later principle'. That may be a burden to them, but it is not one relevant to whether this court should exercise its jurisdiction in terms of section 105. That is the fate of all taxpayers who dispute a SARS assessment – it is not a basis for exceptional circumstances.

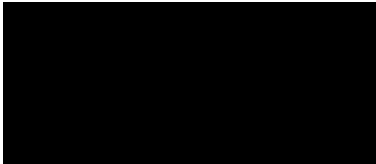
Conclusion

- [73] SARS succeeds in its preliminary objections. The taxpayers have not made out a case for this matter to be heard in the High Court in terms of section 105 of the TAA. For the same reasons but by a different mechanism they have not made out a case for why they have not exhausted their internal remedies in terms of the TAA, and thus they have not complied with section 7(2) of PAJA. Despite their initial contentions to the contrary these are threshold issues which they must meet and for the reasons I have given, they have not done so. The application fails.
- [73] Costs should follow cause. This was the type of case that required the engagement of two counsel. Hence, I award costs on this basis.

ORDER:-

[74] In the result the following order is made:

1. The application is dismissed.
2. The applicants, jointly and severally, the one paying the others to be absolved, are liable for the costs of the respondent, including the costs of two counsel.

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N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA

Date of hearing: 02 May 2023 – 03 May 2023 (The case we heard in Johannesburg)

Date of judgment: 24 July 2023

Appearances:

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