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.

DATE: 20/2/15 SIGNATURE:

CASE NO: 16408/2013

In the matter between:

ACKERMANS LIMITED Applicant

And

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Date of Hearing: 5 to 7 November 2014
Date of Judgment: 20 February 2015

JUDGMENT

MOTHLE, J

INTRODUCTION:

1. Ackermans Limited ("*Ackermans*") seeks relief in the form of an order for the review and setting aside of a decision made by the Commissioner for the South African Revenue Service ("*SARS*")[1] on 19 September 2012 to raise the Additional Assessments to Ackermans' Original Assessments for the years 1998 to 2013.[2]

2. According to SARS, the Additional Assessments were raised, based on amongst others, an allegation that Ackermans misrepresented and failed to disclose material facts in regard to "the true nature and substance of a series of agreements resulting in transactions it had concluded with other entities, which, in SARS's view, were simulated loans.

3. The issue for determination by this Court is whether this decision by SARS stands to be reviewed and set aside in terms of the provisions of the ***Promotion of Administrative Justice Act,***[3] ("*PAJA*") or declared unconstitutional, unlawful and invalid. Ackermans thus relies on the provisions of PAJA and in the *alternative* on the constitutional principle of legality.

[1] Unless specifically stated, SARS includes the Commissioner.
[2] Ackermans was originally assessed as follows: For 1998 year of assessment, in November 1999; for 1999 in August 2001; for 2000 in November 2001; for 2001 in January 2003; for 2002 in January 2004 and for 2003 in January 2005.
[3] Act 3 2000

BACKGROUND:

4. On 23 October 1997 Ackermans found itself indebted to Pepkorfin (Pty) Ltd *("Pepkorfin")* in the amount of R191 288 467. Through a series of interrelated agreements, including Loan Agreements, Sale of Shares Agreements, Promissory Notes; Subscription Agreement and Swap Agreements, *("the Relevant Agreements")* Ackermans executed transactions with various entities, to wit, Pepkorfin, Mettle, Absa Limited and Pepkor. A summary of these transactions is stated as follows in the founding affidavit:

> *"4.1* On *24 October 1997, in terms of the Loan Agreement, Mettle loaned an amount of R185 612 000, bearing interest at 15.57688% ("the loan") to Ackermans and Ackermans issued 10 promissory notes to Mettle, each for an amount of R14 938 993. The loan was repayable on 24 October 2002;*
>
> *4.2 Ackermans partially discharged its indebtedness to Pepkorfin in respect of the Pepkorfin loan by instructing Mettle to pay the loaned funds to Pepkorfin, which Mettle did:*
>
> *4.3 In terms of the Subscription Agreement, Mettle was entitled to subscribe for shares in Ackermans for a price of R185 612 000 on October 2002;*

4.4 On 24 October 1997, Mettle sold the Shares to Pepkor for an amount of R85 612 000 in terms of the Sale of Shares Agreement. Pepkorfin partially discharged its indebtedness to Pepkor by paying the subscription price to Mettle on Pepkor's behalf;

4.5 On 24 October 1997, Mettle sold the promissory notes to Absa Ltd for R100 224 682; and

4.6 In terms of the Swap Agreement, Ackermans effectively converted its fixed interest rate exposure on the outstanding balance of the loan to a floating interest rate exposure to Absa Ltd."

5. On 15 October 2003, SARS requested information and documents from Ackerman, relating to these transactions. From that date up until 5 February 2005, an exchange of letters ensued between Ackermans and SARS in regard to the request and supply of the documents and information. Ackermans contend that they supplied all the documents and information as requested, while SARS maintains that not all documents were provided.

6. On 5 February 2005, SARS issued the first notification of it's intend to raise Additional Assessments for the period 1998 to 2003. This notice was followed by another notice on 6 July 2006. From that date until 9 November 2011, there was no further communication between SARS and Ackermans on the question of Additional Assessments.

7. On 9 November 2011, SARS issued a Letter of Findings addressed to Ackermans. In that letter, Ackermans was afforded an opportunity to comment on the findings made by the Commissioner for SARS and the revised assessments which SARS intends to raise in respect of Ackermans's 1998 to 2003 years of assessment. This letter by SARS is detailed and a summary thereof is found in the reply thereto by Ackermans's attorneys in their letter dated 12 March 2012 under the heading "*Background*". The following four paragraphs of Ackermans' letter sums up Ackermans' understanding of SARS's case as follows:

> *"1.1 Per the Letter of Findings, the Commissioner contends that a loan of R185,612,000.00 entered into between Ackermans and Boland Financial Services (Pty) Ltd (subsequently renamed Mettle Operations (Pty) Ltd), ("Mettle") on 24 October 1997 ("Loan or Loan Agreement") constituted a "simulated loan" agreement.*
>
> *1.2 The Commissioner further contends that the loan agreement form part of a series of transactions entered into between Ackermans, Mettle, Pepcor Limited ("Pepcor") and Pepcorfin (Pty) Ltd ("Pepcorfin") "In order to disguise the true nature of the transactions between Ackermans, Mettle and Pepcor with the intention of the company evading or reducing its liability for the payment of income tax".*

1.3 Furthermore, in the Letter of Findings, the Commissioner states his intention to disallow a portion of interest deductions claimed by Ackermans in respect of the loan on the basis of his contention that the loan constitutes a "simulated loan", and to issue Additional Assessments to Ackermans in terms of Section 79 of the Income Tax Act No. 58 of 1962 ("Act").

1.4 Furthermore, it is stated that SARS intends to levy additional tax in terms of Section 76 of the Act, since in the Commissioner's view, interest deductions were claimed by Ackermans on a "simulated transaction". In addition, we note that it is SARS' intention to levy Section 89 QUAT interest against Ackermans in respect of all relevant years of assessment."

8. In the same Letter of Findings, SARS contends that Ackermans made misrepresentations as follows:

"8.1 *The tax returns rendered by Ackermans contained incorrect statements and were a misrepresentation in that a portion of the interest deductions claimed in the company's tax return for the years of assessment ending 1998 to 2003 were represented to be in respect of interest payable in terms of the "simulated loan;*

8.2 *Ackermans answered "NO" to the question whether it has entered into "interest rate swap transactions" in its 1998 to 2003 income tax returns;*

8.3 *Ackermans answered "NO" to the question whether the company was party to a structured finance transaction in its 2002 to 2003 income tax returns; and*

8.4 *It is on the basis of these misrepresentations that SARS proceeded to raise Additional Assessments for the years 1998 to 2003 original assessments of Ackermans.*

9. On 19 September 2012, SARS issued the Additional Assessments in terms of **Section 79 of the *Income Tax Act*[4]** *("ITA")* in which Ackermans' taxable income for the years 1998 to 2003 was adjusted. In doing so, SARS contended that;

9.1 it disallows certain interest deductions which have been claimed by Ackermans and which had been originally allowed by SARS in terms of Section 11(a) of the ITA in respect of an alleged loan in the sum of approximately R185 million;

9.2 having regard to the true nature and substance of the series of transactions which had been misrepresented and are not disclosed,

[4] Act 58 of1962

Ackermans ought to have claimed interest deductions on an amount of approximately R100 million;

9.3 SARS was satisfied that the amount of tax that was originally assessed for the 1998 to 2003 years of assessment was less than the amount of tax that was properly chargeable; and

9.4 SARS was satisfied that the fact that the amounts which should have been assessed to tax were not so assessed was due to the misrepresentation and/or non-disclosure of material facts.

10. It is this decision by SARS to raise the Additional Assessments on 19 September 2012 that is sought to be reviewed and set aside in this application.

11. This application before this Court is therefore not about the merits or demerits of the Additional Assessments, but rather about the review and setting aside alternatively the constitutional legality of the decision of SARS to issue the Additional assessments.

GROUNDS OF REVIEW:

12. Ackermans contends that the decision by SARS stands to be reviewed and set aside on the following grounds under PAJA namely that:

12.1 SARS was precluded by the provisions of Section 79(1) of the ITA (the Section 79 proviso) from raising or deciding to raise the Additional Assessments;

12.2 The raising of the Additional Assessments or the decision made after a very lengthy period of delay, was unreasonable and procedurally unfair; and

12.3 the SARS decision was materially influenced by an error of law, took into account the relevant considerations and/or did not consider all relevant considerations, that the raising of the additional assessment or the decision was not rationally connected to the information before the Commissioner, that the Commissioner failed to take a decision or that the raising of the Additional Assessments or the decision was so unreasonable that no reasonable person would have done so.

THE CONTENTION BY SARS

13. SARS in its answering affidavit to the application contends, *in limine* that this Court does not have jurisdiction to decide this matter because the issues raised are complex matters requiring the expertise of the Tax Court. In support of that contention, SARS submits that the Tax Court has powers of review for the relief sought by Ackermans *alternatively* that Ackermans has not exhausted its internal remedies before the Tax Court and therefore in terms of Section 7 of PAJA their application for review should not be entertained. SARS further

contends that there are disputes of fact which should be resolved by the Tax Court.

14. Both SARS and Ackermans raise points *in limine* which if upheld, would dispose of this application, at least in its present form in this Court. Ackermans contend that there was an unreasonable delay in raising the Additional Assessments, which unreasonable delay should be justification to review and set aside the decision to raise the Additional Assessments on the grounds of PAJA, *alternatively* non-compliance with the principle of constitutional legality. SARS in turn raises the questions of jurisdiction; failure to exhaust the internal remedies as well as disputes of fact as grounds for the application to be dismissed in its present form and the objection and appeal process to continue in the Tax Court. I will therefore first deal with the question of jurisdiction in this judgment.

Jurisdiction

15. The Tax Court is creature of statute and as such its powers are limited to those specified in the relevant tax statutes such as the ITA, **Value Added Tax Act** ("VAT Act")[5] and the ***Tax Administration Act*** *("TAA")*[6].

16. Section 105 of TAA provides thus:

> "***105. Forum for dispute of assessment or decision***- *A taxpayer may not dispute an assessment or "decision" as described in section*

[5] Act 89 of 1991.
[6] Act 28 of 2011.

104 in any court or other proceedings, except under this Chapter or by application to the High Court for review."

17. Bertelsmann J, siting in the Tax Court [7] held thus:

> *"It was made clear in **ITC 1806 (2005) 68 SATC 117** that the Tax Court only has adjudicate jurisdiction allocated to it by the legislature over matters brought before it. It is submitted that a review must be brought before the High Court. **Rosie and Others v C: SARS.** It follows that relief based upon a review which can only be launched in terms of PAJA is beyond the jurisdiction of this Court."*

18. In ***Metcash Trading Ltd v Commissioner SARS and Another***[8], after referring to the remedies of a vendor under the VAT Act, Kriegler J stated the following:

> *"(33) But and this is crucial to an understanding of this part of the case, the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing complaints about the Commissioner's decisions, but it leaves intact all other avenues of relief.*
>
> *(46) It is therefore clear that any decision of the Commissioner to make a VAT assessment under Section 31 and/or to levy additional tax*

[7] Case ITC 1866 (2012) 75 SATC 268.
[8] 2001 (1) SA 1109 (CC).

under Section 60 is subject to judicial intervention in certain circumstances."

19. The review application under PAJA raises an issue concerning the protection of a fundamental right in terms of section 33 of the Constitution.[9] Section 169 of the Constitution empowers the High Court to decide on any constitutional matter. This includes matters relating to the protection on enforcement of fundamental rights, unless that matter is assigned to a Court of equal status to the High Court, **see *Fredericks and Others v MEC Education and Training, Eastern Cape, and Others*[10].**

20. It seems to me that on the strength of the authorities cited above, this court has the jurisdiction to hear this review application. The objection by SARS that this court does not have jurisdiction to hear this application has no merit and must therefore fail.

Delay

21. The main ground of review by Ackermans is that SARS unreasonably delayed in raising the Additional Assessments. Ackermans contend that since issuing the first notification to raise Additional Assessments in February 2005, SARS issued a further notification in July 2006 and thereafter the Letter of Findings on 9 November 2011. Ackermans contend that between the period 2006 and 2011, nothing was heard from SARS.

[9] The Constitution of the Republic of South Africa, 1996.
[10] 2002 (2) SA 693 (CC).

22. Ackermans further alleges that in the exchange of correspondence between itself and SARS, information in the form of documents sought by SARS was made available to SARS as requested. SARS thus had all the necessary information and documents at its disposal to enable it to make a decision timeously, which it failed to do. It is further contended that this unreasonable delay on the part of SARS in effecting the Additional Assessments as notified in February 2005, offends the provisions of Section 237 of the Constitution which provides that: "*All constitutional obligations must be performed diligently and without delay.*"

23. It is further submitted by Ackermans that failure to act in accordance with this imperative is a breach of the principle that the exercise of a public power must comply with the Constitution and it is also a breach of the constitutional principle of legality.

24. Ackermans argues further that the delay in raising Additional Assessments can potentially prejudice a taxpayer, in that relevant documents which may prove vital to their defence may have been lost or destroyed. It is further contended by Ackermans that the memories of witnesses may fade, which would then prejudice its case where it may be called upon to object or appeal against the Additional Assessments.

25. There is, however, no evidence submitted by Ackermans that the relevant documents *in casu* have since been lost or destroyed, or that memories of witnesses have faded. On the contrary, Ackermans' deponents to the founding

affidavit, supplementary affidavit, confirmatory affidavits as well as the replying affidavit, do not demonstrate faded memories. Similarly, the bundles of documents attached to the application are clearly not lost or destroyed. In fact, Ackermans insists that all documents requested by SARS in regard to this matter have been submitted. Any alleged prejudice on the part of Ackermans appears perceived and not real.

26. In its defence SARS contends that in the five year period between the second notification in July 2006 and the Letter of Findings in November 2011, it had to wait for the judgment of a case before the Supreme Court of Appeal, which had a bearing on the legal principles involved in these Additional Assessments. The case referred to is that of ***CSARS v NWK***.[11] SARS further contends that prescription on the levying of taxes runs for 30 years and thus it is therefore entitled, within that period, to recover taxes due.

27. It is indeed imperative that all Constitutional obligations executed by organs of State in the exercise of public power, must be performed diligently and without delay. An unreasonable delay will result in a procedurally unfair administrative action, which is a reviewable conduct in terms of Section 6 of PAJA. The decision to raise Additional Assessments is an administrative action which is an exercise of public power and it falls within the ambit of Section 237 of the Constitution, as quoted above.

[11] CSARS v NWK (2010) ZASCA 168.

28. The Courts frown upon unreasonable or inordinate delay in the exercise of public power and performance of public duties. See in this regard Mohlomi **v Minister of Defence;**[12] **Ex Parte Minister of Safety and Security: In Re S v Walters**[13] as well as **Pering Mine (Pty) Ltd v Director General; Mineral and Energy Affairs and Others**.[14]

29. It is thus generally accepted in these court decisions that such inordinate and unreasonable delays in the exercise of public power or performance of public functions, prolong the element of uncertainty on the part of all concerned and results in the interest of justice not being served.

30. It is not disputed that there was an approximately six (6) years delay from July 2006 up until 19 September 2012, for SARS to raise the Additional Assessments. The question is whether this delay was unreasonable.

31. Section 273 of the Constitution, correctly so, does not state what period would constitute unreasonable delay in any given situation. This is left to the courts to determine, having regard to the circumstances of each case. The raising of Additional Assessments is an exercise of statutory authority in terms of section 79 of ITA, which provides for time periods within which it will be permissible to raise the Additional Assessments. A determination of the reasonableness or otherwise of the delay requires a consideration of the provisions of section 79 of ITA.

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[12] 1997 (1) SA 124
[13] 2002 (4) SA 613 (CC).
[14] 67 SATC 314.

32. Section 79 of ITA provides:

"*Additional Assessments*

(1) If at any time the Commissioner is satisfied –

(a) that any amount which was subject to tax and should have been assessed to tax under this Act has not been assessed to tax; or

(b) that any amount of tax which was chargeable and should have been assessed under this Act has not been assessed; or

(c) ..... he shall raise an assessment or assessments in respect of the said amount or amounts .... provided that the Commissioner shall not raise an assessment made under this sub-section –

(i) after the expiry of three years from the date of the assessment (if any) in terms of which any amount which should have been assessed to tax under such assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, unless –

(aa) the Commissioner is satisfied that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed, was due to fraud or misrepresentation or non-disclosure of material facts;

(bb) the Commissioner and the taxpayer agree otherwise prior to the expiry of the three-year period;

33. The essence of section 79(1) of ITA is that any Additional Assessments have to be effected within 3 years from the date of the original assessment. SARS is not entitled to raise additional assessment after the 3 years of the original assessment, unless the circumstances stated in sub-paragraph (aa) or (bb) of subsection 1 (c) (i) to section 79, exists. In other words, SARS must have been satisfied, after the expiry of the 3 year period from the date of the last assessment, that:

33.1 prior to the relevant original assessment being raised, Ackermans had committed a fraud, or had misrepresented a material fact to SARS or had not disclosed a material fact to SARS;

33.2 The fact that the amount assessed in the relevant additional assessment was not assessed in the relevant original assessment was

due to such fraud, misrepresentation or non-disclosure of material facts.

34. Ackermans contends that there was no fraud, misrepresentation or non-disclosure of material facts as contemplated in section 79 (1) (c) (i) (aa) in respect of any relevant year. SARS on the other hand contends that there were misrepresentations on the part of Ackerman, amongst others to the effect that a portion of the interest deductions claimed in the tax returns were represented to be in respect of interest payable in terms of the "simulated loan", when in reality there were repayments of capital of the true loan.

35. There is clearly a dispute of fact on this part of the evidence, which is relevant in deciding whether, apart from other explanations, the delay in raising Additional Assessments falls or does not fall within the proviso in subsection (1) (c) (i) paragraph (aa) of section 79. If it is concluded on the resolution of the disputed facts, that there was misrepresentation or non- disclosure of material facts on the part of Ackermans, the delay by SA will be covered by the proviso in paragraph (aa) and will thus be reasonable. If, however, it is found that there were no misrepresentations and there was a disclosure of the material facts, the delay from 2006 to 2012 when Additional Assessments were raised, would constitute an unreasonable delay in contravention of i section 79 (1) (c) (i) as quoted above.

36. In essence, the oral evidence necessary to adjudicate the review application is the same evidence that would be required to adjudicate the merits of the

challenge on the Additional Assessments. Such adjudication will entail examination of the oral and documentary evidence relating to the allegations of misrepresentations and non-disclosure of material facts, within the context of the relevant agreements and transactions conducted by Ackermans and other entities.

37. Ackermans submits that this Court should refer this application for review to the hearing of oral evidence in order to adjudicate on the reasonableness or otherwise of the delay. SARS is however of the view that the Tax Court is better placed to adjudicate on the disputed facts, necessary to make a finding not only on the delay but also on the merits of the Additional Assessments. It is further contended by SARS that since Ackermans has lodged its objection to the Additional Assessments, the matter may, in the normal course, be heard on appeal by the Tax Court.

38. While there appears to be very few authorities supporting the contention that a review application filed on papers should be referred to the hearing of oral evidence, I agree with the submission that there are no rules which prohibit such. However, the disputed facts and issues raised in this application require, in my view, the expertise of a tax court to adjudicate. It seems to me therefore that the adjudication of the disputed facts on the allegations of misrepresentations and non-disclosure of material facts, will bring this matter to finality.

39. I have been referred to a recent Full Court appeal judgment of the Western Cape Division, Cape Town, in the matter of ***ABC (Pty) Ltd v The Commissioner of the South African Revenue Service, case no A 129/2014.*** This case is an appeal against the judgment of the Tax Court. In paragraph [22] of that judgment, the Full Court endorsed the view expressed in ***Kommissaris van Binnelandse Inkomste v Transvaal Suikerkorporasie Bpk 1985 (2) SA 668 (T),*** that the "appeal" to the Tax Court is in reality a review of the Commissioner's decision on customary review grounds.

40. Having regard to the views expressed above, I am of the opinion that it would be appropriate to defer to the internal remedies in the ITA, which Ackermans may resort to by way of appeal to the Tax Court, should it not be satisfied with the decision on the objection. Consequently, and in view of the conclusion I have reached, there is no need for this Court to consider other points of argument raised by both SARS and Ackermans in this application.

Costs

41. It is a general rule of costs in litigation that such costs follow the result. The successful party is awarded costs. However, in this case, each of the parties has been successful to some extent. Considering that the matter may be heard by the Tax Court, it may well be that at this stage each party should pay its costs, more so that this decision does not affect the merits of the dispute, which may still be adjudicated.

42. In the premises I make the following order:

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

2. Each party is to pay its own costs.

S P MOTHLE
Judge of the High Court
Pretoria.

For the Applicant:

	Adv. PA Solomon SC
Assisted by:	Adv. J Boltar
Instructed by:	Edward Nathan Sonnenbergs Sandton, Johannesburg

For the Respondent:

	Adv. D. Fine SC
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