

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 21/21045

DELETE WHICHEVER IS NOT APPLICABLE

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

16 September 2021


Judge Dippenaar

In the matter between:

RAPPA RESOURCES (PTY) LTD

Applicant

and

COMMISSIONER OF THE SOUTH

AFRICAN REVENUE SERVICE

Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 16th September 2021.

DIPPENAAR J:

[1] This is an opposed interlocutory application under r 30A in review proceedings launched by the applicant under r 53 in which the applicant primarily seeks a compelling order directing the respondent to file the record.

[2] Pursuant to receiving the respondent's answering papers, and attached to its replying affidavit, the applicant sought to amend its notice of motion by the inclusion of a directive under s105 of the Tax Administration Act¹ ("the TAA") under the preface "to the extent necessary, the applicant seeks a directive". In that notice of amendment, it also sought to substantially expand on and particularise the "record" referred to in its initial notice of motion. The amendment introduced in prayer 1 is: *"Insofar as might be necessary and to the extent that s105 of the TAA applies, it is directed in terms of that section that this court hears and determines the compelling application and the review application of which it forms part"*.

[3] The respondent did not oppose the granting of the amendment but contended that: (i) the inclusion of an order seeking a directive under s105 constituted a concession that a directive under s 105 was necessary and (ii) the ambit of the proposed record was

¹ 28 of 2011

overly broad. No further affidavits were delivered by the parties, nor was an opportunity sought to do so. The amendment to the notice of motion will be allowed.

[4] In summary, the applicant's case was that it is of right entitled to the record of the proceedings pursuant to which the respondent decided to issue certain assessments pertaining to VAT refunds on 29 March 2021. Reliance was placed on the provisions of uniform r 53 and the applicant's constitutional right under s33 of the Constitution. The applicant maintained that the review proceedings were squarely based on some 30 grounds under various of the subsections of s6 of the Promotion of Administrative Justice Act² ("PAJA") and some 10 grounds underpinning a legality review.

[5] In its founding papers in the review application, the applicant characterised the review as being that the decision to issue the assessments is reviewable and contrary to the provisions of ss 3 and 6 of PAJA and s 33 of the Constitution, alternatively fell foul of the rule of law and the constitutional principle of legality, in particular ss 2 and 172 of the Constitution.

[6] It was argued that the Tax Court does not have the necessary jurisdiction to entertain a review under PAJA or one based on the principle of legality and thus that it is as of right entitled to the record underpinning the respondent's decision to issue the assessments. As such a directive under s105 of the TAA is not necessary and the section is not applicable as it only applies to disputes under chapter 9 of the TAA.

[7] In the main review application, the applicant seeks the setting aside of the respondent's decision to issue assessments and an order declaring the decision of the respondent to issue the assessments to be in conflict with the principle of legality and accordingly unconstitutional, unlawful and invalid. It further seeks an order setting aside

² 3 of 2000

the assessments. Its case is predicated on a review against the decision to issue the assessments on 29 March 2021, based on PAJA and under the principle of legality.

[8] In summary, the respondent's case was that the applicant had no right to launch review proceedings prior to obtaining a directive from the High Court in terms of s105 of the TAA and that the application to compel was fatally defective absent such directive. As such, it refused to provide the record. It objected to the belated application to seek such directive after delivery of its founding papers and contended that it should have been sought by the applicant in its founding papers, rather than by way of a later amendment and should not have been sought in speculative terms, predicated by the phrase "insofar as may be necessary". Its case was predicated on the contention that the applicant had not illustrated exceptional circumstances to warrant a departure from the dispute resolution mechanisms provided in Chapter 9 of the TAA. It characterised the review proceedings as an abuse as the review would not be dispositive of the disputes between the parties and the applicant had raised the grounds of review on almost the exact basis in an objection to the assessment. The same issues raised in the review would thus have to be determined in the Tax Court, resulting in a duplication of litigation, piecemeal litigation and the risk of different findings. The respondent framed the primary question to be decided as whether the applicant is entitled to launch a review application. If not, its case is that the compelling application is premature.

[9] In my view, the first issue to determine is whether this is the appropriate point to determine whether s105 of the TAA is applicable and whether a court should direct the proceedings to proceed in the High Court. If not, no other reason has been proffered by the respondent why the record should not be produced. The respondent's only complaint was that the documents sought were over broad.

[10] S105 of the TAA provides:

"Forum for dispute of assessment or decision.

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”.

[11] To determine whether s 105 is applicable involves a consideration of the nature of the review proceedings and raises matters of some complexity. It requires consideration of both the exact nature of the review proceedings and whether exceptional circumstances exist. The primary contention of the respondent is that the review proceedings are flawed and constitute an abuse and that it should not be directed that the review proceedings proceed in the High Court.

[12] At this stage of the proceedings, the applicant is still able under r 53(4) to supplement its papers upon the production of the record. It is trite that the applicant's case is only fully stated after the applicant has had access to the record and has filed its supplementary affidavit³.

[13] I agree with the applicant that it would be premature to determine the merits of the review application at this stage in circumstances where it is open to the applicant to supplement its papers once it has obtained the record. To effectively predetermine the prospects of success of the main review proceedings at present by determining the issues pertaining to s105 of the TAA, would be improper and prejudicial to the applicant.

[14] Moreover, the current application is an interlocutory one in which the production of the record is sought under r 53(1)(b). To determine matters of some legal complexity in interlocutory proceedings which seek the disclosure of a record, would in my view be inappropriate.⁴

³ Cape Town City v South African National Roads Authority 2015 (3) SA 386 (SCA) para [35]

⁴ Carte Blanche Marketing CC and Others v Commissioner South African Revenue Services (26244/2015) ZAGPPHC 253 (26 May 2017) para [50]

[15] In those circumstances I shall not express any view on the ultimate success of the application or the validity of the s 105 point raised by the respondent and shall not deal with the arguments raised by the respective parties on the issue.

[16] The court ultimately hearing the review application would be better placed to determine whether an order should be issued under s105 of the TTA and whether it is applicable. I conclude that the issue should be deferred, to be determined together with the main review application. This issue has already been canvassed in the application papers and the parties' heads of argument.

[17] The applicant placed reliance on *Peolwane Properties (Pty) Ltd v Commissioner of the South African Revenue Service*⁵ wherein it was held that a respondent in a review application may not refuse to provide the record of its decision because in its view the review application was flawed and a defence of a failure to exhaust internal remedies under s7(2) of PAJA was rejected. *Peolwane* may ultimately be found to be distinguishable as it was determined under a previous version of s105 of the TAA and made a determination on the issue of whether the applicant had a right to review, an issue which I have concluded should be dealt with in the hearing of the main review application. I however respectfully agree that the applicant is under r53(1)(b) entitled to the record and that defences applicable to the main review proceedings do not arise at this early stage of the proceedings⁶.

[18] Under r 53 (1)(b), the applicant has a right to access to the record of the decision under review, which forms an important part of the right to review of administrative action⁷

⁵ (34483/2014) unreported judgment of Tsoka J in the Gauteng Local Division (22 October 2015)

⁶ *Peolwane* fn 5 supra, para [20]

⁷ *Jockey Club v Forbes* 1993 (1) SA 649 (A) 660E-H

and is an important tool in the review process⁸. The applicant further has a constitutional right under s34 of the Constitution to access of the record of the decision under review⁹.

[19] I conclude that the applicant is thus entitled to the record of the proceedings which dealt before the decision maker when it decided to issue the assessments on 29 March 2021.

[20] It was undisputed that in the amended notice of motion, the applicant substantially expanded on the specific documents sought as part of the record. As it was not contained in the original notice of motion, the respondent was at a disadvantage to deal in its answering affidavit with any objections to the production of any of the documents referred to in the amended notice of motion.

[21] The respondent, during argument, challenged the documents now sought as being overly broad and referred to various portions of the answering affidavit and documentation attached thereto that referred to certain documents being privileged or confidential. Insofar as documents are privileged, the applicant would not be entitled thereto¹⁰. In my view, the respondent should be afforded a proper opportunity to object to the production of any documents particularised in the amended notice of motion. On the other hand, if the record which is provided by the respondent is insufficient it should be open to the applicant to seek further documents. Provision will be made in the order for an appropriate challenge to be launched if production is challenged on appropriate grounds.

[22] The normal principle is that costs follow the result. The applicant has been substantially successful and there is no reason to deviate from this principle.

⁸ Turnbull Jackson v Hibiscus Coast Municipality 2014 (6) SA 592 (CC) para [37]

⁹ Democratic Alliance v Acting National Director of Public Prosecutions 2012 (3) SA 486 (SCA) para [37]; Helen Suzman Foundation v Judicial Service Commission 2017 (1) SA 367 (SCA) para [13]

¹⁰ Comair limited v Minister of Public Enterprises and Others

[23] I grant the following order:

[1] The applicant's notice of motion is amended by the introduction of prayer 1 which provides: *"Insofar as might be necessary and to the extent that s105 of the TAA applies, it is directed in terms of that section that this court hears and determines the compelling application and the review application of which it forms part"*.

[2] The relief sought in prayer 1 pertaining to the applicability of s105 of the Tax Administration Act 28 of 2011 and whether a directive should be issued thereunder is postponed sine die, to be enrolled for hearing together with the main review application.

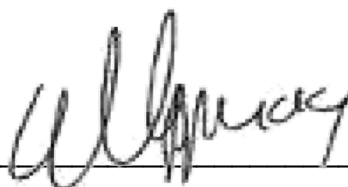
[3] The respondent is directed to comply, within 15 days of granting of this order, with uniform r53(1)(b) by dispatching to the registrar and the applicant, a complete record containing all documents and all electronic records (including correspondence, contracts, memoranda, advice, recommendations, evaluations, internal deliberations and the like) that relate to the decision which is the subject of the review application under case number 2121/21045, together with such reasons as the respondent is by law required or desires to give or make;

[4] The record must contain, subject to [5] below, (i) all documents that served before the relevant decision maker in relation to the decision to issue the additional assessments made on 29 March 2021; (ii) all reports, submissions, memoranda and other records which were placed before the person or committee who took the decision to issue the additional assessments; (iii) all working papers, schedules, notes memoranda and minutes prepared by the respondent pertaining to: (a) the matters recorded in the letter of audit findings dated 11 December 2020; and (b) the finalisation of audit letter dated 29 March 2021;

[5] The respondent is afforded a period of fifteen days to object to the production of any documents forming part of the record and in such objection must provide comprehensive grounds for the basis of such objection;

[6] In the event that the respondent fails to produce the record or objects to the production of certain documents, and the applicant does not accept the grounds of objection raised, the applicant is authorised to approach the court, on the same papers, duly supplemented, for appropriate relief within 15 days of receipt of the objection;

[7] The respondent is directed to pay the costs of the application.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 10 August 2021
DATE OF JUDGMENT	: 16 September 2021
APPLICANT'S COUNSEL	: Adv. R Bhana SC : Adv. G. Goldman : Adv. G. Singh
APPLICANT'S ATTORNEYS	: Girard Hayward Inc.
RESPONDENT'S COUNSEL	: Adv E. Coetzee SC : Adv. H De Wet SC
RESPONDENT'S ATTORNEYS	: VZLR Inc.