



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 4438/2023

In the matter between:

DITSOANE TRADING AND PROJECT CC

APPLICANT

and

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE

RESPONDENT

Neutral citation: *Ditsoane Trading Project CC v The Commissioner for SARS*

Coram: Mbhele, DJP et Daffue, J

Heard: 29 July 2024

Delivered: 29 January 2025

Summary: Tax law – understatement penalty- constitution of the Audit Penalty Committee – whether the Commissioner was empowered to constitute the Audit Penalty Committee – whether section 105 of the Tax Administration Act (TAA) is applicable to the understatement penalty levied in terms of section 222 and 223 of the TAA – High Court lacks jurisdiction to adjudicate the review.

ORDER

1. The application is dismissed.
 2. The applicant shall pay the costs of the respondent, including the costs of two counsel, the fees of senior counsel to be taxed on scale C.
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JUDGMENT

Mbhele, DJP (Daffue J concurring)

INTRODUCTION:

[1] A dissatisfied registered taxpayer approached the High Court on review without seeking leave from the court in terms of s 105 of the Tax Administration Act 28 of 2011 (the TAA) to hear the matter. It raised two issues, in the main. Firstly, the powers of the respondent (the Commissioner) to establish the Audit Penalty Committee (the Committee – which is incorrectly referred to as the Understatement Penalty Committee by the applicant) and to determine a taxpayer's behaviour for purposes of ss 222 and 223 of the TAA and secondly, the regularity of the process followed by the Commissioner qua the South African Revenue Services (SARS) in imposing the understatement penalty on the applicant.

[2] In essence, the applicant contends that the Commissioner did not have statutory powers to constitute the Committee and for that reason, the Commissioner's decision to impose the understatement penalty is unlawful. The applicant further contends that its behaviour for purposes of s 223 of the TAA could not only by law be determined by the Commissioner at an administrative level within SARS.

[3] The Commissioner raised several points in limine, but also dealt with the merits of the matter. The most relevant point raised is the failure of the applicant to request and obtain leave from the court to deal with the disputes as provided for in s 105 of the TAA. It is the applicant's case that it has brought a legality review to the court and therefore, the court has jurisdiction to hear the review. Consequently, no leave was sought in terms of s 105 in the notice of motion and no facts have been relied upon in

the founding affidavit to show any exceptional circumstances why this court has jurisdiction. After the point of limine was taken in the answering affidavit, fully motivated, the applicant still did not find it necessary to deal with this aspect in reply and/or to amend its notice of motion. Its stance continued in its written submissions and during oral argument.

THE FACTS:

[4] The facts in this matter are largely common cause. The applicant is registered with SARS as a Value Added Tax (VAT) vendor in terms of the VAT Act 89 of 1991 (the VAT Act). As a registered vendor the applicant was obliged to submit returns for remittance of VAT on the prescribed form every second uneven month as prescribed by the VAT Act. The applicant is also registered with SARS for Income Tax in terms of the Income Tax Act 58 of 1962 (ITA) and liable to submit CIT-14 returns annually.

[5] SARS informed the applicant that it would conduct an audit into its tax affairs specifically pertaining to VAT. On 20 March 2020 two senior employees of SARS held a meeting with the applicant to discuss their audit findings and to obtain certain explanations. On 28 May 2020, the auditor Ms Debra van Rensburg sent her audit findings to the applicant, indicating inter alia that the applicant failed to declare output tax. The applicant was called upon in this letter to furnish reasons if it was not in agreement. The applicant provided a response as a result of which the audit findings were slightly adjusted. The applicant failed to provide any reasons why an understatement penalty should not be imposed notwithstanding an opportunity having been provided to him. On 24 June 2020 the Committee eventually considered all the information provided by Ms Van Rensburg to them in order to consider the understatement penalty. The chairperson whose responsibility it was, made a determination in respect of the understatement penalty. On 26 June 2020 SARS sent its audit letter to the applicant informing it that the audit was finalized. In the same letter SARS informed the applicant further that, in addition to the assessment raised by SARS, a 150% understatement penalty in terms of s 222 read together with s 223 of the TAA was levied, based on the applicant's behaviour of "intentional tax evasion".

[6] On 04 August 2020 the applicant objected to the assessment and SARS' decision on the objections was communicated to the applicant on 25 November 2020. The outcome of the objections was the last of the decisions taken by SARS on the

matter. The Commissioner pointed out in the answering affidavit that in order to apply for review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) the applicant should have brought its application within 180 days from 25 November 2020. It failed to apply for condonation. The Commissioner also submitted that a legality review was in any event not the proper pathway to obtain review, but a PAJA review. It is not necessary to deal with this at all bearing in mind the ultimate conclusion.

[7] On 28 March 2022 the applicant and Nehemia Itumeleng Morweng Ditsoane, the sole director of the applicant, (the director) were charged with committing the offence of intentional tax evasion. On 27 September 2022 the applicant and the director pleaded guilty as charged.

[8] On 06 March 2023 the applicant requested a certified copy of the particulars of the Committee's decision which made a determination that the applicant's conduct amounted to intentional tax evasion and the reasons why the inquiry was not conducted in terms of ss 50 to 58 of the TAA. The Commissioner did not respond, but this issue is really immaterial.

THE DISPUTES:

[9] The applicant laments that the Commissioner acted *ultra vires* the statutory powers conferred on him when he constituted the Committee to look into the taxpayer's behaviour and by authorizing the said Committee to impose the understatement penalty. It is the applicant's submission that the inquiry held by the Committee upset the provisions of the TAA in that it enquired into the applicant's criminal behaviour and imposed a penalty in the applicant's absence. It submits, further, that the determination of understatement and the imposition of the understatement penalty may only be made in terms of ss 50 to 53 of the TAA. It is not necessary to consider this submission, bearing in mind the outcome of the case.

[10] The Commissioner points out that the applicant was afforded a right of hearing and numerous opportunities to make representations which it did. According to him the Committee did not enquire into any criminal behaviour of the taxpayer. The Commissioner sets out the role of the Committee as follows: if there was (a) a default in rendering a return; (b) an omission to render a return; (c) an incorrect statement in a return; or (d) if no return is required; (e) a failure to pay the correct amount of tax, all of

which, either individually or cumulatively, result in prejudice to SARS or the fiscus in respect of a tax period.

[11] The Commissioner raised three points in *limine*.

11.1 First, since the understatement penalty is imposed by way of an assessment, s 105 of the TAA provides that a taxpayer may only dispute an assessment or decision by way of objection and appeal under chapter 9 of the TAA and may not resort to the High Court, unless permitted to do so by an order of that court.

11.2 Second, the applicant seeks an order of constitutional invalidity, but failed to make out a case in its founding affidavit for the order it seeks. There are no facts in the founding affidavit that can sustain such an order. The only grounds advanced by the applicant are that the Commissioner acted *ultra vires* in constituting the Committee since there is no empowering provision and that the procedure followed by the Committee was unlawful, unreasonable and procedurally unfair. The applicant failed to demonstrate which provisions of the Constitution are offended by the conduct of the Commissioner.

11.3 The applicant launched the application two years out of time and did not apply for condonation.

EVALUATION:

[12] It is apposite at this stage to deal with the point in *limine* pertaining to jurisdiction although there were several other points raised by the Commissioner. The Commissioner contends that the applicant's right to review the decision made by SARS only vests once a directive is issued in terms of s 105 of the TAA by this Court. It is common cause that such directive was not sought by the applicant. The applicant contends that s 105 is not applicable to understatement penalties levied in terms of ss 222 and 223 of the TAA. It is for this reason that the applicant insists that this Court has jurisdiction to hear this matter. It is well established that where the jurisdiction of the court before which a review application is brought is contested, a ruling on this issue

must precede all other orders. See *Competition Commission of South Africa v Standard Bank of South Africa*¹ where the Constitutional Court remarked as follows:

"As mentioned, we agree with the first judgment that the appeal should succeed. Where the jurisdiction of the court before which a review application is brought is contested, a ruling on this issue must precede all other orders. This is because a court must be competent to make whatever orders it issues. If a court lacks authority to make an order it grants, that order constitutes a nullity. Scarce judicial resources should not be wasted by engaging in fruitless exercises like making orders which cannot be enforced."

[13] Section 224 of the TAA provides as follows:

"224. Objection and appeal against imposition of understatement penalty

The imposition of an understatement penalty under section 222 or a decision by SARS not to remit an understatement penalty under section 223(3), is subject to objection and appeal under Chapter 9."

It is clear that there is no separate regime designed to administer appeals and objections of understatement penalties, they are governed under chapter 9 of the TAA. The argument by the applicant that s 105 does not find application in objections or appeals to understatement penalties is without merit and falls to be rejected.

[14] Section 105 provides that a taxpayer may only dispute an assessment or "decision" as described in s 104 in proceedings under chapter 9, unless a High Court otherwise directs. This section makes it clear that a taxpayer must first apply to the High Court and request it to condone the deviation from the normal course prescribed in s 104 of the TAA. The amendment introduced in 2015 through s 52 of the Tax Administration Laws Amendment Act 23 of 2015 adds another step which a taxpayer must overcome before a tax dispute may be considered by a High Court.

[15] Section 104(2) sets out decisions that may be objected to as follows:

- "(a) a decision under subsection (4) not to extend the period for lodging an objection;
- (b) a decision under section 107(2) not to extend the period for lodging an appeal; and
- (c) any other decision that may be objected to or appealed against under a tax Act." (Emphasis added)

¹ *Competition Commission of South Africa v Standard Bank of South Africa* [2020] ZACC 2; 2020 (4) BCLR 429 CC par 201.

The above classification is an indication that objection to any decision taken by SARS officials must be handled in terms of s 104, including the impugned decision by the Commissioner to constitute the Committee.

[16] In *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* the SCA held as follows:

"[17] Section 105 is an innovation introduced by the TAA from 1 October 2011. It has moreover been narrowed down by an amendment made in 2015. 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. Thus, a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA, unless a high court directs otherwise.

[18] This is reinforced by the amendment of s 105 in 2015. The original version read as follows:

'A taxpayer may not dispute an assessment or "decision" as described in section 104 in any court or other proceedings, except in proceedings under this Chapter or by application to the High Court for review.' (underlining for emphasis)

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

[19] This understanding is reinforced by the explanatory memorandum that accompanied the Tax Administration Law Amendment Bill of 2015. It described the purpose of the amendment of s 105 as follows:

'The current wording of section 105 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 or before the tax board or the tax court, be exhausted before a higher court is approached 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 High Court to direct otherwise should the specific circumstances of a case require it.'

[20] The purpose of s 105 is clearly to ensure that, in the ordinary course, tax disputes are taken to the tax court. The high court consequently does not have jurisdiction in tax disputes unless it directs otherwise. In *Wingate-Pearse* it was put as follows:

'Tax cases are generally reserved for the exclusive jurisdiction of the tax court in the first instance. But it

is settled law that a decision of the Commissioner is subject to judicial intervention in certain circumstances In its amended form s 105 thus makes it plain that "unless a High Court otherwise directs", an assessment may only be disputed by means of the objection and appeal process."²

[17] A finding that this Court has no jurisdiction to review the decision of SARS absent compliance with section 105 of the TAA is dispositive of the matter. In *Absa Bank Limited and Another v Commissioner for the South African Revenue Service (ABSA)* the court recognised that it could only exercise its discretion to depart from the normal course in exceptional circumstances. Sutherland, DJP remarked as follows:

"It was contended that the provisions of s 105 indicate a confined arena in which to conduct any disputations over a tax liability. However, plainly, if a court may 'otherwise direct', that results in an environment for dispute resolution in which there is more than one process. A court plainly has a discretion to approve a deviation from what might fairly be called the default route. Inasmuch as the section is couched in terms which imply that permission needs to be procured to do so, there is no sound reason why such approval cannot be sought simultaneously in the proceedings seeking a review, where an appropriate case is made out. It was common cause that such appropriate circumstances should be labelled 'exceptional circumstances'. The court would require a justification to depart from the usual procedure, and this, by definition, would be 'exceptional'. However, the quality of exceptionality need not be exotic or rare or bizarre; rather it need simply be, properly construed, circumstances which sensibly justify an alternative route. When a dispute is entirely a dispute about a point of law, that attribute, in my view, would satisfy exceptionably."³

[18] Ponnan, ADP in *Rappa* endorsed the principle that there should be exceptional circumstances before the High Court could deviate from the normal route. He however highlighted that the mere fact that a dispute raises a pure point of law does not, of its own, create exceptional circumstances. He remarked as follows:

"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

² *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* (Case no 1205/2021) [2023] ZASCA 28 (24 March 2023); See also *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (1231/2021) [2023] ZASCA 29 (24 March 2023); *The Commissioner for the South African Revenue Service v Absa Bank Limited and Another* (596/2021) [2023] ZASCA 125 (29 September 2023).

³ *Absa Bank Limited and Another v Commissioner for the South African Revenue Service* [2021] ZAGPPHC 127; 2021 (3) SA 513 (GP).

complete reconsideration of the assessments.”⁴

[19] *Rappa* clarified that the default position in tax disputes is a referral to the tax court. The applicant must show exceptional circumstances warranting deviation from the normal route and that raising a point of law does not on its own warrant deviation from s 105. S 105 is designed to promote alternative dispute resolution and allow taxpayers an opportunity to exhaust all internal remedies in a cheaper environment where they have access to specialized skills before approaching the High Court. It does not take away the right of the taxpayer to approach the High Court; it however allows the High Court to decide whether exceptional circumstances exist warranting deviation before judicial resources are committed.

[20] In *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* the Supreme Court of Appeal reconfirmed the principles set out above and made the following observation:

“ ... In simply ignoring the emphasis placed by the TAA on alternative dispute resolution and in disregarding the need to exhaust its internal remedies, the high court became the appellant’s first port of call. The danger with such an approach is that high courts could potentially be flooded with like matters ... ”⁵

[21] The applicant did not attempt to make out a case for exceptional circumstances. The applicant found no reason to exhaust available internal remedies in terms of the TAA. Consequently, it has not made out a case for this matter to be heard in the High Court in terms of s 105 of the TAA. The application must fail.

[22] Costs should follow the event.

⁴ *Rappa* fn 2 above par 12.

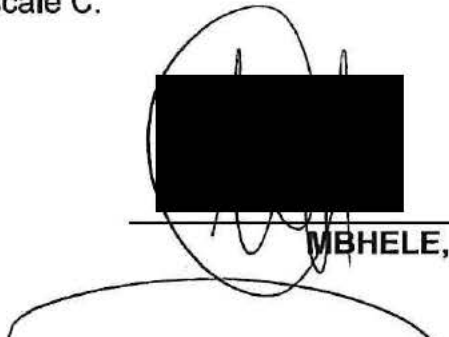
⁵ *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* (728/2022) [2023] ZASCA 144; 86 SATC 474 (8 November 2023) par 24.

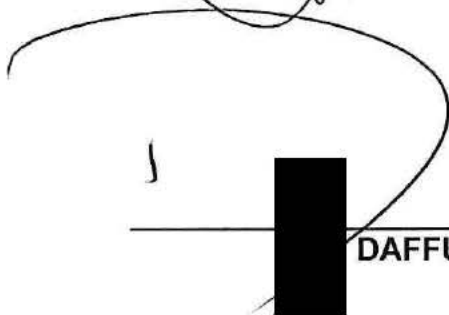
ORDER:

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

1. The application is dismissed.
2. The applicant shall pay the costs of the respondent, including the costs of two counsel, the fees of senior counsel to be taxed on scale C.

I concur



MBHELE, DJP

DAFFUE, J

Appearances:

For the Applicant:

Instructed by:

Advv MB Mojaki and TM Ngubeni

Moruri Attorneys Inc

Bloemfontein

For the Respondent:

Instructed by:

Advv N Snellenburg SC and MS Mazibuko

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