IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
_____	_____
DATE	SIGNATURE

CASE NO: 20525/21

DATE: 6 September 2022

In the matter between:-

CITY POWER JOHANNESBURG (SOC) LTD Applicant

V

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

Respondent

JUDGMENT

KOOVERJIE J

A RULE 30 AND 30A APPLICATIONS

[1] I have been seized with two interlocutory applications namely:

(i) an application by the Commissioner for the South African Revenue Service (SARS) in terms of Rule 30; and

(ii) an application by City Power Johannesburg (Soc) Ltd (City Power), in terms of Rule 30A.

[2] The parties are in agreement that these applications be consolidated and heard together. For the purposes of this application I will refer to the parties as "SARS" and "City Power". The nub of the dispute pertains to a jurisdiction issue.

[3] The Rule 30 application is premised on the basis that the review application instituted by SARS (wherein it sought to review and set aside of the respondent's decision to only partially allow the applicant's request in terms of Section 164 of the Tax Administration Act 28 ("TAA")) constitutes an irregular step.[1] Furthermore, it was contended that the review application is premature and this court does not have jurisdiction.

[4] The interlocutory proceedings between the parties unfolded as follows:

(i) City Power instituted a review against SARS' decision taken in terms of Section 164 of the TAA. SARS failed to file the record in terms of Rule

[1] P C01-2 of the record

53(1)(b) of the Uniform Rules of Court. Instead, SARS issued a Rule 30 notice on the premise that the said review proceedings constituted an irregular step;

(ii) City Power in persisting with its review application instituted its Rule 30A application, compelling SARS to file the record in terms of Rule 53(1)(b), thereby, *inter alia*, requesting all documents and electronic records pertaining to SARS' impugned decision of 16 November 2020 ("the decision").

[5] Although the determination of the merits in respect of the review is not before me, it would be necessary to have regard thereto when considering the jurisdiction point.

B BACKGROUND

[6] The tax dispute between the parties arose when SARS disallowed the objections against the additional assessments regarding the 2014, 2015 and 2016 income tax years of the assessment. The total assessed liability was calculated in an amount of R1,269, 454,085.00 (one billion, two hundred and sixty-nine million, four hundred and fifty-four thousand and eighty-five rands). The tax debt is to be adjudicated on appeal to the Tax Court (income tax dispute).

[7] Based on the "pay-now-argue-later" principle, City Power was required to make payment of its tax debt. SARS partially suspended the payment obligation and directed that 50% of the capital amount remained payable whilst the balance of the disputed debt was suspended, as per its decision of 16 November 2020. It should be noted that this constituted the second decision in terms of Section 164(3) of the TAA. It is this decision that City Power seeks to review.

C ISSUES FOR DETERMINATION

[8] Ultimately, the issues for determination are whether City Power was, in law, justified to institute the review application or whether it was confined to exhaust the internal dispute resolution processes in terms of the TAA, more specifically, Section 105 thereof.

[9] Accordingly the outcome of the Rule 30A application will have a bearing on the outcome of the Rule 30 application.

D POINTS IN LIMINE

- **Condonation**

[10] The review application was served on 26 April 2021. However SARS only served its Rule 30 notice on 8 July 2021. City Power contended that SARS failed to furnish a reasonable and full explanation for the delay in seeking condonation. Hence the application lacked substance and had no merit.

[11] SARS explained that it only became aware of the irregular step after consulting with their counsel a few days after receipt of the review application. City Power argued that SARS was out of time in filing the Rule 30 notice, thereby being non-compliant with Rule 30(2)(b). SARS was required to file the notice within 10 days of becoming aware of the fact that the step concerned had been taken and not within 10 days of becoming aware of the irregularity of the step. In other words, within 10 days of

becoming aware that the review application was filed. The review application was served on 26 April 2021 and the Rule 32 was only filed on 8 July 2021.

[12] It is trite that condonation is not granted at the mere request of a party seeking such indulgence. Although this court has a wide discretion, good cause must be shown. The term "good cause" is not cast in stone.[2] However the principal requirements have been crystalized by our authorities to test "good cause" namely that:

(i) an explanation for the default must be sufficiently full for the court to understand how the delay came about and to assess the party's conduct in such delay;

(ii) there must be a *bona fide* defence showing that the party's conduct was not ill-founded;

(iii) there should not be prejudice to the opposite party and further any such prejudice could be compensated by an appropriate order as to costs.[3]

[13] A court is required to balance various factors and have regard to all of them, with none of them being decisive.[4] Factors identified by our courts for consideration include the length of the delay; the explanation for or the cause for the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the party or parties; and the effect of the delay on the administration of justice. They are inter-related and must be weighed against each other – the strong factors compensating the weak.[5]

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[2] Silber v Ozen Wholesalers (Pty) Ltd 1954 2 SA 345 A at 353 A
See also: Erasmus, Superior Court Practice Volume 2 D1 - 322-323
[3] See also: Erasmus, Superior Court Practice, Volume 2 D1 - 323
[4] Melane v Santam Insurance Company Limited 1962(4) SA 531 A at page 532; NEHAWU on behalf of Mafikeng and Others v Charlotte Theron Children's Home [2014] BLLR 979 (LAC)
[5] NUMSA v PARBAR JS 142/11, Labour Court of South Africa, Johannesburg, 18 January 2014

[14] The broad test and the ultimate determination is that condonation should be granted if it is in the "interest of justice". In determining what is in the "interest of justice", all relevant factors are considered. The particular circumstances of each case will determine which of these factors are relevant.[6] The concept "interest of justice" is wide and not capable of a precise definition.[7]

[15] An objective conspectus of all the facts are considered in order to determine whether the indulgence sought is justified. The test was aptly summarized in ***Melane v Santam Insurance Company Limited at 532 A***, the court stated:

"In deciding whether sufficient cause has been shown, the basic principle is that this court has a discretion, to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated for that would be a piecemeal approach incompatible with a true discretion. They are not individually decisive, save of course that there would be no prospects of success, there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the

[6] Brummer v Gorfil Brothers 2000 (2) SA 837 C

[7] Grootboom v National Prosecuting Authority and Another 2014(2) SA 68 CC at para 22

> "I have read the judgment by my colleague Zondo J. I agree with him that based on Brummer and Van Wyk, a standard for considering an application for condonation is in the interest of justice. However, the concept interest of justice is so elastic that it is not capable of a precise definition. As the two cases demonstrate, it includes the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonable of explanation for the delay; the importance of the issue to be raised in the intended appeal; the prospects of success".

importance of the issue and strong prospects may tend to compensate prolonged delay. And the respondents' interest in the finality must not be overlooked."[8]

[16] Having considered the explanation proffered by SARS for the delay, together with the other facts, I find that good cause has been shown. Although the applicant was correct in its understanding of the time period set out in Rule 30(2)(b), I am of the view, firstly, that the delay was not excessive and there has been no prejudice suffered by City Power. Secondly, it is not only in the interest of justice but in the public interest that the matter be heard. SARS exercised a public function in arriving at the impugned decision. In the premises condonation for the late filing of the Rule 30 notice is condoned.

- **Appropriateness of the Rule 30 Notice**

[17] Procedurally, City Power raised two points *in limine* regarding the Rule 30 application, namely:

(i) the Rule 30 application was not filed timeously (which I have dealt with above); and

(ii) the Rule 30 procedure was not the appropriate procedure.

[18] It was argued that Rule 30 is only applicable to irregularities of form and not to matters of substance.[9] Defences such as prescription and jurisdiction should be raised by special plea and not in terms of Rule 30. SARS' contention is based on

[8] Own emphasis
[9] C03-9 of the record

matters of substance, namely that statutory provisions in the TAA have been transgressed. Therefore, the Rule 30 constitutes an abuse of process.

[19] I have noted that a similar objection was raised in the ***FP*** matter[10] where SARS was criticized for instituting a Rule 30 notice pertaining to whether the court had jurisdiction. The court, in the ***FP*** matter referred to ***SA Metropolitan Lewensversekering-maatskappy Bpk v Louw NO***[11] where it was held that Uniform Rule 30 was *"intended as a procedure whereby a hindrance to the future conducting of litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed"*. At para 45, the court in ***FP***, applying this proposition, stated:

"In the present context it is the 'hindrance' of the review on motion which will be removed from the future conduct of the pending tax appeal should the review be set aside as an irregular step. I am accordingly persuaded that SARS cannot be criticized for invoking uniform rule 30 rather than uniform rule 6(d)(iii)..."

[20] I am further mindful that although the Rules of Court cannot simply be disregarded, our courts should not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before courts. In these circumstances, the Rule 30 application is permissible.[12]

E JURISDICTION

[10] Commissioner for the South African Revenue Service v FP (Pty) Ltd 25330, 25331, 25256 [2021] ZATC 8 (19 October 2021) at paragraphs 43-45
[11] 1981(4) SA 329- O
[12] Federated Trust Limited v Botha 1978(3) SA 645 A at 654 C-I and Eke v Parsons 2016 (3) SA 37 CC

[21] Generally it is the review court that would make a finding on jurisdiction. However there is no impediment for this court to make a determination on the jurisdiction aspect. There stands authority where the jurisdiction of the court is contested, it is necessary to make a ruling before one proceeds on the merits.[13] It is not prudent for a court to order compliance with the Rule 53 process, before the issue of jurisdiction is settled.

[22] In light thereof, I proceed to consider the issue of jurisdiction. The main issue for determination, in this matter, is whether a High Court has jurisdiction to adjudicate the review application instituted by City Power.

- **SARS's case**

[23] Since SARS's case is premised on Section 105 of the TAA, it argued that City Power was required to follow the dispute resolution process set out in Chapter 9 of the TAA. Further City Power is required to obtain leave of the court to proceed with the review application.

[24] The relevant provisions central to the determination of this matter are Section 104 and 105 of the TAA:

(i) Section 105 reads:

"105. Forum for a dispute of assessment or decision-

[13] Para 20 Competition Commission of South Africa v Standard Bank of South Africa CCT158/18, 170/18, 218/18 20 Feb 2020 – CC p199

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.";

(ii) Section 104 of the TAA stipulates:

"104. Objections against assessments or decisions-

(1) a taxpayer aggrieved by an assessment made in respect of a taxpayer may object to the assessment;

(2) the following decisions may be objected to and appealed against in the same manner as the assessment:

(a) a decision under subsection (4) not to extend the period for lodging an objection, and

(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 under a Tax Act.

(3) a taxpayer who is entitled to object to an assessment or decision must lodge an objection in a manner under the terms and within the period prescribed in the Rules."[14]

[25] Section 101 of the TAA defines what decisions are capable of resolution under Chapter 9 of the TAA. The term "decision" is defined as decision referred to in Section 104(2).

[14] my emphasis

[26] SARS contended that the impugned Section 164 decision constituted a "decision" as envisaged in Section 104 (2)(c) read with Section 105. Consequently the Tax Court has jurisdiction to consider the decision. Hence a taxpayer can therefore not sidestep the statutory process of objection and appeal processes to the Tax Court in terms of Section 105. A taxpayer thus aggrieved by a decision which falls within the ambit of Section 104 is required to firstly exhaust the internal process.

[27] Furthermore, it was argued that City Power failed to obtain leave of the Court prior to it instituting the review application.[15] This was a fundamental requirement that had to be met.

- **City Power's case**

[28] City Power contended that SARS's interpretation and understanding of the provisions of the TAA are misconstrued. In summary, the following was submitted on behalf of City Power's version was as follows:

(i) Chapter 9 of the TAA regulates the appropriate forum for the resolution of the disputes relating to assessments or decisions and may be objected to or appealed against in the same manner as an assessment;

(ii) however, the impugned decision in issue does not fall under Chapter 9 of the TAA. A decision made in terms of Section 164 of the TAA does not make provision for an internal resolution process to be adhered to;

(iii) moreover, the decision taken in terms of Section 164 does not constitute a "decision" that falls within the purview of Section 104(2)(c). On this basis, City Power is not confined to follow the process set out in Section 105;

[15] C01-9 of the record

(iv) the dispute in the main application is unrelated to the income tax dispute that is pending in the Tax Court. The review application concerns the correctness of SARS's decision not to wholly suspend the payment obligation of the applicant in respect of the tax debt which is disputed pending the final adjudication of the Tax Court appeal. The matter before the Tax Court concerns, *inter alia*, the extent of City Power's indebtedness.

[29] It was further argued that the decision in terms of Section 164 of the TAA resulted from the exercise of discretionary powers of the respondent and is further not capable of resolution by means of an objection or appeal to the Tax Court. A discretionary decision in terms of Section 164 should be properly ventilated in a review application before a High Court. Such discretionary powers constitute "administrative action" in terms of Promotion of Administrative Justice Act ("PAJA").

F ANALYSIS

- **Applicability of Sections 104 and 105 of the TAA**

[30] Having heard argument from both parties, I am required to firstly determine whether the decision is one in terms of Section 104. If so, then S105 would find application.

[31] Prior to the amendment of Section 105 in 2015, the parties were given the option to either refer their disputes via the internal dispute resolution process or approach the High Court on review[16].

[16] Amended in terms of Government Gazette No. 39310 of 22 October 2015

[32] However, the amended Section 105 is more onerous and limits the extent to which disputes can be resolved before the High Court. The amended Section 105 reads:

"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"[17].

[33] Section 105 makes provision for internal remedies, such as an objection or an appeal process in terms of SARS' dispute resolution process (either before the Tax Board or the Tax Court) to be firstly exhausted before a High Court is approached.[18] However, Section 105 does not oust the jurisdiction of the High Court when the circumstances warrants a deviation from the internal processes.

[34] On a reading of the amended Section 105, I am of the view that it is aligned with developments in our law (which I deal with below). The fact that the impugned decision constitutes an administrative action, as defined in the Promotion of Administration Justice Act ("PAJA") and that a Tax Court has jurisdiction to adjudicate tax disputes in terms of PAJA which includes legality reviews, is not enough to oust the jurisdiction of the High Court. As stated aforesaid, Section 105 (as amended) is more onerous.

[35] In an earlier decision of ***Metcash***,[19] the court appreciated that the door of the court is not shut to litigants. However, a case has to be made to satisfy the court that the matter be entertained by the court.[20]

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[17] Memorandum on the objects of Tax Administration Laws Amendment Bill, 2015 and my emphasis
[18] The Commissioner for the South African Revenue Service v FP (Pty) Ltd Case 25330, 25331 and 25256 Tax Court Cape Town, 19 October 2021
[19] Metcash Trading v The Commissioner for the South African Revenue Sercie 2001 (1) SA 1109 CC
[20] At paragraph 43 that there is no impediment placed on the taxpayer in any way to approach a court of law. A taxpayer against whom an assessment has been made is not restricted from resorting to a court of law for whatever other relief that may be appropriate in the circumstances.
Section 34 of the Constitution gives litigants the right to access to a court to resolve a dispute

[36] With the advent and adoption of our Constitution, the Constitutional Court in the ***Koyabe*** matter warned that if litigants were allowed to proceed straight to court, it would undermine the autonomy of the administrative process, all the more so where administrators have specialized knowledge or easier access to the relevant facts or information. [21]

[37] With the promulgation of PAJA, Section 7(2) of PAJA clarified the context within which a matter becomes ripe for review before a court. Section 7(2) placed a more onerous duty to exhaust internal remedies in respect of administrative action.

(i) Section 7(2)(a) stipulates that:

"no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has been exhausted.".

(ii) Section 7(2)(b) in fact entitles a court to direct a party to first resort to the internal remedies before instituting proceedings for judicial review.

(iii) Section 7(2)(c) further allows a court in exceptional circumstances and on application by a party, to exempt a party from its obligation to exhaust such internal remedy if the court or tribunal deems it in the interest of justice.

[38] Exemption from complying with the internal processes would be allowed under exceptional circumstances and on application to the court. Two preconditions have to be met in terms of Section 7(2), namely: the circumstances must be exceptional and

[21] Koyabe v Minister of Home Affairs and Others 2010 (4) SA 327 (CC) at par 36
See also Director General Department of Home Affairs v Link 2020 (2) SA 192 WCC, par 32

must be in the interest of justice. This was affirmed in ***Dengetenge***[22] read with ***Nichol***[23].

[39] More recently, the Supreme Court of Appeal in ***MEC Local Government Environmental Affairs and Development Planning Western Cape***[24] upheld ***Nichol***, stating that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted by way of a successful application under Section 7(2)(c) of PAJA. The person seeking exemption must satisfy the court, firstly, that there are exceptional circumstances, and secondly, that it is in the interest of justice that exemption be given.

[40] In ***Nichol*** the court interpreted what "exceptional circumstances" entail:

"Circumstances that are out of the ordinary and that render it inappropriate for the court to require the Section 7(2)(c) for the applicant first to pursue the available remedies. The circumstances must, in other words, be such as to require the immediate intervention of the courts rather than to resort to the applicable remedy."[25]

[41] In ***Koyabe*** the Constitutional Court advised that *"what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue. Thus, where internal remedy would not be*

[22] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others (619/12) [2013] SASCA 5 at para 120

[23] Nichol v Registrar of Pension Funds 2008 (1) SA 383 (SCA) at para 15

> "It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under Section 7(2)(c)."

[24] Member of the Executive Council for Local Government, Environmental Affairs and Development Planning Western Cape v HU Plotz NO and Another Case No. 495/2017 SCA, dated 1 Dec 2017 at par 20

[25] Nichol matter, par 16

effective, and/or where its pursuit would be fatal, a court may permit a litigant to approach the court directly …".[26]

[42] In ***Koyabe*** the Constitutional Court, in fact, appreciated that a rigid approach is not sound. It held that the mere existence of an internal remedy is not reason enough to force parties down that avenue. The court went on to state:

"So too where an internal appellate tribunal has developed, a rigid policy which renders exhaustion fallible."[27]

[43] Our courts have therefore appreciated that in certain instances internal processes need not be exhausted, namely when the administrative action was unlawful, where there is a question of law or where the decision at first instance is final. A court has a discretion to approve a deviation from what might be called a default route.[28]

[44] The court in ***ABSA*** further recognized that Section 105 is couched in a manner that requires consent of the court before such matter can be entertained by such court. A court can decide to entertain the matter if there is justification to depart from the usual practice. Exceptional circumstances must exist.[29]

[45] Furthermore, in circumstances where internal remedies have been legislated, the court in ***R v Secretary of State for the Home Department, Ex parte Swati [1986] I All ER 717 CA at 724 a-b*** expressed:

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[26] Koyabe matter, par 39
[27] See footnote 28
[28] Koyabe matter, par 39
[29] ABSA Bank Ltd & Another v SARS 2021 (3) SA 513 GP at par 25, 44 & 45 (ABSA matter).

"By definition, exceptional circumstances defy definition, but where parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type procedure was provided."

[46] In ***Nichol***[30] the court also recognised that exemption may be granted if it is in the interests of justice and stated:

"Moreover the person seeking exemption must satisfy the court that there are exceptional circumstances and that it is in the interest of justice that the exemption be given."

[47] City Power contends that the impugned decision does not fall within Section 104(2)(c), namely it is not - *"any other decision that may be objected to or appealed against under the Tax Act."*

[48] On a reading of Section 104(2), it specifies decisions that may be objected to or appealed against in the same manner as an assessment. They are as follows: those decisions in terms of Section 104(2)(a) - not to extend the period for lodging an objection; Section 104(2)(b) – a decision under Section 107(2) not to extend the period for lodging an appeal and Section 104(2)(c) any other decision that may be objected to or appealed against.

[49] I have further noted the submissions made by SARS on this issue, namely which decisions fall within the purview of Section 104(3). In the ***FP*** matter SARS identified four decisions which constitute Section 104(2)(c) decisions, namely:

(i) a decision not to authorize a refund of an excess payment (Section 190(6));

[30] ABSA matter, par 26

(ii) a decision not to remit a penalty (Section 220);

(iii) a decision not to remit an understatement penalty (Section 224 read with Section 222 and 223); and

(iv) decisions made in respect of the withdrawal of voluntary disclosure relief (Section 231(2)).[31]

SARS' reasoning was that the right to object and/or appeal was specifically entrenched in the said provisions.

[50] In the ***FP*** matter, Section 42 and Section 106 of the TAA were considered by the court. It was argued that since these provisions do not expressly entrench the rights to object and appeal, they therefore are not "decisions" as envisaged in Section 104(2)(c).

[51] Relying on a similar argument, City Power submitted that even Section 164 does not make provision for an objection or an appeal. On this basis it was argued that Section 105 does not find application.

- **Compliance with Section 7(2) of PAJA**

[52] Even if the said reasoning has merit, I am of the view that compliance with Section 7(2) of PAJA is non-negotiable in these circumstances. The applicant is required to satisfy this court that the internal processes have been exhausted and, more importantly, that exceptional circumstances warrant the attention of the High Court.

[31] FP matter at par 21

[53] I have noted that City Power alleged the following grounds for seeking relief directly from this court, namely that:

(i) City Power had exhausted all internal remedies under Section 7(2) of PAJA; and

(ii) SARS exercised a public power and performed a public function in terms of the enabling legislation.

[54] The nature of the review application is one where City Power seeks to set aside and substitute the Section 164(3) decision, where a SARS official partially disallowed the tax debt despite a request to suspend the entire amount of the disputed assessed tax liability payable was made.

[55] Section 164(1) of the TAA is known as “pay-now-argue-later” rule which provides that the obligation to pay tax will not be suspended by an objection or appeal unless a senior SARS official otherwise directs in terms of Section 164(3) of the TAA.

[56] Section 164(5) of the TAA further makes provision for the senior SARS official to further revoke his/her decision to suspend the payment with immediate effect if it is satisfied that:

(a) the objection or appeal was frivolous or vexatious;

(b) the taxpayer employ dilatory tactics or, on further consideration, the suspension should not have been given or if there is a material change in any of the factors upon which the initial decision to suspend was based.

[57] It is common cause that such decisions constitute administrative actions as defined in PAJA.[32] Section 1 of PAJA defines administrative action as *"any decision taken or any failure to take a decision by an organ of state when … exercising public power or performing a public function in terms of any legislation … which adversely affects the rights of any person …"*.

It is also not disputed that the senior SARS official exercised his/her discretionary power. This entails that the decision has to be lawful, reasonable and procedurally fair.

[58] As alluded to above, the contention that the decision in terms of Section 164(3) is an administrative action which has to be tested in terms of PAJA is not sufficient since it has been accepted that the Tax Court has jurisdiction in terms of PAJA which includes legality reviews.

[59] On my understanding, therefore, although it may be that the Tax Court may have jurisdiction under certain justified circumstances there is no reason why the High court cannot entertain the matter if the circumstances justify it.[33]

[60] On the issue as to whether City Power had exhausted the available internal processes, I am required to have regard to the specific circumstances which existed before or at the time of the institution of the review proceedings in issue.

[61] I have noted the interaction between the parties from the review application. In summary:

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[32] Metcash Trading v The Commissioner for the South African Revenue Service 2001 (1) SA 1109 CC at 1133 C-G at par 40

[33] Section 117 of the TAA set out the jurisdiction

(i) City Power claimed a Section 12C allowance from the 2003 income tax year of assessment onwards. However, SARS disallowed the Section 12C deduction and City Power thereafter replied to SARS audit findings;

(ii) thereafter SARS issued additional assessments and levied understatement penalties;

(iii) City Power lodged an objection in terms of Section 104 of the TAA read with Rule 7 of the Rules, objecting to the additional assessments mainly on the basis that City Power was exempt from income tax;

(iv) the Notice of Objection was disallowed in its entirety. This caused City Power to file its Notice of Appeal against the respondent's disallowance of the applicant's objection in terms of Section 107 read with the Rules;

(v) upon the issuing of the additional assessments, City Power submitted a request for suspension of payment of the disputed tax in terms of Section 164 of the TAA. SARS partially allowed the suspension (first partial allowance dated 18 May 2020 decision);

(vi) City Power then in terms of Section 11(4) of the TAA informed SARS of its intention to take the SARS decision on review by way of application to court. City Power further requested SARS to undertake that it would stay all recovery proceedings regarding the disputed tax debt pending the finalisation of the adjudication of the review application;

(vii) in response, SARS advised that the Section 11(4) notice was premature as the City Power was required to first exhaust all internal remedies provided in the TAA. The internal remedy available was in terms of Section 9 of the TAA where a specified SARS official would reconsider the decision.[34] This led to a dispute as to the interpretation of Section 9 of the TAA. City Power's understanding as set out in its correspondence was:

"We respectfully disagree with your interpretation of Section 9 of the TAA. The decision by SARS not to suspend the payment of a disputed tax debt is not subject to any internal remedy. In this respect, notably, the statute in Section 9 of the TAA does not provide for the exercise of any remedy or a remedy of an internal nature. That much is evident from the fact that the statute actually expressly provides for a reconsideration by the same SARS official – thus it can never be said to constitute the exercise of a remedy in the sense that another individual and/or decision making body would reconsider or review the correctness of the initial decision. In this respect your attention is directed at the SCA decision in ***DPP Valuers (Pty) Ltd v Madibeng Local Municipality 2015 JDR 2093 (SCA) at par 10-22*** *as well as to the decision by Plasket J (as he then was) referred to by the SCA in DPP Valuers, par 21."*

Further it was stated that in any event the senior SARS official has failed to exercise his discretion to reconsider and has neither availed City Power to such opportunity[35];

(viii) SARS, however, persisted with the Section 9 internal remedy process and advised City Power that it was up to the taxpayer to initiate the Section 9

[34] MM14 (A01-22)
[35] MM15 (A01-22)

reconsideration, City Power was further advised that the request would be presented to a different senior SARS official;

(ix) it was on this basis that City Power submitted the formal request in terms of Section 9 of the TAA. This caused a second partial allowance of the suspension decision to be issued (16 November 2020, the second partial allowance decision)[36];

(x) on 20 November 2020, City Power further requested that SARS suspend the collection steps to recover the disallowed amount. When ADR proceedings ensued SARS refused to accede to City Power's request until the conclusion of the ADR proceedings[37];

(xi) City Power once again issued a Section 11(4) notice on 15 December 2020, advised SARS of its intention to approach the High Court;

(xii) SARS, upon receipt of the second Section 11(4) notice, proposed an amicable resolution by:

(i) agreeing not to institute recovery proceedings in respect of the disputed amount pending the finalisation of the applicant's intended review application by this court; alternatively

(ii) SARS was willing to agree that the balance of the disputed tax debt be suspended until the resolution of the Section 12C dispute by the Tax Court;

[36] MM20 (A01-23)
[37] MM21 (A01-24)

(xiii) City Power alleged that on its understanding of the resolution, it agreed on the said terms. However, it later transpired that the parties were not on the same page regarding the interpretation of SARS' proposed settlement.

[62] Currently, the matter, as it stands on the Section 164 issue, is that SARS had at least two opportunities to consider the matter. SARS has not proposed specific prescribed processes, except that the applicant can appeal to the Tax Court.

[63] Although I am mindful of the fact that SARS has not as yet responded to the allegations set out in the review application, the processes undertaken have been considered by me on the reading of the correspondence attached to the application. I reiterate that the decision in terms of Section 164(3) was considered once again by SARS in terms of the Section 9 dispute resolution process.

[64] The argument that the Tax Court has jurisdiction does not oust the jurisdiction of the High Court. I find that in this instance exceptional circumstances do exist. From the said interaction between the parties, I am satisfied that the internal dispute resolution processes have been exhausted. These are circumstances as envisaged by the courts in ***Nichol*** and ***Koyabe***. It can further not be gainsaid that it would be in the interests of justice that the exemption in terms of Section 7(2)(c) be granted.

[65] In the circumstances the review application should proceed. SARS is accordingly required to file the Rule 53(1)(b) record.

[66] In the premises, I make the following order:

1. The filing of the Rule 30 application is condoned.
2. The Rule 30 application is dismissed with costs, including costs of two counsel.
3. The Rule 30A application is granted with costs, including costs of two counsel.
4. SARS is ordered to file the record requested in terms of Rule 53(1)(b) of the Uniform Rules of Court.

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JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	Adv PA Swanepoel SC
	Adv L Sigogo SC
Instructed by:	Edward Nathan Sonnenbergs Incorporated
Counsel for the Respondent:	Adv R Bhana SC
	Adv T Chavalala
Instructed by:	The State Attorney
Date heard:	27 July 2022
Date of Judgment:	6 September 2022