REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2018/58410

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

1/8/2023
DATE

MOKOSE SNI

In the matter between:

SASOL FINANCING INTERNATIONAL PLC — Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES — Respondent

Case No: 2019/66502

SASOL FINANCING INTERNATIONAL PLC — 1st Applicant

SASOL FINANCING (PTY) LIMITED — 2nd Applicant

and

COMMISSIONER FOR THE SOUTH AFRICA REVENUE SERVICE — 1st Respondent

THE MINISTER OF FINANCE — 2nd Respondent

JUDGMENT

MOKOSE J

Introduction

[1] Before this court today, are two review applications, a directive having been issued by the Deputy Judge President that the matters will be heard together as they are related. These matters are inextricably linked in that the registration decision by the respondent, the first review, was the precursor to the assessment decision, the second review, as will be seen hereafter.

[2] The first application is the review of the decision taken by the respondent, South African Revenue Services (SARS) to register the first applicant, Sasol Finance International (SFI), a company incorporated in the Isle of Man as a South African taxpayer in terms of Section 22(5) of the Tax Administration Act 28 of 2011 ("TAA"). The second review application consists of a review of the income tax assessments issued by SARS against SFI for 2002 to 2012 years of assessment, a review of the penalty assessments issued in respect of those years and the constitutional challenge in terms of Section 270(6)(b) of the TAA.

[3] SFI is incorporated in the Isle of Man. Its parent company, Sasol Limited, set up the SFI to perform internal treasury functions including pooling foreign currency, extending loans to others in the group and also to invest surplus funds.

Brief Background

[4] It is common cause that prior to 2001, the Income Tax Act 58 of 1962 ("the Income Tax Act") imposed tax on income derived from a source within South Africa - so-called *"source based"* taxation. In 2001 South Africa adopted a residence-based income tax system in terms of which persons who are resident in South Africa for tax purposes pay South African tax on their worldwide income. Under the Income Tax Act, a foreign incorporated company is "resident" in South Africa only if it has its *"place of effective management"* in South Africa. The *"place of effective management"* is however, not defined in the Act.

[5] SFI was incorporated on the 24th of September 2001 on the Isle of Man. It was allegedly incorporated to meet Sasol's strategic international funding needs. Upon application to the South African Reserve Bank, approval was granted for the transfer of R5 million for the establishment of the applicant and to fund its working capital. It is alleged that the senior management was from the inception of this company, located on the Isle of Man and was responsible for the decision making, oversight and implementation of the overall optimal strategy and strategic day-to-day treasury activities of the applicant in serving its primary role as an offshore treasury company for Sasol.

[6] The court is also informed that following an in-depth investigation audit into the tax affairs of SFI spanning several years, SARS formed the view that SFI was obliged to register as a taxpayer since it was tax resident in South Africa as defined in paragraph (b) of the definition of a "resident" as contained in Section 1 of the Income Tax Act.

[7] On 16th February 2018 SARS determined that the SFI's place of effective management during the years 2002 to 2012 had been in South Africa and therefore had been a "resident" during those years and would be registered as a taxpayer with effect from the 2002 tax year. SFI now seeks the following relief:

(i) that SARS decision of the 16th of February 2018 to register SFI as a taxpayer under section 22(5) of the TAA be reviewed, declared unlawful and set aside;

(ii) insofar as may be necessary, the applicant be exempted from the obligation to exhaust any remedy in terms of Section 7(2)(c) of Promotion of Administrative Justice Act 3 of 2000 ("PAJA"); and

(ii) that SARS be directed to pay SFI's costs including the costs of three counsel.

[8] In order for this court to determine whether it should grant the relief sought, it is necessary to consider some of the bases upon which SARS has assessed SFI as a taxpayer. This review application is not about whether SFI or SARS were right or wrong about SFI having its place of effective management in South Africa or on the Isle of Man. That would be a factual inquiry which does not fall within the jurisdiction of this court but would fall within the exclusive jurisdiction of the Tax Court as established in terms of Section 116 of the TAA. This court is tasked to review the decision by SARS to

register the SFI as a taxpayer, declare the decision invalid and set it aside in terms of PAJA or in terms of the principle of legality.

[9] This court is also not called upon to determine the correct interpretation of the phrase *"place of effective management"* as contained in the definition of *"resident"* in Section 1 of the Income Tax Act and to decide where the SFI's place of effective management was actually situated. The court accepts that the decision was correct and that SFI calls upon it to scrutinize the process SARS followed in arriving at its decision to register it as a taxpayer.

[10] It is accepted by this court that SARS has as one of its main objectives the efficient and effective collection of revenue. Its functions include the enforcement of the national legislation as listed in Schedule 1 to the SARS Act. In terms of established principles of statutory interpretation of the Income Tax Act and the TAA, the acts must be interpreted by SARS contextually and purposively so as to achieve the objectives and functions of SARS as set out therein.

Interpretation Notes

[11] On the 26th of March 2002 the respondent published an Interpretation Note IN6 to guide taxpayers on how to go about interpreting and applying the phrase, *"place of effective management"*. A company's place of effective management was defined as *"the place where the company is managed on a regular or day-to-day basis."* This guideline is broadly referred to as the *"implementation approach"*.

[12] SARS points out that the implementation approach does not strictly and accurately capture the content of Interpretation Note IN6 which contains factors that go beyond the implementation of decisions and expressly states that the list of factors is not exhaustive. Accordingly, the facts and circumstances must be examined on a case-by-case basis. The factors set out in Interpretation Note IN6 constitute 'substance' factors which are not limited to those that simply respond to the question of where decisions are implemented.

[13] In 2015 SARS published a new interpretation note, Interpretation Note 6-2 which stipulated that a company's place of effective management is where *"key management and commercial decisions that are necessary for the conduct of its business as a whole are in substance made."* The note informed that the key decisions approach would be used in determining a company's place of effective management. Furthermore, SARS stipulated that Interpretation Note IN6-2 would only be applicable prospectively.

[14] The decision by SARS to register SFI as a taxpayer has a long paper trail. The applicant contends that SARS strayed from Interpretation Note IN 6 and the implementation approach and applied Interpretation Note IN6-2 or a combination of both to determine its status as a taxpayer. Either way, SARS reneged on its promise to apply IN6-2 and the key decisions approach prospectively. A letter of audit findings was furnished to the applicant on 5 December 2016 wherein the applicant was informed of the intention to register it as a taxpayer and an invitation to respond thereto, extended to the applicant. A letter of finalization of audit was sent on 16 February 2018 wherein an explanation of its determination of SFI's place of effective management was furnished to the applicant.

[15] At the beginning of 2018 and after SFI had responded to the letter of findings, SARS sent the assessment letter. We are informed that shortly before SARS sent the assessment letter, SARS' Large Assessment Committee discussed SFI and its status. The applicant alleges that this committee moors its conclusion primarily to Interpretation Note IN 6-2 and the key decisions approach. A few days after the assessment letter was sent to SFI, SARS' Investigative Audit: Large Business Division prepared a memorandum which also reflects the determination of SFI's place of effective management based on *"strategic decisions, alternatively, the implementation of key treasury operations"* taking place in South Africa. The applicant alleges that SARS considered and applied Interpretation Note IN6-2 and the key decisions approach thereby reneging on its promise to apply note 6-2 prospectively only.

[16] The applicant contends that SARS' decision to register it as a taxpayer is an administrative action under PAJA and exercises public power and performs public functions under the applicable tax legislation. Furthermore, if SARS' decision is not an administrative action it remains an exercise of statutory and public power therefore it is reviewable under the principle of legality. This decision is not subject to the internal objection procedure under section 104 of the TAA which does not apply because this review is not about the correctness or validity of SFI assessments. This review is about the

lawfulness of SARS' administrative decision to register SFI as a taxpayer. However, if Section 104 is not applicable would be in the interests of justice to exempt SFI from following that procedure before bringing the review.

[17] We are informed that the basis upon which SARS concluded that SFI's place of effective management is situated in South Africa was a drawn out and detailed investigation into the affairs of the company and is detailed in the finalisation of audit letter. It concluded that since inception SFI was significantly constrained by a lack of resources to deal with the treasury functions and transactions it was required to deal with. It was doubtful that the two out of five employees could have effectively conducted a fully segregated treasury in the areas of cash management and pooling, trading, foreign exchange management, the issuing of intercompany loans, obtaining of third-party finance and the issuing of guarantees. SARS then concluded that SFI was created to avoid the taxation of interest and foreign exchange gains in South Africa and that based on the assessment of these facts, it was clear that SFI was both effectively managed and controlled from South Africa.

[18] Following the decision in the matter of *Oceanic Trust Co Limited NO v Commissioner, South African Revenue Services*[1] and during September 2011, SARS produced the discussion paper on the conflict between the approach adopted in IN6 and that adopted in the OECD commentary. A proposal was made that there ought to be a refinement of the general focus adopted in IN6 to align it with the approach of international norms. This resulted in the publication in 2015 of Interpretation Note IN6-2 which is generally referred to as *'the key decisions'* approach which refers to *"a place where key management and commercial decisions that are necessary for the conduct of its business as a whole are in substance made"*.

[19] SARS contends that it applied a test that was consistent with the law as set out in the Oceanic case which it must be noted, predates both the Discussion Paper and Interpretation Note IN6-2.

[1] [2012] JOL 2880 (WCC)

Inordinate Delay on the part of SARS

[20] The applicant's first ground of review is that SAR's decision is inordinately delayed and as such should be set aside. The applicant contends that SARS delayed in making its registration decision by almost two decades only registering it as a taxpayer in February 2018 with effect from the beginning of July 2001. The applicant brings to the court's attention the matter of *Cassimjee v Minister of Finance*[2] where the court held that any inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant its dismissal. The court held further that the power to dismiss such a claim is derived from the court's inherent jurisdiction to control its own proceedings. It set out the three requirements for a dismissal, emphasizing that each case turns on its own facts.[3] The three requirements are that there should have been a delay in the prosecution of the action, that the delay must be inexcusable and thirdly that the defendant must be seriously prejudiced thereby.

[21] The applicant contends therefore that the first requirement has been met in that there was a delay in the decision. This is not in dispute. The applicant further contends that the second requirement, being that there is no excuse for the delay, has also been met as SARS fails to offer a reason other than its logistical difficulties in finalizing the matter. Thirdly, the applicant is also of the view that the requirement of serious prejudice has been met in that after two decades SFI does not have the documentation and relevant testimony to refute the allegations now made against it and cannot the information. Furthermore, the most important witness, Mr. Leon Roome, is now elderly and frail and would have great difficulty in coping with the challenges of a trial regarding events that took place two decades ago. It is also impossible for elderly ex-employees to refresh their memories and be able to testify with knowledge of a vast volume of material dating back so many years.

[22] SARS, on the other hand, denies that there was an inordinate delay on its part and explains that to the extent that it took long for it to reach its decision, that was fully explained in the correspondence and engagements with SFI. It is further submitted that 'the delay' cannot be described as inordinate which would warrant the decision to be reviewed and set aside.

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[2] 2014 (3) SA 198 (SCA)

[3] Cassimjee v Minister of Finance 2014 (3) SA 198 (SCA)

[23] SARS explains in its papers that it was required to piece together the mechanics of the various transactions based on large amounts of complex documentation to enable it to come to the decision of registering the applicant as a taxpayer. These investigations were lengthy and took time to assimilate and probe. Furthermore, SARS was often provided with inadequate and often meaningless responses to requests for information thereby causing the very delays complained of. Furthermore, in administering the TAA, SARS is not constrained to time periods to enforce its powers and duties particularly not in instances where there had been non-compliance by a taxpayer or a prospective taxpayer including the failure to register for tax.

[24] Whilst I agree that the period taken by SARS seems to be an ordinately long time, the delay has been explained that to obtain the information as was required to enable it to come to a decision, took a long time for the reasons as stated. Thereafter, the information had to be probed to enable a decision to be made by the respondents. The reasons for the delay are reasonable in the circumstances: therefore, I am of the view that the delay in the prosecution of the matter is excusable. Accordingly, the second requirement of an inexcusable delay as per the Cassimjee matter quoted above, has not been met.

[25] The third requirement being that of the serious prejudice suffered by the applicant must also be met. Regarding serious prejudice it is accepted as a rule that the longer the delay, the greater the likelihood of serious prejudice at the trial.[4] SARS is however of the view that the difficulties identified by the applicant pertaining to the employees are more contrived than real. SARS submitted that its requests to interview the relevant employees were easily met. Furthermore, the applicant has not made out a case to set aside the impugned decision based on the alleged delay.

[26] I agree and am satisfied that the applicant has not made out a case to set aside the impugned decision based on the alleged delay. Furthermore, I do not see the prejudice as averred by the applicants – furthermore, I agree that the inability of the employees to give evidence was contrived as SARS was able to interview the relevant employees satisfactorily so as to enable it to make the impugned decision.

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[4] Per Salomon J in the English case of Allen v Sir Alfred McAlpine and Sons Ltd: Bostick v Bermondsey and Southwark Group Hospital Management Committee; Sternberg v Hammond [1968] 1 All ER 543E to H, commended by and cited in the SCA in Cassimjee (supra) at para 12.

SARS' decision contravenes the Tax Administration Act

[27] The respondents contend that the registration decision by SARS was taken in terms of Section 22(5) of the TAA which provides as follows:

"Where a person is obliged to register with SARS under a Tax Act failed to do so, SARS may register the person for one or more tax types as is appropriate under the circumstances or for purposes of section 26(3)."

[28] The applicant contends that this was a necessary precursor to the assessment decision as a company or a person is obliged to register with SARS prior to SARS being able to raise an assessment. In terms of Section 67 of the Income Tax Act a person who is obliged to register as a taxpayer is *"every person who becomes liable for normal tax being income tax and becomes liable to submit a tax return"*. Accordingly, SARS had to satisfy itself that SFI was obliged to register with it as a taxpayer. For SARS to reach such a conclusion it had to consider whether SFI's place of effective management was in South Africa.

[29] The applicants aver that whilst SARS was satisfied that SFI's board decisions were taken in South Africa and that the implementation decisions were taken on the Isle of Man and applied Interpretation Note IN6-2, SFI cannot be held liable retrospectively for South African tax for the periods that Interpretation Note IN6 was applicable.

[30] Section 99 of the TAA provides for limitations on SARS' power to raise assessments. Section 99(1)(d) prohibits the raising of assessments where the tax sought to be levied was previously not levied due to *"a practice generally prevailing"*. The applicant contends that SFI cannot be held liable for tax which would not have been payable under Interpretation Note IN6, applying the implementation approach as that approach constituted a *"practice generally prevailing"*.

[31] Under Section 5(2) of the TAA a practice generally prevailing ceases only under the following circumstances:

(i) where there is an amendment of a relevant statutory provision;

(ii) where a court overturns or modifies an interpretation of the relevant statute that is the subject of the publication; or

(iii) where SARS withdraws or modifies the official publication *"from the date of the official publication of the withdrawal or modification."*

[32] According to the applicant, none of the circumstances described above occurred and in particular, there was no change to the definition of "resident" in Section 1 of the Act. Furthermore, there has been no decision by a court overturning or modifying the interpretation of the phrase *"place of effective management"*. Furthermore, Note IN6 was withdrawn only from the date of the official publication of Note IN6-2 being the beginning of November 2015.

[33] The applicant avers that the effect of Section 5 read with Section 99(1)(d) is to preclude SARS, where there has been a change in the practice generally prevailing, from revisiting the tax periods during which "the practice generally prevailing" applied. They may not be assessed retrospectively because of any change.

[34] SARS denies that it applied Interpretation Note IN6-2 retrospectively and that to the extent that it relied on some of the considerations mentioned in interpretation note IN6-2 and the OECD commentary in reaching its decision, it did not act in a procedurally unfair or unlawful manner warranting the review and setting aside of the impugned decision. SARS contains that SFI's criticism on its alleged sole reliance on Interpretation Note IN6-2 is misplaced. This was stated in the audit finalisation letter.

Breach of binding undertaking

[35] When Interpretation Note IN6-2 was published, it was stated that it would be applicable to the years of assessment after its date of publication which was November 2015. The applicant avers that SARS undertook to only apply the note prospectively. However, the registration decision is unlawful because in making such a decision to register it as a taxpayer, SARS considered and applied IN6-2 retrospectively thereby reneging on its promise to apply IN6-2 prospectively only. The applicant relied on the Constitutional Court judgment of *KwaZulu-Natal Joint Liaison Committee v MEC for Education,*

KwaZulu-Natal[5] and that of *Pretorius v Transport Pension Fund*[6] and contends that the repudiation by SARS of its promise is unconscionable when measured against the constitutional standard of reliance, accountability and rationality. It further contends that such repudiation is unlawful and justifies the setting aside of the decision to register SFI as a taxpayer in South Africa.

[36] The respondents are of the view that the applicants' contentions in this regard have no merit and that Interpretation Note IN6-2 was not applied retrospectively in making the decision to register SFI as a taxpayer. Furthermore, counsel for the respondent distinguished the matter *in casu* from the KwaZulu-Natal matter on the basis that the matter *in casu* deals with the interpretation of a tax note and that the respondent never gave a promise to the applicant not to register it for tax purposes whilst the court held the provincial government to its promise pay independent schools a subsidy in the following year.

[37] The Pretorius matter concerned an appeal against the decision on an exception. The Constitutional Court referred to the alleged absence of legislative authority to make the promise at issue. However, it held that this related to matters of capacity that lay outside the material pleaded in the particulars of claim. The decision in the KwaZulu Natal matter was followed which neither of the parties contended had been incorrectly decided.

[38] A promise must be consistent with the public body's statutory obligations. Accordingly, a public body cannot contract itself out of its statutory duties.[7] I agree with the respondent that an undertaking by SARS to apply Interpretation Note 6-2 prospectively only could not undermine SARS' obligation to apply the rules of the Income Tax Act pertaining to the place of effective management as interpreted by the courts. A promise to do so would conflict with its statutory obligations and would be unlawful.

[39] Furthermore, I take note of Section 3(2) of the TAA which requires SARS to administer the TAA and the tax acts. In line with this obligation, SARS must register a person as a taxpayer where he is obliged so to register in South Africa. Furthermore, SARS must then collect the tax so to, the tax debt.

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[5] 2013 (4) SA 262 (CC)
[6] 2019 (2) SA 37 (CC)
[7] R v Liverpool Taxi Owner's Association [1972] 2 All SA 589 (CA) at 594

Breach of SFI's legitimate expectation

[40] The applicant contends that its expectation was legitimate for the following reasons:

(i) Interpretation Note IN6 is clear and unambiguous;

(ii) SARS created an expectation that it would comply with Interpretation Note IN6;

(iii) the expectation is derived from a document created precisely buy SARS as a guideline to taxpayers pertaining to their compliance with tax statutes;

(iv) SARS has the power to publish interpretation notes which are intended to guide taxpayers; and

(v) the retrospective application of Interpretation Note IN6-2 is contrary to the principles of good administration, candour and transparency.

[41] Furthermore, the applicant contends that it *"enjoyed an expectation"* that SARS would not apply a new interpretive approach retrospectively.

[42] The respondents denied that the applicant has met the requirements for a legitimate expectation which well formulated as follows in the matter of *NDPP v Phillips*[8]*:*

"(a) the representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications;

(ii) the expectation must have been induced by the decision maker;

(iii) the expectation must be reasonable;

(iv) the representation must be one which is competent and lawful for the decision maker to make."

[43] A legitimate expectation arises *"either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."*[9] According to South African law, legitimate expectation entitled the person to procedural

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[8] 2002 (4) SA 60 (W) at para 28

[9] Premier, Mpumalanga v Executive Committee, Association of State Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC) at para 33

fairness in relation to administrative action that may affect or threaten that expectation. The question whether a legitimate expectation confers a right to substantive relief beyond that ordinarily contemplated by a duty to act fairly has not been determined to be part of our law.[10]

[44] The applicant contends that SFI enjoyed an expectation that SARS would not apply a new interpretive approach retrospectively and that it was not fair for SARS to deprive SFI of that expectation without a hearing. In response to this contention the respondents submit that SFI was only entitled to procedural fairness and not to any substantive relief flowing from the alleged breach of its legitimate expectation. Furthermore, SFI had been granted an opportunity to be heard by SARS when confronted with its findings by way of the letter of ordered findings. However, the applicant contains then it was a perverse form of procedural fairness in that SARS did not notify SFI of its intention to depart from Interpretation Note IN6 and apply the key decisions approach prior to applying that change.

[45] I am of the view that when SFI was afforded an opportunity to influence SARS decision it should have spoken exhaustively on any aspect of the potential application of Interpretation Note IN6-2 and all such issues as were listed in the letter of audit findings. This did not happen. Furthermore, SFI did not make out a case for the right to substantive relief based on a breach of legitimate expectation neither did it plead a case for the development of the common law to recognize such a right to substantive relief. Accordingly, SFI's case based on legitimate expectation fails.

Decision is unreasonable

[46] The applicant contends that SARS' decision based on interpretation note IN6-2 and the key decisions approach is unreasonable for the following reason: Interpretation Note IN6 was the prevailing approach for a period of 13 years to determine a company's place of effective management. This interpretation note was legitimately relied upon by taxpayers and potential taxpayers for clarity on how the law would be applied. The applicant accepts that the respondent is entitled to change interpretation notes from time to time. However, in so doing SARS is bound to act rationally, fairly and reasonably. The reasonableness of an administrative decision depends on factors such as the nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the

[10] Premier, Mpumalanga case (supra) at para 36

decision, the reasons given for the decision, the nature of competing interests involved and the impact of the decision on those affected.[11]

[47] The respondent denies that it acted unlawfully, unfairly or unreasonably in its registration of SFI as a taxpayer in South Africa. It contends that in so doing it considered all relevant factors and in particular, Interpretation Note IN6 as a flexible guideline in making the decision. To the extent that it considered relevant factors mentioned in Interpretation Note IN6-2, it was entitled to do so as it was consistent with the law. Furthermore, the respondent contends that it was obliged to apply the law.

[48] Substantive unfairness is not a ground of review under PAJA nor is it a ground of review under the principle of legality. Furthermore, the issue of procedural fairness has been dealt with under the ground of review based on legitimate expectation above.

[49] For the reasons set out above, I am of the view that the application for review is dismissed with costs of three counsel.

Second Review

[50] The second application which is inextricably linked to the matter above, is a review of the income tax assessments that the first respondent, SARS, issued against the first applicant, SFI, for the 2002 to 2012 years of assessments. Furthermore, the review is of the penalty assessments that SARS issued against SFI for the same years of assessment. Thirdly, the review entails a constitutional challenge to section 270(6)(b) of the TAA which is sought to be declared unconstitutional and set aside to the extent that it permits SARS to impose and understated penalties retrospectively.

[51] The main issues for determination are the lawfulness of the decisions by SARS to issue the impugned assessments and penalty assessments. A secondary issue for determination is the constitutionality of the impugned provision.

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[11] Bato Star Fishing (Pty) Ltd v Minister of environmental Affairs and Tourism 2004 (4) SA 490 (CC) at para 45

[52] The applicants seek the following relief:

(i) the income tax assessments that the first respondent issued against the first applicant for the 2002 to 2012 years of assessment are declared invalid and set aside;

(ii) the understatement penalty assessments that the first respondent issued against the first applicant 4 the 2002 to 2012 years of assessment are declared invalid and set aside;

(iii) section 270(6)(b) of the TAA is declared unconstitutional an invalid and is set aside to the extent that it permits the first respondent to impose understatement penalties retrospectively;

(iv) to the extent necessary, the first applicant it's exempted from the obligation to exhaust available internal remedies in terms of section 7(2)(c) of PAJA; and

(v) the respondent be directed to pay the applicant's costs including the costs of three counsel.

[53] SARS and the Minister of Finance ("the Minister") oppose the application an order in respect of the constitutional challenge that the application be dismissed with costs including the costs of three counsel and that in the event that the impugned provision is found to be unconstitutional, the declaration of invalidity is suspended for 24 months.

[54] The background to this matter has been outlined above, the first application having been a precursor to the application presently being dealt with, the review of the assessment decision. The application is based on the same facts as the first review and the grounds of review overlap between the two applications. The correctness of the impugned assessments is in dispute between the parties however, it is not an issue in these review proceedings. The correctness of the impugned assessments can only be the subject of a tax appeal before the Tax Court. Accordingly, this is a review of an administrative decision.

[55] For this reason, the background facts will not be repeated save to say that on the 2nd of July 2018 SFI filed objections against the said assessments. On 5 March 2019 SARS issued a notice of partial disallowance of the objection pertaining to the assessments. During June 2019 SFI requested SARS that the appeal process be put in abeyance pending the finalization of the review application which SARS agreed to. On 2 September 2019 SFI filed the second review for an order declaring invalid and setting

aside the income tax assessment understatement penalties ("USP") for the period 2002 to 2012 tax years. No agreement was reached between the parties to put this matter in appearance pending the outcome of the second review application.

[56] The applicant contends that the impugned assessments are unlawful and invalid because they were issued in contravention of the empowering legislation and are therefore liable to be set aside for review. Furthermore, when SARS issued the impugned assessments SFI income for the relevant years being 2002 to 2012 tax years, had already been assessed in Sasol Finance's hands in terms of Section 9D of the Act. The assessments had therefore prescribed and SARS was precluded from reopening, revising or reassessing any amount therein. SARS had applied the implementation approach in IN6 to ensure that SFI was not resident in South Africa and on that basis SFI was regarded as a foreign company treated by Sasol Finance as its controlled foreign company ("CFC") in terms of section 9D of the act.

[57] The first respondent, SARS, contends that the assessments are not *ultra vires* and are not precluded by legislation. Section 99(1)(a) of the TAA provides that the commissioner may not make an assessment three years after the date of the original assessment by SARS. However, it is subject to the qualifications in *inter alia,* section 99(1) of the TAA.

[58] When South Africa changed from a sourced based taxation two residents-based taxation in 2001, Section 9D was enacted as an anti-avoidance provision aimed at curbing tax avoidance in respect of offshore income. Section 9D(2) provides that a resident shareholder of a CFC must include in its income the net income of that CFC.

[59] A CFC is a foreign company the majority of whose shares are owned by South African residents and is defined in the act as follows:

"any foreign company where more than 50% of the total participation rights in that foreign company a directly or indirectly held, or more than 50% of the voting rights in that foreign company or directly or indirectly exercisable, by one or more persons that our residents..."

[60] A foreign company is defined in section 1 of the Act as *"any company which is not a resident."*

[61] The applicant argues that in applying Interpretation Note IN6, Sasol Finance and SFI satisfied themselves that SFI's place of effective management was on the Isle of Man and that it was not resident in South Africa in terms of section 9D. By issuing the original assessments in accordance with the tax returns, SARS accepted Sasol finance's declaration in its tax returns for the relevant years that SFI was its CFC and assessed Sasol Finance's account in respect of SFI's net income as required by Section 9D.

[62] SARS, on the other hand, explains in its answering affidavit that it never accepted SFI as Sasol Finance's CFC And that the CFC review had not been finalised by it. Pursuant to the audit that SARS conducted it established that SFI was tax resident in South Africa and therefore could not simultaneously be declared as Sasol Finance's CFC. Furthermore, its version ought to be accepted on the Plascon Evans rule.[12]

[63] The Plascon Evans rule serves as a guide to our courts in determining which parties' version should prevail when disputes of fact are found in motion proceedings. The rule holds that when factual disputes arise in circumstances where the applicant seeks final relief, the relief should be granted in favour of the applicant only if the facts alleged by the respondent in its answering affidavit read with the facts it has admitted, justify the order prayed for. This rule applies equally to review applications.[13]

[64] I am satisfied that the application before the court is for final relief. The court is not inclined to grant the relief sought since the facts alleged by the respondent in the answering affidavit read with the facts it has admitted do not justify the order prayed for by the applicant.

Understatement Penalties Unlawful

[65] The applicant submits that in the event of this court having dismissed all the grounds of the review as set out in the first review and also the ground of review set out herein, SFI would seek the setting aside of the understatement penalty assessment on the basis that:

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[12] Plascon Evans Paints Ltd v Van Riebeek Paints Ltd 1984 (3) SA 623 (A) at 634
[13] South Africa Veterinary Counsil v Szymanski 2003 (4) SA 42 (SCA) at para 25

(i) they were unlawfully imposed; or

(ii) section 270 is unconstitutional and should be declared invalid to the extent that it permits the levying of understatement penalties retrospectively.

[66] Prior to the 1st of October 2012 penalties for nonpayment or underpayment of tax were levied in terms of the now repealed section 76 of the Act. Section 222(2) of the TAA provides for the levying of understatement penalties as follows:

"(1) In the event of an "understatement" by a taxpayer, the taxpayer must pay, in addition to the tax payable for the relevant tax, the understatement penalty determined under subsection (2) unless the "understatement" results from a bona fide inadvertent error.

(2) The understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in section 223 to each shortfall determined under subsections (3) and (4) in relation to each understatement."

[67] Section 223 of the TAA prescribes that the understatement penalties may only be remitted if *inter alia* the taxpayer was in possession of the tax opinion confirming that the tax position adopted was likely to be upheld in court. The transitional provision in section 270(6B) of the TAA applies to Section 223(3)(b)(i).

[68] Section 270 (6) of the TAA provides as follows:

"Additional tax, penalty or interest may be imposed or levied as if the repeal of the legislation in schedule 1 had not been affected and maybe assist and recovered under this Act, if-

(a) Additional tax, penalty or interest which but for the repeal would have been capable opinion of being imposed, levied, assessed or recovered by the commencement date of this Act; or

(b) an understatement penalty, administrative non-compliance penalty or interest under this act cannot be imposed, levied, assessed or recovered in respect of an understatement as defined in Section 221, non-compliance or failure to pay that occurred before the commencement of this Act."

[69] Understatement Penalties are intended to punish non-compliant taxpayers and to deter taxpayers from non-compliance with their tax obligations. Although the maximum percentage of penalty that can be levied is the same the two tax regimes being the TAA and the Income Tax Act differ. The applicant is of the view that the TAA is more stringent in respect of the remission of penalties than the Section 76 regime. In terms of section 76 of the Income Tax Act SARS has an unfettered discretion to remit the whole of the penalty unless it was satisfied that the taxpayer had the intent to evade tax. Where the taxpayer intended to evade tax, but SARS was of the opinion that there were extenuating circumstances, SARS also has an unfettered discretion to remit the whole of the penalty. The Minister points out that the only real difference between the sections under the TAA and Section 76 of the Income Tax Act is that the TAA introduced a structured approach to the calculation of penalties which replaced the purely discretionary approach which persisted under the Income Tax Act.

[70] Under the Understatement Penalty regime of the TAA penalty percentages for different behaviours under various circumstances are prescribed in Section 223 (1) and SARS has no discretion. Understatement Penalties do not qualify for remission if the prescribed requirements in terms of Section 223(3) are not met.

[71] The applicant contends that it would not have been lawful for SARS to remit the penalties on the basis of the implementation approach in IN6 and it would have been reasonable to come to the view that SFI's place of effective management was on the Isle of Man. Accordingly, it was clear that SFI was being subjected to a harsher punishment regime under the TAA than would have been applicable under Section 76 of the Income Tax Act.

[72] SARS denies that Section 270 of the TAA allows it to impose understatement penalties retrospectively. SARS states that what section 270(6)(b) allows is for "additional tax" and that the TAA did not create a new obligation for a penalty tax to be imposed. That had been provided for in the form of Section 76 of the Income Tax Act.

[73] The Minister, who has been joined to these proceedings because of the constitutional challenge against the TAA, has a similar view to that of SARS. He submits that the amendment to section 270(6)(b) was to clarify that if an understatement penalty could not be imposed for any reason

before 1 October 2012, additional tax penalties may still be imposed as they read prior to the amendment or repeal of the TAA. The Minister further contends that SFI's constitutional challenge is baseless and misconceived. Furthermore, the constitution does not prohibit the passing of legislation in the civil sphere that has retrospective effect.

[74] A thorough reading and proper interpretation of Section 270(6)(b) indicates that additional tax, penalties or interest maybe imposed as if the old legislation (Income Tax Act in this case) had not been repealed but only if the non-compliance giving rise to that additional tax or penalty arose before the commencement of the TAA. Therefore, Section 270(6)(b) operates forward but looks backwards. This was done to ensure that the taxpayer who had contravened its obligations in terms of the Income Tax Act while it was still in operation would be subjected to the penal consequences applicable in terms of the Income Tax Act however, it would be implemented in terms of Section 222 and 223 of the TAA.

[75] I agree with the view of the Minister and SARS that section 270(6)(b) is not unconstitutional and accordingly the constitutional challenge is dismissed.

Strike out application

[76] The applicants in their replying affidavit to SARS' answering affidavit raised certain matters which the first respondent was of the view was impermissible for the reason that it had been raised for the first time in reply. These also constituted matters which they believed were frivolous, vexatious or irrelevant and which were prejudicial to them. Consequently, SARS seeks to have these matters struck out of SFI and Sasol Finance's replying affidavit. The application is opposed by the applicants.

[77] In terms of Rule 6(15) the court may on application, order to be struck out of any affidavit any matter which is scandalous, vexatious or irrelevant with an appropriate order as to costs including the costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted.

[78] SARS in its application sought to have the word "evade" struck out of the first and second applicants' replying affidavit on the basis that it was irrelevant, scandalous or vexatious. The applicant

in the strike out application submitted that it was never its case that SFI evaded tax and that its case was always that SFI is a South African resident on the basis of its place of effective management being situated in South Africa and accordingly, SFI is taxable on its worldwide income in South Africa.

[79] In opposing the striking out application SFI and Sasol Finance state that the repeated statement that SFI did not pay tax on the Isle of Man without more, insinuates that SFI was established for a tax evasion or tax avoidance purpose.

[80] Furthermore, SARS also seek an order to have the sentence ***"SARS has already lost a tax appeal in the Supreme Court of Appeal and the constitutional court, where this was pertinently in dispute"***[14] to be struck out. SARS is of the view that this statement is not completely factually correct and that SFI and Sasol Finance purposefully overstate their case as the statement in question relates to a different and distinct taxpayer whose tax affairs are not in issue in the present matters.

[81] I have had regard to the impugned sentences and agree with the view of the applicants in the striking application, that the sentences are irrelevant, scandalous and vexatious and grant an order that the following clauses be struck out:

The word "evade" in para 11.4 of the applicants' opposing affidavit

Para 21.4 of SFI and Sasol Finance's replying affidavit

[82] For the reasons stated above, the following order is granted:

In respect of the first review application: 58410/2018

(i) The application is dismissed with costs of three counsel;

In respect of the second review application: 66052/2019

(ii) The application is dismissed with costs of three counsel in respect of the first respondent and two counsel in respect of the second respondent.

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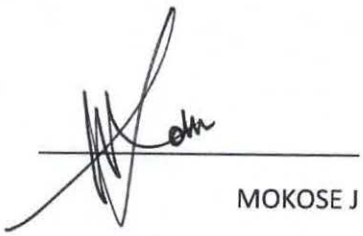

MOKOSE J

Judge of the High Court of
South Africa Gauteng
Division, PRETORIA

For the Applicants:	Adv WH Trengove SC
	Adv JMA Cane SC
	Adv NK Nxumalo
On instructions of:	Webber Wentzel Attorneys
For the First Respondent:	Adv HGA Snyman SC
	Adv NG Maenetjie SC
	Adv RJ Tsele
On instructions of:	Klagsbrun Edelstein Bosman Du Plessis Inc
For the Second Respondent:	Adv A Mosam SC
	Adv M Musandiwa
On instructions of:	The State Attorney, Pretoria
Date of hearing:	16 & 17 November 2022
Date of judgment:	1 August 2023