



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

[REPORTABLE]

Case no: 9706/21

In the matter between:

PIETER JOHAN ERASMUS

Applicant

and

**THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE**

Respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 18 AUGUST 2023

SHER, J:

1. This is an application in which the applicant seeks an order reviewing and setting aside a decision by the Commissioner of the South African Revenue Services that he was party to an alleged impermissible tax avoidance arrangement, in terms of s 80A (read with ss 80B and 80L) of the Income Tax Act,¹ and an assessment that he was consequently liable for dividends tax in the amount of R 183 536 979 (R 183.5 million odd) and an understatement penalty of R 137 652 734 (R 137.6 million odd), plus interest.
2. The dividend tax represents 15% of the amount of R 1 223 579 858 i.e R 1.2 billion, which it is common cause was paid to the applicant on 27 March 2015 by a company, Treemo (Pty) Ltd. The understatement penalty represents 75% of the value of the dividend tax imposed.

¹ Act 58 of 1962.

The facts

3. The applicant is the former CEO of Pepkor Holdings Ltd, a well-known South-African public company which was founded in 1965, which operates a portfolio of retail chains in SA and other countries. At one time or other, relevant to these proceedings, he was a director and shareholder of the company and numerous other companies, including Klee Investments (Pty) Ltd, Newshelf 103 (Pty) Ltd and Treemo (Pty) Ltd, and a beneficiary of the PJ Erasmus Family Trust, which in 2015 changed its name to the Black River View Trust ('the Trust'), and the Trust in turn was also a shareholder in Treemo.
4. On 25 March 2015 Treemo's directors approved a 'capital' distribution to the applicant of R 167 696 542 and cash distributions of R 1 222 303 458 (R1.22 billion odd) and R 1 276 400. In addition, approval was granted for the payment of a cash distribution to the Trust of R 8 723 600. These distributions were paid out 2 days later, on 27 March 2015.
5. As shareholders of Treemo the cash distributions constituted the payment of dividends to the applicant and the Trust, and in the ordinary course would accordingly have been subject to dividend tax at the rate of 15%. But no such tax was levied or paid, because at the time Treemo had so-called STC i.e 'Secondary Tax on Companies' credits which in value exceeded a billion rand, and these were set off against the value of the distributions.
6. Prior to 2012 resident companies that paid dividends in SA were subject to a secondary, dividend tax at a flat rate of 10%. An amendment to the Act² in 2012 whereby the tax payable on dividends was increased to 15%, allowed companies with STC credits to carry them over for a period of 3 years, until 31 March 2015. Thus, the STC credits which were held by Treemo were used days before they were due to expire.
7. Some 4 years later, on 20 March 2019, the applicant was requested to provide the Commissioner with a detailed explanation and documentation pertaining to the various transactions that had taken place between Treemo, the Trust and himself, between the 2015 and 2018 tax years.

² Section 64(2).

8. In the response which he provided on 30 April 2019 the applicant revealed that during December 2014 he had sold 5.5 million shares which he held in Pepkor with a market value of R 510 million, and his entire shareholding in Klee, which had a market value of R 310 million, to Treemo, in exchange for shares in it. At the same time, he had also sold redeemable preference shares which he held in Newshelf, which had a market value of R 750 million, to Treemo, in exchange for shares in it. As far as the distributions which were made to him and the Trust in March 2015 were concerned, he confirmed these totalled just short of R 1.4 billion.
9. In June 2019 the applicant was notified that the distributions would be subjected to an audit. Pursuant thereto, he was called upon to provide additional documentation and to explain why neither the 'capital' distribution of R 167 million odd nor the combined cash distributions of R 1.2 billion odd had been declared in his 2016 return.
10. In the response which he provided on 5 August 2019 the applicant claimed that the distributions had not been disclosed because of an 'oversight' by his accountants, but that no tax consequences flowed from this as they were exempt from tax: the 'capital' contribution was exempt as it constituted a return of capital, and the other distributions were exempt because of the STC credits which were held by Treemo.
11. On 30 July 2020 the applicant was given notice that, the audit having been completed, the Commissioner was of the view that the provisions of the so-called 'General Anti-Avoidance Rule', as embodied in ss 80A-80L of the Act, were applicable, as it appeared that the applicant and the Trust had, together with a number of other corporate entities (including those previously referred to), engaged in an impermissible tax avoidance scheme or arrangement via a series of interrelated transactions in 2014 and 2015, which the Commissioner proceeded to set out.
12. It is not feasible, given the volume and intricacy of the transactions which it is alleged made up this arrangement, to traverse them in detail, nor is it necessary to do so for the purpose of these proceedings. Essentially, the Commissioner

contended that the parties thereto had contrived to obtain and utilize STC credits to shield the applicant from an anticipated liability for dividend tax by way of an interlinking series of what can fairly be described as complex and opaque transactions.

13. According to the Commissioner the initial set of dealings (which included inter-entity loans, various subscriptions for shares and capital and cash distributions, including dividends), constituted a form of 'round-tripping' of funds and a 'dividend strip' which had no apparent commercial rationale other than to transfer STC credits from 2 companies which originally held them, to Treemo.
14. This was followed by a 2nd set of transactions which were concluded between the applicant, the Trust and Treemo (which involved loans, share-sale/share-buyback and 'asset-for-share' arrangements, cessions and delegations, and a put and call option), which ultimately culminated in the distributions which form the subject of this matter.
15. Included amongst this set of transactions were dealings in February 2015 whereby Newshelf repurchased certain shares which were held by Treemo and Klee for R 1 622 790 642 i.e R1.62 billion odd. The Commissioner contended that as 1) the proceeds from the Newshelf repurchase, which the Commissioner referred to as a 'repurchase dividend', were intended to flow to the applicant and the Trust and 2) the applicant and the Trust each must have anticipated a significant liability for dividend tax in the event that this occurred and 3) neither Newshelf nor Klee had significant STC credits which could be used to offset such liability, the parties had facilitated the 'dividend strip' and the investment by the applicant in Treemo, in order to contrive a situation whereby, although the repurchase dividend would flow through Treemo to the applicant and the Trust, their liability for dividend tax could be offset against the STC credits which Treemo had acquired.
16. In the circumstances this constituted an impermissible tax avoidance arrangement as contemplated in s 80A of the Act. It involved 'round-trip financing' between the various transacting parties which had no significant effect on their business risks or net cash flows and had no apparent commercial purpose other

than to create a tax benefit for the applicant and the Trust, which they would not otherwise have obtained.

17. The wording used by the Commissioner was a reference to s 80C of the Act, which provides that a tax avoidance arrangement lacks commercial substance if it will result in a significant tax benefit but does not have a significant effect upon either the business risks or net cash flows of the parties thereto, aside from an effect attributable to the tax benefit that will be achieved. Likewise, the Commissioner's reference to 'round-trip financing' was a reference to the term in ss 80D(1)(a)-(b), which defines it as financing whereby 'funds' (which include not only cash funds but also any cash equivalents or any rights or obligations to receive or pay such) are transferred between or amongst the parties thereto; and which significantly reduces, offsets or eliminates any business risk incurred by any party and results directly, or indirectly, in a tax benefit.
18. The Commissioner accordingly proposed reversing or nullifying³ the tax benefits which had been created by disregarding all the transactions and entities which had participated in the arrangement, other than the repurchase by Newshelf of shares from Treemo and the flow of the resultant 'repurchase dividend' to the applicant and the Trust and render them liable for dividend tax at 15% of the value of the distributions received by them. Consequently, the applicant was invited to submit reasons why the proposed remedy should not be applied and why, in addition, an understatement penalty, as provided for in s 221 of the Act, should not be imposed.
19. In a response which was submitted by the applicant's attorneys on 28 September 2020 the applicant denied that the transactions detailed by the Commissioner constituted steps in, or were parts of, a tax avoidance arrangement. He said they had taken place after he decided in 2013 to restructure his assets, which involved considerable shareholdings, by consolidating them into a single holding company, for which Treemo was identified and acquired in 2014 via the Bravura group of companies. Pursuant thereto, in November 2014 the Trust entered into

³ In terms of s 80B(1)(a) of the Act.

- an agreement for the acquisition of shares in Treemo and a month later the applicant transferred his various shareholdings to it, in exchange for shares in it.
20. At or about this time Steinhoff International Holdings Ltd (a multinational South African company which was also listed in Germany), had decided to conclude a deal with several corporate entities whereby it would acquire a 92% equity interest in Pepkor, for an overall purchase consideration of R 62.8 billion. Pepkor shareholders were not to be paid in cash for their shares but would exchange them for shares in Steinhoff. The remaining 8% shareholding in Pepkor would continue to be held by its management, including the applicant.
 21. Subsequent to this, in January 2015 negotiations had commenced regarding the applicant's shareholding in Pepkor, which was held at the time via Treemo, and other corporate entities. These negotiations resulted in additional agreements being concluded in February 2015 whereby 1) Newshelf repurchased a class of ordinary shares which it held in Treemo, and the proceeds thereof (i.e the so-called 'repurchase dividend') were in turn used by Treemo to resubscribe for another class of ordinary shares in Newshelf and 2) Treemo and Klee in turn exchanged their respective shareholdings in Pepkor and Newshelf for shares in Steinhoff. These agreements were conditional upon approval being obtained for the underlying transactions from the Competition Commission, which occurred in April 2015.
 22. The applicant claimed that for there to have been an impermissible avoidance arrangement in terms of the Act it would need to be shown that the numerous transactions detailed by the Commissioner formed part of an 'operation, 'scheme' or 'undertaking', which in turn required there to be some connection or 'unity of purpose' between them, which there was not. According to him, the various transactions which made up the so-called 'dividend strip' had taken place between companies in which he was not involved and were transactions to which he was not a party.
 23. As for the Newshelf repurchase, according to the applicant this occurred to give effect to the overarching, governing agreements which had been concluded in terms of the Steinhoff/Pepkor deal, and neither he nor the Trust had any say in

dictating the terms, timing, or execution thereof. The applicant averred that at the time when he had engaged in the restructuring of his assets, he had not been aware of the potential Steinhoff/Pepkor deal, and at the time when he transferred his shareholdings to Treemo he had intended that it would remain invested in Pepkor.

24. As for the cash distributions which had been made to him by Treemo, the applicant claimed that these were funded by the proceeds which were received by Treemo from a subscription by the Trust of shares in it and were not funded by the Newshelf repurchase of Treemo shares.
25. Consequently, the various transactions referred to by the Commissioner did not constitute an impermissible tax avoidance arrangement and the distributions that were made were not liable for dividend tax. As for the proposed understatement penalty, insofar as reliance was placed on s 221(e) of the Act (which provides that such a penalty may be imposed where there has been an understatement pursuant to an impermissible avoidance arrangement), the applicant contended that as the subsection was only introduced into the Act in January 2017 it could not be applied retrospectively to the arrangement he was alleged to be party to, as it had been effected in 2014-2015.
26. In November 2020 the Commissioner requested further information from the applicant, including an explanation of the rationale for the R 1.4 billion distribution which had been made by Treemo and whether the purchase price for the acquisition of its shares took account of the STC credits which it held.
27. On 25 January 2021 the applicant confirmed that the calculation of the purchase price of R 12.5 million for Treemo's shares, which had been paid by the Trust, had been arrived at with reference to the STC credits which Treemo had acquired. At the time he had a 12% shareholding in Treemo and the Trust held the remaining 88%. In March 2015 he had concluded a 'call option' agreement with the Trust whereby he obtained an option to acquire the shares it held in Treemo, which was paid for out of the cash distributions he received.
28. On 24 February 2021 the Commissioner notified the applicant that, having considered the responses and additional information that had been provided, he

was not dissuaded from his original findings as set out in his s 80 J notice dated 30 June 2020. Consequently, he had raised an assessment of dividend tax on the amounts received by the applicant as cash distributions from Treemo, which was payable by no later than 30 April 2015, together with an understatement penalty of 75% of the value thereof, which had been levied, plus interest. The applicant was advised that should he wish to object to the assessment he was required to file the requisite notice in this regard.

29. On 15 March 2021 the applicant's attorneys responded that they had been instructed to launch an application in the High Court for the review and setting aside of the Commission's decision, on the basis that his assessment was irregular and fatally defective in that its factual basis was incorrect, as the Newshelf repurchase dividend had not flowed directly or indirectly to the applicant, but was used to invest in other shares. Consequently, the assessment was liable to be set aside as it was not authorized by the empowering provisions of the Income Tax Act or was levied on the basis of irrelevant considerations being taken into account or relevant ones being ignored, and it was not rationally connected to the information which the Commissioner had before him at the time.
30. It was submitted that in the circumstances, no useful purpose would be served in requiring the applicant to lodge his objection and the Commissioner was asked to agree to a stay of the objection process until such time as the review had been heard and any appeals against the judgment therein had been finalized.
31. In his response on 24 March 2021 the Commissioner noted that the applicant had not made use of the internal remedies which were available to him, in order to dispute the assessment. Consequently, the Commissioner was of the view that the proposed review was premature, and he was not prepared to accede to a request to stay the objection or to extend the due date for the filing thereof, *sine die*. This prompted the applicant's attorneys to request an extension of 30 days in order to allow the applicant to submit his objection, under protest. An extension was subsequently granted until 17 May 2021, which was complied with. On 9 June 2021 the applicant launched the instant application, which in due course was enrolled for hearing.

32. Upon allocation, and after considering the contents of the affidavits which had been filed, I invited the parties to make submissions, if any, as to why an order should not be made directing that the Commissioner's point in *limine* that the application should not be entertained as the applicant had failed to exhaust his internal remedies, should not be separated from the merits of the application and heard prior to a consideration thereof. Both parties duly made submissions. After considering them I made an order whereby I directed that the point in *limine* should be separated from the remaining issues and argument was subsequently heard only in respect thereof.
33. Shortly before the hearing the applicant filed an application for leave to amend his notice of motion, in order to seek an order exempting him from exhausting his internal remedies prior to the hearing of the review and directing that it may be heard.

The law

34. As was pointed out in the introduction, the application is one for the review and setting aside of the Commissioner's decisions that the applicant was party to a tax avoidance arrangement and that he was accordingly liable for dividends tax and an understatement penalty.
35. It was accepted⁴ that the Commissioner's decision in levying a tax assessment on the applicant constituted administrative action as per the Promotion of Administrative Justice Act⁵ ('PAJA'), and the review was framed in terms thereof. As a result, the provisions of ss 7(2)(a)-(c) of PAJA and s 105 of the Tax Administration Act⁶ ('TAA') came into play.
- (i) Ad the PAJA provisions
36. As far as the PAJA provisions are concerned, s 7(2)(a) stipulates that no court shall review an administrative action unless any internal remedy which is provided for in any other law has first been exhausted. Where a court is not

⁴ As per *ABSA & Ano v Commissioner, South African Revenue Service* 2021 (3) SA 513 (GP) para 30; and *Forge Packaging (Pty) Ltd v Commissioner, South African Revenue Service* [2022] ZAWCHC 119 para 47. In contrast to this it was held in *ABSA* (para 29) that, as a decision to issue a GAAR notice in terms of s 80J of the Income Tax Act 58 of 1962 is not 'final' and thus has no 'external or legal effect', it does not constitute administrative action as defined in PAJA.

⁵ Act 3 of 2000.

⁶ Act 28 of 2011.

satisfied that this has been done it must (in terms of s 7(2)(b)), direct that the party concerned first do so, before proceeding with a PAJA review. However, (in terms of s 7(2)(c)) a court may, on application, exempt a party from discharging this obligation, in 'exceptional circumstances', *if it deems this to be in the interests of justice*. Consequently, it has been held by our highest Courts that compliance with the duty to exhaust all internal remedies is compulsory, before a PAJA review is brought, unless the party concerned is excused from this obligation by a court,⁷ or the remedies specified are not available or would not be effective, or their pursuit would be 'futile'.⁸

37. Exceptional circumstances are not defined in PAJA, and one must accordingly look to the interpretation which has been given to the term in the case law. In this regard, courts have eschewed formulating a precise definition of general application, holding instead that the meaning to be given to the phrase will depend on the facts and circumstances of each particular case,⁹ including in tax matters.¹⁰ So, the phrase is 'sufficiently flexible' in its application that circumstances which might be regarded as ordinary in one matter may qualify as exceptional in another.¹¹
38. In arriving at a determination of the proper meaning to be afforded the term in the case before it, the Court is essentially required to be mindful of the trite and well-established three-legged canon of interpretation that regard must be had for the language used, in the context of the statute in respect of which it appears or to which it is applicable, and its purpose.¹²

⁷ *Nicol v Registrar of Pensions* 2008 (1) SA 383 (SCA) para 15; *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) para 29.

⁸ *Id*, *Koyabe*.

⁹ *Koyabe* n 7 para 29; *Liesching & Ors v S* 2019 (4) SA 219 (CC) paras 39, 51 (minority) and 132 (majority).

¹⁰ *Commissioner, South African Revenue Service v Rappa Resources (Pty) Ltd* 2023 (4) SA 488 (SCA) para 22.

¹¹ *Liesching* n 9 paras 39, 52.

¹² *Long Beach Homeowners Assoc v Department of Agriculture, Forestry & Fisheries & Ano* [2017] ZASCA 42 at para 15.2, which dealt with the meaning to be given to the term in the context of s 3(3)(a) of the Natural Forests Act 84 of 1998, which provided that a natural forest may not be destroyed save in 'exceptional circumstances'; *Rappa* n 10 para 17 and *United Manganese of Kalahari (Pty) Ltd v Commissioner, South African Revenue Services* [2023] ZASCA 29 para 11, which concerned the requirement that a Court seized with a review in a tax matter may only permit a deviation from the default route provided for in the Tax Administration Act 28 of 2011, in 'exceptional circumstances'.

39. As far as the language is concerned the Constitutional Court has confirmed,¹³ as has the Supreme Court of Appeal (including in a recent tax case¹⁴), with reference to earlier decisions of this Court, that an exceptional circumstance is one which is 'out of the ordinary' or 'unusual or special'.
40. In this regard, they cited *MV Ais Mamas*¹⁵ (which dealt with a provision¹⁶ in the Admiralty Jurisdiction Regulation Act¹⁷ that an admiralty court can, in exceptional circumstances, order the production of documents for inspection in regard to a maritime claim which is to be brought in a foreign court or tribunal), where Thring J held that the term denotes 'something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it, something uncommon, rare or different'.¹⁸ They also referred to *Petersen*,¹⁹ which dealt with the requirement²⁰ that a person charged with certain serious offences can only be released on bail if they can show the existence of exceptional circumstances, being circumstances that are 'indicative of something unusual, extraordinary, remarkable or peculiar'.²¹
41. Ultimately, and by way of summary, it has been held that what needs to be shown is that the circumstances are out of the ordinary, such that they render it inappropriate to require that the applicant should first exhaust any alternative remedies that may be available to them and justify the intervention of the Court, rather than of an alternative, available forum.²²
42. Finally, it should be pointed out that in endorsing the test espoused in *MV Ais Mamas* both the Constitutional Court²³ and the Supreme Court of Appeal²⁴ implicitly adopted two corollaries that flow from it (as is apparent in the extract

¹³ *Liesching* n 9, paras 131-132.

¹⁴ *Rappa Resources* n 10. *Vide* also *Ntlemeza v The Helen Suzman Foundation & Ano* 2017 (5) SA 402 (SCA) and *Knoop NO & Ano v Gupta (Executor)* 2021 (3) SA 135 (SCA), which concerned the ambit of the principle that in exceptional circumstances a Court may deviate from the rule that the operation and execution of an order which is final in effect is suspended, pending an appeal, and in contrast to this, that the operation and execution of an order which is interlocutory is not, in terms of ss 18(1) and (2) of the Superior Courts Act.

¹⁵ *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & Ano* 2002 (6) SA 150 (C).

¹⁶ Section 5(5)(a)(iv).

¹⁷ Act 105 of 1983.

¹⁸ *Id.*, 156H.

¹⁹ *S v Petersen* 2008 (2) SACR 355 (C) para 55.

²⁰ Section 60(11)(a) of the Criminal Procedure Act 51 of 1977, read with Schedule 6 thereof.

²¹ *Id.*, para 55.

²² *Nicol* n 7 para 16.

they quoted from it) viz that 1) whether or not exceptional circumstances exist is not a decision which depends on the exercise of a judicial discretion, but is a matter of fact to be determined on the evidence and 2) where a statutory provision directs that a fixed rule shall be departed from only in 'exceptional circumstances' effect will, generally speaking, best be given to the intention of the legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining the circumstances relied upon as allegedly being exceptional.²⁵

(ii) Ad s 105 of the TAA

43. That brings us to s 105 of the TAA, which provides that unless a Court 'otherwise directs', a taxpayer may only dispute a tax assessment or a decision as described in s 104 pertaining to their tax affairs,²⁶ in terms of the dispute resolution procedures provided for in the TAA. To this end a taxpayer who is dissatisfied with an assessment which has been levied may lodge an objection to it to the Commissioner, and if that that objection is unsuccessful, may lodge an appeal against the refusal thereof to the special Tax Court, established in terms of the Act.
44. In a review of the powers afforded to the Tax Court, the Constitutional Court held in *Metcash*²⁷ that it was an independent and impartial tribunal specially tooled to deal with tax cases. Although it operates to all intents as an ordinary court it has wide and extensive powers to interfere with, amend or reverse decisions of the Commissioner. Although the proceedings before it are appellate, they are more akin to a trial, as the appellant has the right to a full hearing i.e. a right to adduce and challenge evidence on issues raised in the appeal. Given the extensive powers which have been afforded to it, it has consequently been described as a court of revision, rather than a court of appeal.²⁸

²³ In *Liesching* n 9, which was concerned with the interpretation of s 17(2)(f) of the Superior Courts Act 10 of 2013, which provides that the President of the Supreme Court of Appeal may in exceptional circumstances refer a decision by 2 judges of appeal to refuse a petition, to the Court for reconsideration.

²⁴ *Rappa* n 10, which concerned an appeal against the dismissal of a review of a decision of the Commissioner.

²⁵ *Mv Ais Mamas* n 15, at 156H-157C.

²⁶ Being one which can be objected to or appealed.

²⁷ *Metcash Trading Ltd v Commissioner, South African Revenue Services & Ano* 2001 (1) SA 1109 (CC) para 47.

²⁸ *Rappa* n 10 para 13; *Africa Cash & Carry v Commissioner, South African Revenue Services* 2020 (2) SA 19 (SCA) para 52.

45. In the circumstances, it is trite that the Tax Court may exercise what would traditionally be defined as review powers, in a tax appeal which has been raised before it.²⁹ It is by now also well-established that such review powers include the power to determine both so-called PAJA reviews in terms of the grounds provided for in PAJA (these are set out in s 6 of PAJA and include complaints that the decision under challenge was arrived at without regard for relevant considerations, or by having regard to irrelevant ones, or without there being a rational connection between the material on which it was based and the conclusion which was arrived at by the decision-maker), as well as legality reviews i.e. reviews on the basis that the decision-maker acted outside of their powers.³⁰ Legality reviews challenge the conduct of an official or organ of state on the basis that it constitutes the exercise of public power, whereas PAJA reviews do so on the basis that it constitutes the exercise of administrative action, as defined in terms of PAJA.
46. Section 105 was introduced via the TAA in October 2012. In its original formulation it provided that a taxpayer could not dispute an assessment, or a decision which could be objected to or appealed in terms of the Act, except by way of proceedings under the Act i.e by way of objection and appeal, or by way of application to the High Court for review. Thus, the section seemingly gave the taxpayer a choice: they could elect to proceed either by way of the internal remedies of objection and if that failed, appeal, before the Tax Court (before thereafter proceeding to the High Court, if necessary, by a way of review or appeal), or they could elect instead to proceed directly to the High Court, on review.
47. In 2015 the section was amended, as set out above, to read simply that 'unless a High Court otherwise directs' a taxpayer can only dispute a tax assessment or a decision pertaining to their tax affairs, which can be objected to or appealed, in

²⁹ *Rappa* n 10 para 14, citing *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie* 1985 (2) SA 668 (T).

³⁰ *Rappa* n 10 para 15, endorsing the decision of the Full Court in *South Atlantic Jazz Festival v Commissioner, South African Revenue Services* 2015 (6) SA 78 (WCC) paras 21-24; *Wingate-Pearse v Commissioner, South African Revenue Services & Ors* 2019 (6) SA 196 (GJ) para 47.

terms of the dispute resolution procedures provided for in the Act i.e by way of objection to the Commissioner and failing success, an appeal to the Tax Court.

(iii) Ad the case law

48. Between 2015 and 2020 the Gauteng High Court declined to entertain review applications that had been brought before it, in respect of tax assessments³¹ which had been levied by the Commissioner, in 3 reported matters that I was referred to,³² on the basis that the applicants had not made out a case to be heard in the High Court as they had internal remedies available to them in terms of the TAA, which they had not exercised. From a perusal of the decisions in these matters, which concerned reviews which had been brought in terms of PAJA, it seems that extensive consideration was not given in them as to the ambit of the requirement of exceptional circumstances, which is necessary for an exemption to be granted from compliance with internal remedies, where a PAJA review has been brought.
49. It further seems that, until the decision of the selfsame Court in 2021 in the matter of *ABSA Bank v Commissioner, South African Revenue Service*,³³ no consideration was given to the question of whether in the case of a legality review in the High Court of a decision of the Commissioner (the most classic instance of which is one where it is alleged that the Commissioner has acted *ultra vires* by exceeding his statutory powers), in contrast to a PAJA review, it was necessary for an applicant to show the existence of exceptional circumstances, given that no such requirement is expressly set out in s 105 of the TAA, unlike s 7(2)(c) of PAJA.
50. As in this matter, in *ABSA* the applicant had sought to challenge a decision by the Commissioner that it had been party to an alleged impermissible tax avoidance arrangement, which had resulted in dividends being paid out, free of dividend tax. It sought to review and set aside both the Commissioner's refusal to

³¹ 'VAT' assessments in terms of the Value-Added Tax Act 89 of 1991.

³² *A Way to Explore (Pty) Ltd v Commissioner, South African Revenue Services* [2017] ZAGPPHC 541; *Gold Kid Trading CC v Commissioner, South African Revenue Services* 2019 JDR 1288 GJ; *Brits v Commissioner, South African Revenue Services* 2020 JDR 0121 (GP); which followed the Court's earlier refusal, in 2014, to entertain a review of an (income) tax assessment in *Medox v Commissioner, South African Revenue Services* [2014] ZAGPPHC 98.

³³ 2021 (3) SA 513 (GP).

withdraw a notice in terms of the GAAR provisions,³⁴ as well as the issue of letters of assessments pursuant thereto. However, unlike in this case the review was seemingly prosecuted and dealt with as a legality review and not one based on PAJA.³⁵

51. The Commissioner contended that it was contrary to the dispute resolution scheme of objection and appeal which was provided for in the TAA, for the applicant to approach the Court, without exhausting such internal remedies. In response, ABSA contended that the dispute turned solely on a 'pure' point of law and there was ample precedent which established that a court of law could deal with such a dispute, in tax matters.
52. In determining the point in favour of ABSA the Court referred (understandably, given that it was dealing with a legality review and not one in terms of PAJA), to the provisions of s 105 of the TAA only, and not to ss 7(2)(a) and (c) of PAJA. Nonetheless, in considering when a Court may 'otherwise direct' in terms of s 105 that a matter involving a tax dispute may be heard by it, as opposed to a forum provided for by the TAA, it held that the Court 'plainly' had a discretion to approve a deviation from the 'default' route (via the dispute resolution mechanism and procedures provided for in the TAA), in 'appropriate' circumstances, which it considered should be 'labelled' as exceptional circumstances, as the Court would require justification to depart from the default procedures, and this by definition, would be 'exceptional'.³⁶
53. It held further that the exceptionality required for such a dispute to be heard in a civil Court need not be 'exotic' or 'rare' or 'bizarre' and, properly construed, required simply that there were circumstances which 'sensibly justified' the alternative route of approaching the Court directly for relief.³⁷ In its view, when a

³⁴ Section 80J.

³⁵ The refusal of the Commissioner to withdraw a notice which was issued in terms of s 80J of the GAAR provisions was considered not to constitute administrative action and was therefore subject to challenge on the grounds of legality (para 29). Although the review was also directed at the letters of assessment which had been issued by the Commissioner, which the Court was of the view constituted administrative action (*vide* para 30), the matter was still argued and dealt with as a legality review (paras 31-32).

³⁶ Para 27.

³⁷ *Id.*

- dispute was one entirely about a point of law, that attribute would satisfy the requirement of exceptionality.
54. Consequently, it held³⁸ that a taxpayer was not obliged to pursue a remedy in respect of a tax dispute in terms of the dispute resolution procedures which were set out in tax legislation only and was entitled to apply directly to a Court for relief in exceptional circumstances, which would be present when the dispute turned wholly on a point of law.³⁹ It endorsed *ABSA's* contention that it would be preferable for a Court to hear such a dispute rather than to 'condemn' the parties to a 'protracted slog' through the internal remedies and fora provided for to the Tax Court and then, if necessary, from there to the High Court.⁴⁰
55. The decision in *ABSA* did not find favour in this Division, per Binns-Ward J, in *Forge Packaging*,⁴¹ which was decided in June last year. It concerned a review (of additional assessments which had been levied by the Commissioner), which had been brought at the time when an appeal was pending in the Tax Court. As in *ABSA* the challenge in *Forge Packaging* was formulated on the basis that the matter was wholly concerned with a point of law, and that the applicant should therefore not be compelled to go through the dispute resolution procedures set out in the TAA, including a 'protracted slog' in the Tax Court.
56. Binns-Ward J pointed out that not only was the matter one which was not based exclusively on a point of law and concerned material, commercial disputes of fact, but even if it was amenable to determination on a purely legal issue without the need for any oral evidence, there was no need for a 'slog' in the Tax Court as the TAA made provision⁴² for a tax appeal which concerned a point of law only, to be heard by the President of the Court, sitting alone without assessors.
57. Thus, if the question of law arose from facts that were common cause or undisputed, there was no reason why the Tax Court could not deal with it in the pending appeal by way of a stated case,⁴³ and nothing prevented the taxpayer

³⁸ At para 47.

³⁹ Para 48.

⁴⁰ Para 19.2.

⁴¹ Note 4.

⁴² In section 118(3).

⁴³ In terms of the relevant provisions of the Tax Court and High Court rules.

from requesting the Tax Court to hear and decide the point, separately from or prior to the remaining issues, if it would be dispositive. In the circumstances the learned judge was not persuaded that the applicant had shown good cause for a directive in terms of s 105 of the TAA that the matter should be heard in the High Court. An application for leave to appeal the decision was subsequently dismissed.⁴⁴

58. Shortly after the initial argument was heard in this matter, the Supreme Court of Appeal handed down judgments in 2 matters which pronounced on s 105 of the TAA: *Rappa Resources*,⁴⁵ which concerned the levying of VAT assessments, penalties and interest and *United Manganese*,⁴⁶ which concerned adjustments that were made to taxable income and the imposition of dividends tax and understatement penalties.
59. In *Rappa Resources* the applicant had sought orders in the Court *a quo* reviewing and setting aside the assessments and declaring that the Commissioner's decision to issue them conflicted with the principle of legality. In addition, when the Commissioner thereafter failed to lodge the record of the decision the applicant sought an order compelling the production thereof. The Commissioner adopted the position that neither the principal nor the interlocutory application was competent because they had not been sanctioned in terms of s 105 of the TAA. The applicant had not initially sought a directive in terms of s 105 from the Court but sought to amend its notice of motion to do so, when the point was taken.
60. Without determining the principal application the Court *a quo* made an order directing the Commissioner to deliver the record of the decision. It further directed that the relief which was sought in terms of s 105 was to be determined at the hearing of the principal application.
61. On appeal, the Commissioner contended that the applicant's right to review the Commissioner's decision only vested if, and when, a directive had been made in

⁴⁴ *Forge Packaging (Pty) Ltd v Commissioner, South African Revenue Service* [2022] ZAWCHC 163, handed down on 23 August 2022.

⁴⁵ Note 10.

⁴⁶ Note 12.

terms of s 105 that the High Court would entertain the review, failing which the applicant had no right to obtain an order compelling the production of the record of the decision under review. The SCA upheld these contentions. It held that although the TAA did not disqualify a High Court from determining a tax dispute it could only do so once a directive had been made in terms of s 105, as its purpose was to ensure that, in the ordinary course, tax disputes were to be dealt with by way of the procedures provided for in the TAA including, if necessary, proceedings before the Tax Court.

62. In arriving at this conclusion Ponnán ADP pointed out⁴⁷ that whereas s 105 had previously afforded a dissatisfied taxpayer the option of seeking relief directly in the High Court, as opposed to the fora provided for in the TAA, the 2015 amendment had sought to do away with this. In this regard he referred to the Explanatory Memorandum⁴⁸ which accompanied the Tax Administration Law Amendment Bill of 2015, when it was presented to parliament, in which it was pointed out that although the previous wording of the section 'created the impression' that a tax dispute under Chp 9 of the TAA could either be reviewed by the Tax Court or a High Court at the taxpayer's election, the section was intended to ensure that the internal remedies of objection and appeal provided for in the TAA were to first be exhausted before the High Court was approached, and the Tax Court was to deal with the dispute as a Court of first instance. Thus, per the memorandum, the amendment sought to make this intention clear, whilst at the same time preserving the right of the High Court to direct otherwise, should the 'specific circumstances' of a particular case require it. No attempt was made in the memorandum to prescribe what would constitute such circumstances.
63. In the result, the SCA held that as the purpose of the section was clearly to ensure that in the 'ordinary' course tax disputes were to be taken to the Tax Court, the High Court did not have jurisdiction to hear matters involving such disputes, unless and until it directed otherwise.⁴⁹ As to when the High Court might do so i.e. when the circumstances might justify such an order, Ponnán ADP

⁴⁷ Para 19.

⁴⁸ At para 2.52 thereof.

⁴⁹ Para 20.

endorsed⁵⁰ the approach adopted in *ABSA*, that this would require the applicant to show that exceptional circumstances were present. In adopting the requirement of exceptionality referred to in *ABSA* the learned judge held that it was neither desirable nor possible to lay down a precise rule as to what such circumstances would be, and each case was to be decided on its own facts.

64. As I read the judgment, in doing so Ponnán ADP did not adopt the interpretation which was given to the term by Sutherland ADJP in *ABSA* and adopted instead that which was formulated in *MV Ais Mamas*, as previously set out above viz that what was contemplated by the words was ‘something out of the ordinary and of an unusual nature which is excepted in the sense that the general rule does not apply to it’ and which is therefore ‘uncommon, rare or different’. The ratio of the decision in *Rappa Resources* was followed by the same bench of the SCA in the matter of *United Manganese*, judgment in which was handed down on the same day.

An assessment

65. It may be useful, at this juncture, to summarize the current state of the law, as I understand it, in the context of this matter. In the first place, the effect of the decisions in *ABSA* and *Rappa Resources* is that in any civil review of a tax dispute as referred to in s 104 of the TAA read with Chp 9 thereof (i.e one which involves a dispute pertaining to a tax assessment or a decision by the Commissioner, which can be resolved by way of an objection or appeal), whether it is brought as a so-called PAJA review or as a legality review, the applicant will need to show the existence of exceptional circumstances which justify the matter being heard by a civil Court as opposed to the fora and procedures available under the TAA i.e by way of an objection to the Commissioner and, if that fails, an appeal to the Tax Court. The effect of these decisions has therefore been, at least insofar as such reviews are concerned, to subsume the PAJA requirement of exceptional circumstances into the determination of whether a Court should make a directive in terms of s 105 of the TAA.

⁵⁰ At para 21.

66. Matters which deal with disputes which do not fall within the ambit of s 104 (read with Chp 9 of the TAA) are not subject to such a restriction and do not require a directive in terms of s 105. Exactly what such matters will entail is not something which needs to be demarcated in these proceedings, as they concern a review. All that needs to be said is that there will clearly be instances where, depending on the facts and circumstances,⁵¹ an applicant may be entitled to approach a civil Court directly for relief, without such strictures.
67. Essentially, the decisions in *ABSA* and *Rappa Resources* have therefore standardized the material requirement which an applicant needs to meet, whatever form their review takes, save in one respect, which it appears has not as yet enjoyed the attention of the Courts in tax-related disputes. In this regard, in terms of s 7(2)(c) of PAJA, in a PAJA review the applicant can only be exempted from exhausting the internal remedies of objection and appeal, if he succeeds not only in showing that there are exceptional circumstances present *but also that they render it necessary in the interests of justice* that he be heard, instead of utilizing such remedies. This does not seem to be required in a legality review, nor when seeking a directive under s 105 of the TAA, although it could, and perhaps should, be read into the provision, in order not to have a disjunct between the operation of the two provisions.
68. As far as I have been able to ascertain, this issue has not been expressly dealt with in any of the reported tax cases to which I was referred. In my view it is an aspect which assumes some importance in matters which involve alleged impermissible tax avoidance arrangements or schemes, in terms of the GAAR provisions, such as the one before me. I will revert to this in due course.
69. In the second place, in terms of s 105 of the TAA, *prior* to such a review (in whatever form) being entertained, the applicant will need to obtain a directive from the Court that the matter may be heard by it, instead of being dealt with via the objection and appeal processes set out in the TAA, which is the default route that should be followed. Unless and until such a directive is obtained, a civil Court does not have jurisdiction to hear the review.

⁵¹ Such as where declaratory orders are sought- *vide* the discussion that follows.

70. In order to show the existence of exceptional circumstances the applicant bears the onus of showing, on a balance of probabilities, that there are circumstances present which are out of the ordinary in the sense that they are unusual, uncommon or different, to the extent that they justify that the matter should be heard by the Court, instead of being dealt with via the default route. This means that inevitably, where such circumstances are disputed and are not common cause, the issue will fall to be decided on the version which is put up by the respondent,⁵² which in the case of a tax review will be the Commissioner, unless of course that version is so fanciful, implausible, or untenable that it can be rejected out of hand. Whether such circumstances are present is a determination which is to be made on the facts which are before the Court, in each and every instance. This does not constitute the exercise of a discretion on the part of the Court but a factual determination that needs to be made by it, based on the evidence submitted by the parties.
71. That brings me to the decision in *ABSA*, on which the applicant relies heavily. An appeal against it was heard by the SCA on 8 March 2023. For obvious reasons I considered it prudent to await the outcome thereof, but given that some 5 months have passed and no judgment has yet been handed down and, given this Court's obligation to deliver judgment as soon as is practically possible, for the reasons that follow I have decided that it would not be inappropriate for me to comment on it, and that it is in fact necessary that I do so.
72. There are aspects of the decision with which I disagree. and which, in my respectful view, are wrong. In this regard, in the first place I am of the view that the Court erred in holding⁵³ that a civil Court has a 'discretion' to deal with a tax dispute and to insist that internal remedies which may be available to a taxpayer should be exhausted, and likewise, it erred in holding⁵⁴ that a civil Court has a 'discretion' to approve a deviation from the default route of objection and appeal via the TAA.

⁵² In accordance with the trite so-called *Plascon-Evans* principle.

⁵³ Para 19.2.

⁵⁴ At para 27.

73. To my mind, not only the ratio of the subsequent decision of the SCA in *Rappa Resources* in relation to s 105 of the TAA, but the provisions of s 7(2) of PAJA and the cases that have dealt with it exclude the exercise of a discretion, in both instances referred to: the taxpayer must exhaust their internal remedies and a civil Court may only approve a deviation from the default route, if and when the taxpayer has shown that there are exceptional circumstances present which justify this. In this regard, as I previously pointed out,⁵⁵ in adopting the test for exceptional circumstances which was espoused by Thring J in *MV Ais Mamas* the Constitutional Court and the Supreme Court of Appeal have both made it clear (albeit in other statutory contexts) that the determinations of whether or not exceptional circumstances have been shown and whether or not the taxpayer should therefore be excused from exhausting their internal remedies are not discretionary, but fact-bound determinations.
74. In arriving at its conclusions, the Court in *ABSA* pointed out that there were precedents such as *Metcash*,⁵⁶ where civil Courts had entertained tax disputes on points of law, instead of compelling taxpayers to exhaust internal remedies that were available to them. But the decision in *Metcash* needs to be considered in its proper context.
75. In that matter the Constitutional Court was required to consider whether to confirm a declaration of constitutional invalidity which had been made a *quo* in respect of s 36(1) of the VAT Act, on the basis that it unlawfully limited the right of access to a Court, contra s 34 of the Constitution. The section provides that a taxpayer is obliged to pay a VAT assessment and to argue about its validity later, even though an objection or appeal may have been lodged against it.
76. The Constitutional Court held that the section was not concerned with access to a Court and did not prohibit or limit a taxpayer's rights in this regard. A dissatisfied taxpayer could lodge an objection against the assessment and failing the success thereof, an appeal to the special Tax Court, which had wide and extensive powers of revision. From there, if necessary, the taxpayer had access to a civil Court, on review or appeal. Pending the resolution of the dispute by way

⁵⁵ *Supra*, para 36.

⁵⁶ Note 27, para 22.

of the objection and appeal processes a superior civil Court had the jurisdiction to consider, and 'where appropriate', to grant relief. In this regard the CC pointed out that it was settled law that the High Court had jurisdiction to hear and determine tax cases which turned on legal issues and it referred to a long line of tax cases in this regard, in which *declaratory* relief was granted by civil Courts.

77. Amongst the cases that the CC referred to was the decision in 1991 in *Friedman*⁵⁷ where the Witwatersrand Local Division held that where a dispute involved no question of fact and was 'simply' one of law, the Commissioner and the Tax Court were not the only competent authorities to deal with it- when a *declaratory order* was sought a civil Court had the power to do so. Consequently, the CC held that a decision of the Commissioner to make a VAT assessment and to levy additional tax under the VAT Act was subject to judicial intervention, in 'certain circumstances'.
78. What the Court in *ABSA* appears to have failed to appreciate is not only that the common law precedent referred to in *Metcash* was expressed in relation to the power of civil Courts in tax-related matters to grant declaratory relief and not in relation to its power of review, but also that *Metcash* was decided in 2000, some 11 years before the passing of the TAA, whereby s 105 was introduced; a provision which was later amended in 2015 to make it clear that in regard to tax decisions and assessments which can be contested by way of objection and appeal in terms of the TAA, the default route for a taxpayer is to exercise these internal remedies, and a taxpayer may only be heard by the High Court in such matters if they have obtained an order from it allowing them to do so. Until then, the High Court does not have jurisdiction in respect of granting any relief which might otherwise be obtained by way of the objection and appeal process in terms of the TAA. Thus, s 105 (as amended) has now considerably restricted a taxpayer's ability to approach a civil Court for relief, in such matters, contrary to the position that previously prevailed at common law, as per the decisions referred to in *Metcash*. According to its preamble read with Chp 9, one of the principal objectives of the TAA is to provide for the resolution of certain tax

⁵⁷ *Friedman and others NNO v Commissioner for Inland Revenue: In re: Philip Frame Will Trust v Commissioner for Inland Revenue* 1991 (2) SA 340 (W) 341I-J.

disputes outside of the civil Court structure, by way of objections and then appeals, to a Tax Board or Tax Court. Section 105 is the provision which seeks to give express effect to this objective, by excluding the general jurisdiction of a civil Court, in certain defined tax matters, which are capable of resolution by means of such alternative dispute resolution processes. Thus, the line of cases which relate to the power of a civil Court to grant relief in tax matters, which predate the passing of the TAA, no longer serve as authority for the proposition that civil Courts have a discretionary power to decide tax cases which concern points of law, at least not those that fall within the remit of ss 104 read with Chp 9 of the Act.

79. Thus, to my mind, even if a tax dispute in relation to a decision or assessment, which can be resolved by way of an objection or appeal, is 'purely' one of law, and involves no question of fact, or turns wholly on a point of law, this in itself will not mean that a civil Court can deal with it. And, in my view, and contrary to what was held in *ABSA*, such an attribute does not in itself confer, or satisfy, the necessary requirement of exceptionality.
80. In this regard, as far as I am aware it has never been suggested by any of the Courts that have attempted to give grammatical meaning to the term, in its various statutory contexts, that exceptional circumstances need either to be 'exotic' or 'bizarre'. As I have attempted to point out in my exposition of the case law, they do however need to be so out of the ordinary, uncommon, unusual or different, that they justify the Court's intervention. In the context of this type of matter, I cannot understand why a point of law, or even an error of law, would in itself necessarily constitute an exceptional circumstance. Points of law are not extraordinary, uncommon, or unusual and inevitably, in the ultimate analysis most, if not all, matters turn on them. If they did not, no civil Court of review or appeal would ever be able to find that the decision of a functionary, Court or tribunal *a quo* was wrong, in law. For the same reason, no objection in a tax matter would ever be upheld by the Commissioner, and no appeal would ever be upheld by the Tax Court.

81. So, the hurdle which must be overcome is not, as per *ABSA*, simply that there are circumstances present which 'sensibly' justify the alternative route of having the matter dealt with by a civil Court. There must be circumstances present which are so out of the ordinary, unusual or uncommon, that they justify that route being followed, and errors or points of law, without more, hardly constitute such circumstances. And errors of fact obviously result in errors of law. In my view, neither of these will therefore ordinarily constitute circumstances which in themselves are out of the ordinary, uncommon or unusual. Thus, whilst an error of fact will obviously be a ground for an appeal before a Tax Court, which strives at arriving at the correct decision, it will hardly constitute an exceptional circumstance so as to justify a civil Court in entertaining a review in a tax matter of the kind under discussion.
82. But, even if I am wrong in relation to my treatment of the decision in *ABSA*, I am nevertheless of the view that it does not avail the applicant. The case which was put up by him in his affidavits, in regard to the alleged exceptional circumstances which justified the matter being heard by this Court instead of by way of objection and appeal, was as follows.
83. The applicant contended firstly, that the Commissioner had made a factual error on which the entire basis for the imposition of the tax liability rested, by concluding that the dividend which had been paid out by Treemo had been funded by the Newshelf repurchase dividend, when in fact it had been funded by the subscription of shares in Treemo, by the Trust. The applicant claimed that the facts in this regard were not in issue and the legal untenability of the Commissioner's assessment was plain. In addition, the applicant alleged the Commissioner had erred by seeking to impose an understatement penalty on the basis of s 221(e) of the Income Tax Act, which was introduced some years after the alleged arrangement or scheme to which he had been party, had been affected, and he contended that it could not be implemented retrospectively. Thus, the argument in this regard was that the Commissioner had made a legal error. The applicant contended that these factual and legal errors cumulatively collapsed the 'entire architecture' of the assessment and that (following the *ABSA*

playbook), it would accordingly be inappropriate and severely prejudicial for him to go through the lengthy and costly process of resolving his dispute by pursuing his objection to the assessments via the internal remedies which were available to him, including if necessary, the prosecution of an appeal before the Tax Court, when the invalidity and unsustainability of the assessment could be addressed 'quickly and conveniently' by way of a review before the High Court.

84. In his response, the Commissioner denied that any errors had been made, factual or legal. The Commissioner disputed the applicant's factual assertions in relation to the source of the dividend that was paid out to him, and claimed they were not supported by the documents which SARS had in its possession. The Commissioner was of the view that the Trust's subscription for shares in Treemo had been funded by the call option premium which the applicant had paid to it, which in turn had been funded by the dividend which Treemo had paid to the applicant. But, according to the Commissioner, how the dividend to the applicant had been funded or sourced was in any event legally irrelevant. It had been paid out, free of tax, pursuant to the adoption of an impermissible avoidance scheme or arrangement which had no obvious purpose and no commercial rationale, other than to allow for the avoidance of tax. As for the understatement penalty, the Commissioner contended that no legal error had been made in relation to the applicability of s 221(e), and the imposition of such a penalty was in any event competent in terms of other provisions of the section.
85. As was correctly submitted by the Commissioner, the circumstances which were raised by the applicant do not constitute 'pure' points of law, nor is this a matter which turns wholly, or even partially, on a 'pure' point of law. It is about the underlying facts. The complaint which was put forward by the applicant is principally that the Commissioner's assessment was based on an incorrect factual premise and was arrived at as a result of an error of fact, not law. An error of fact is corrected on appeal, not on review, which deals with process rather than result and usually culminates in a referral back to the decision-maker, and not a revised tax assessment.

86. It further seems to me that in any event, in matters where impermissible tax avoidance schemes or arrangements are allegedly involved in terms of the GAAR provisions of the Income Tax Act, for a variety of reasons it will ordinarily not be in the interests of justice, as required by s 7(2)(c) of PAJA, for a civil Court to entertain a PAJA review thereof, as a Court of first instance. For one thing, the facts in matters involving such schemes or arrangements will invariably be complex, opaque and contested and review Courts are not the appropriate forums for dealing with them.
87. By definition,⁵⁸ an impermissible tax avoidance arrangement is one which was entered into or carried out by means, or in a manner, which would not normally be employed for *bona fide* business purposes, or which lacks commercial substance in whole or in part; and which has as its sole or main purpose the obtaining of a tax benefit. It includes any 'transaction, operation, scheme, agreement or understanding', and all steps therein or parts thereof.⁵⁹ As for the parties concerned the Act provides⁶⁰ that not only direct parties but also 'connected' or 'accommodating' or 'tax-indifferent parties'⁶¹ in, or to, an arrangement or scheme may be treated by the Commissioner as one and the same.
88. To determine whether any tax avoidance arrangement or scheme falls foul of the GAAR provisions it will therefore have to be construed by an adjudicating functionary or Court on the basis of a rigorous and careful analysis of the underlying transactions, agreements and steps in terms of which it was given effect to. In undertaking such an exercise consideration will, of necessity, have to be given to the intentions, motives and conduct of the participants in the alleged scheme or arrangement. This is not an exercise that can be performed by a civil Court in a review, on cold paper, but one best suited to ventilation in a Tax Court where the parties are able to put the necessary evidence before a judge and 2

⁵⁸ In terms of s 80A of the Income Tax Act.

⁵⁹ Section 80L.

⁶⁰ In s 80F.

⁶¹ As defined in s 80E.

qualified and experienced members, one drawn from the accounting profession and one from the business sector.

89. In this regard I found the cynicism which was expressed by the applicant's counsel as to the forensic skills and expertise of such a tribunal, as opposed to that constituted by a single judge sitting on his own in a civil Court, without expert assistance, to be somewhat disparaging and unfounded. It has been emphasized on more than one occasion by the Constitutional Court that the specialized skills and knowledge which a specialist tribunal can bring to bear are better suited to proceedings where the cogency of material of a 'technical' nature needs to be interrogated and properly weighed and assessed, and it is the proper forum for getting to the heart and truth of such matters. Complex tax avoidance schemes or arrangements such as the one in this matter, involving layers of transactions and dealings which are interwoven in a tapestry of cause and effect by a variety of actors, need to be dealt with by a Tax Court panel possessed of the necessary financial, accounting, business and forensic experience, rather than by an ill-equipped civil Court judge.
90. What the applicant seeks to do in this matter is to unravel the Commissioner's finding that he was party to an impermissible scheme or arrangement, on the simple basis that the Commissioner erred in relation to his understanding and treatment of one of the underlying steps or transactions which allegedly formed part thereof. (The apparent simplicity of the challenge is however belied by the applicant's own declaration⁶² that there are several matters in the GAAR notice which was issued in July 2020 which are disputed by him and on which basis he contends that the assessment is objectionable).
91. The strategy which has been adopted is clearly one aimed at having the finding that the applicant was party to an impermissible tax avoidance arrangement set aside by the High Court, on application, on the basis of a possible single alleged error of fact by the Commissioner, instead of having to rebut, by way of evidence, in an objection process or in an appeal before a Tax Court, the statutory presumption⁶³ that the alleged arrangement was entered into for the sole or main

⁶² Para 44 of his affidavit.

⁶³ In s 80G (1).

purpose of obtaining a tax benefit which would not otherwise have been obtained.

92. In my view, should a civil review of an alleged tax avoidance scheme or arrangement be allowed in the High Court, at first instance, it would encourage dissatisfied taxpayers to frustrate and bypass the dispute resolution process which is provided for in the TAA, by leapfrogging over it into the High Court, whenever there is room to argue that the Commissioner's understanding of one or other transaction or step in such scheme or arrangement, is wrong. To allow a civil review in such circumstances, based on contrary assertions in the affidavits which are filed by the parties, would be to ignore s 80G (2) of the Act, which allows for the purpose of a step in, or part of, an avoidance scheme or arrangement, to differ from the purpose attributable to the scheme or arrangement as a whole.
93. Even if the Commissioner made a factual error in regard to his understanding and treatment of the Newshelf repurchase dividend and/or the Trust's subscription of shares, I cannot see any reason why it would be inappropriate or prejudicial to require the applicant to ventilate this through the process of an objection, and thereafter, if necessary, an appeal. As was pointed out in *Forge Packaging* such processes will not inevitably, and necessarily, be lengthy and costly. And they are most likely to arrive at a fair, proper, and correct determination of the applicant's tax liability, if any. If anything, allowing the applicant to have this review heard in a civil Court will not result in the expeditious and final resolution of the dispute. Even though it could possibly result in the setting aside of the Commissioner's s 80J determination the matter would inevitably be referred back, and given the amounts involved there is no doubt that a revised determination would follow, which would inevitably be challenged again. Thus, the proper way for the matter of the applicant's possible tax liability to be resolved is for the processes of objection and appeal to be followed, and if warranted, from there the applicant would have recourse to this Court on review or appeal. To allow a review in this Court at this stage would only add to the costs and delay, not reduce them. Given the congested Court rolls and

capacity constraints of the High Court, having the dispute resolved by way of the dispute resolution processes of the TAA will in fact be much quicker and more convenient for both the applicant and the Commissioner.

Conclusion

94. In the result, I am of the view that the applicant has failed to show that 1) there are exceptional circumstances present and 2) that a directive in terms of s 105, allowing for the matter to be heard in this Court and exempting him from exhausting his internal remedies, should be granted.
95. As far as costs are concerned there is no reason why they should not follow the event and given the nature and importance of the issues involved, and that both parties made use of more than one counsel, the costs occasioned by the employment of two counsel are justified.
96. I make the following Order:
 1. The application for a directive that the review referred to in para 2, which was lodged by the applicant on 9 June 2021, be heard by this Court, and that the applicant be exempted from exhausting the remedies of objection and appeal which are available to him in terms of Chp 9 of the Tax Administration Act, 28 of 2011, is dismissed.
 2. The application for the review and setting aside of the decisions of the respondent, the Commissioner for the South African Revenue Service, that:
 - 2.1 the applicant was party to an alleged impermissible tax avoidance arrangement or scheme in terms of s 80A read with ss 80B, 80J and 80L of the Income Tax Act 58 of 1962, on the basis as set out in the Commissioner's letter dated 24 February 2021, and
 - 2.2 that the applicant was accordingly liable for dividends tax and an understatement penalty in the amounts as assessed; is struck from the roll.
 3. The applicant shall be liable for the respondent's costs, including the costs occasioned by the employment of two counsel.

A handwritten signature in black ink, appearing to read 'M SHER', with a large, stylized initial 'M' and a trailing flourish.

M SHER

Judge of the High Court

Appearances

Applicant's counsel: M Janisch SC and B J Vaughan

Applicant's attorneys: Edward, Nathan Sonnenbergs Inc (Cape Town)

Respondent's counsel: G Marcus SC, D West and M Mbikwa

Respondent's attorneys: State Attorney (Cape Town)

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