



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 596/2021

In the matter between:

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

APPELLANT

and

**ABSA BANK LIMITED
UNITED TOWERS PROPRIETARY
LIMITED**

FIRST RESPONDENT

SECOND RESPONDENT

Neutral citation: *The Commissioner for the South African Revenue Service v
Absa Bank Limited and Another (596/2021) [2023] ZASCA
125 (29 September 2023)*

Coram: DAMBUZA AP, SCHIPPERS, MATOJANE and GOOSEN JJA
and MALI AJA

Heard: 8 March 2023

Delivered: 29 September 2023

Summary: Tax law – General Anti-Avoidance Provisions – legality review of refusal to withdraw a notice issued in terms of s 80J of Income Tax Act - s 9 of Tax Administration Act — subsequent assessments made in terms of s 80B of Income Tax Act – review of failure to withdraw s 80J notices academic – review of assessments not wholly question of law – high court lacking jurisdiction to adjudicate review.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Sutherland ADJP, sitting as court of first instance) reported *sub nom Absa Bank Limited and Another v Commissioner for the South African Revenue Service* [2021] ZAGPPHC 127; 2021 (3) SA 513 (GP):

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The orders of the high court are set aside and substituted with the following order:
‘The application is dismissed with costs, including the costs of two counsel.’

JUDGMENT

Goosen JA (Dambuza AP, Schippers and Matojane JJA and Mali AJA concurring):

[1] This appeal concerns the exercise of the High Court's review jurisdiction in the context of a tax assessment raised in terms of s 80B of the Income Tax Act 58 of 1962 (the ITA). The Gauteng Division of the High Court, Pretoria (the high court), set aside a decision by the Commissioner of the South African Revenue Service (SARS), refusing to withdraw notices issued in terms of s 80J of the ITA to the respondents, Absa Bank Limited (Absa) and its wholly owned subsidiary, United Towers Proprietary Limited (United Towers), respectively. It also set aside subsequent notices of assessment, issued in terms of s 80B of the ITA. Leave to appeal was granted by the high court.

The facts

[2] It is common ground that Absa and United Towers entered into an investment arrangement which involved a series of interlinked transactions, the details of which are as follows. Absa and United Towers subscribed for preference shares in PSIC Finance 3 (Pty) Ltd (PSIC3). Their investment was secured by other entities in the ‘group’. PSIC3 used the proceeds of the share issue to subscribe for preference shares in PSIC Finance 4 (Pty) Ltd (PSIC4). In turn PSIC4 made a capital contribution to Delta 1 Finance Trust (D1 Trust). D1 Trust applied the capital contribution to make interest-bearing loans to Macquarie Securities South Africa Ltd (Macquarie). The D1 Trust invested the interest earned on the Macquarie loans in Brazilian Government Bonds, which in terms of the Double Taxation Agreement between South Africa and Brazil, provided a tax-free income stream to the D1 Trust. D1 Trust distributed the income stream to PSIC4. The latter paid this to PSIC3 as dividends, and PSIC3 in turn paid dividends to Absa and United Towers.

[3] SARS initiated an investigation of the Macquarie Group investment scheme during 2016. Pursuant to this investigation, it sought and obtained information from Absa and United Towers. In May 2018, SARS issued notices to Absa and United Towers in terms of s 42 of the Tax Administration Act 28 of 2011 (the TAA), signifying an audit of their tax affairs for the 2015, 2016 and 2017 years of assessment. These notices stated that the audit would relate to the tax treatment of the dividends received by Absa and United Towers from PSIC3. The audit notices included a request for further information in terms of s 46 of the TAA. Absa and United Towers responded to these notices on 18 June 2018.

[4] On 30 November 2018, SARS issued notices to Absa and United Towers in terms of s 80J of the ITA. The notices were, essentially, in identical terms.

They indicated that SARS had completed its preliminary audit of the arrangement entered with entities in the Macquarie ‘group’. The notices set out an intention to raise assessments in terms of the General Anti-Avoidance Rule (GAAR) provisions of the ITA.¹ Absa and United Towers were afforded a period of 60 days to respond to the preliminary audit findings.

[5] The response period was extended, at the request of Absa and United Towers, to 28 February 2019. On 15 February 2019, Absa and United Towers submitted a request to SARS, in terms of section 9(1) of the TAA, to withdraw the s 80J notices. Absa and United Towers also requested a further extension of the period within which to respond to the notices, pending SARS's consideration of its request for withdrawal of those notices. SARS duly extended the period to 31 March 2019. On 5 March 2019, SARS informed Absa and United Towers that it was not withdrawing the s 80J notices. It stated that any objections they had to the notices should be raised in submissions made in their responses to those notices, as required by s 80J.

Proceedings before the high court

[6] On 29 March 2019, Absa and United Towers launched an application in the high court seeking an order reviewing the decision not to withdraw the s 80 J notices and directing that the decision be substituted with one withdrawing the notices, alternatively that the request for withdrawal be remitted to SARS (the s 9 review). They simultaneously submitted their responses to the s 80J notices to SARS in terms of s 80J (2) of the ITA. The s 9 review proceedings continued while SARS was considering the responses to the s 80J notices.

¹ These are s 80A to L of the ITA aimed at preventing abuse of certain sections of the Act through abnormal arrangements, schemes, or agreements concluded with the main aim of obtaining tax benefits, including the avoidance, postponement, or reduction of liability for tax.

[7] On 17 October 2019, SARS issued Letters of Assessment and Additional Assessments to Absa and United Towers for the 2014, 2015, 2016 and 2017 tax years. It determined that they had participated in an avoidance arrangement and assessed their tax liability on the basis that their investment returns in the scheme constituted taxable income. After these additional assessments were raised by SARS, Absa and United Towers applied for leave to amend the notice of motion in the s 9 review, to extend its reach to include the review and setting aside of the assessments (the assessment review). The application was opposed. Leave was granted, however, and the application was broadened to include the assessment review.

[8] The application was heard by the high court, which granted orders setting aside the decisions not to withdraw the s 80J notices; withdrawing the notices; and setting aside the additional assessments. The high court concluded that the decisions refusing to withdraw the s 80J notices were subject to review based on the principle of legality notwithstanding that they were not final. It held, in relation to the assessment review, that a taxpayer is not obliged only to pursue the remedies for disputing tax liability as provided by s 104 of the TAA. The taxpayer may apply directly to court for relief in exceptional circumstances. Exceptional circumstances would include a dispute that turned wholly upon a point of law. The high court found that the s 80J notices were premised upon an acceptance that Absa and United Towers were ignorant of the terms of the arrangement or scheme. Upon that premise they could not be parties to the avoidance arrangement. It held further, that since the notices of assessment were issued upon the factual premise of the s 80J notices, the assessments were tainted by an error of law. The high court concluded that the s 80J notices and the assessments were inextricably linked and, accordingly, set aside both sets of decisions.

The issues on appeal

[9] The appeal concerns two distinct review applications in a composite notice of motion. The first relates to the refusal or failure to withdraw the s 80J notices upon a request made in terms of s 9 of the TAA. It was founded upon the contention that SARS was wrong in its view that the objections to the s 80J notices raised by Absa and United Towers, should be addressed in their responses to the notices. It was also contended that the principle of legality was breached since the issuing of the notices was based upon an error of law. The error was that Absa and United Towers were parties to an avoidance arrangement even though they had no knowledge of the arrangement and had derived a tax benefit from it, to which they would otherwise not have been entitled.

[10] The second review concerned the additional tax assessments raised by SARS. This review engaged the exercise of the high court's review jurisdiction to set aside the assessments either under the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA) or the principle of legality. It was founded upon the same grounds as the attack on the s 80J notices.

[11] The following issues arise in relation to these two reviews:

- (a) Is a 'decision' not to withdraw a s 80J notice reviewable in terms of s 9 of the TAA, either prior to or after the issuing of a notice of assessment in terms of s 80B of the ITA?
- (b) Was the high court correct to characterize the challenge to the assessments as wholly a question of law which entitled it to exercise its jurisdiction in terms of s 105 of the TAA?
- (c) Was the high court correct in its determination of the dispute?

The GAAR provisions

[12] Tax avoidance, whether in part or in whole, is not *per se* unlawful or impermissible.² Sections 80A to 80L of the ITA deal with arrangements entered by a taxpayer which have the effect of conferring a tax benefit through the avoidance of a tax liability that would otherwise accrue. These anti-avoidance provisions confer upon SARS the authority to investigate the transactions and to raise additional or compensatory assessments to counteract the consequences of such avoidance schemes or arrangements. In terms of s 80A, an ‘avoidance arrangement’ is defined as an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and,

‘... .

(a) in the context of business-

- (i) it was entered into or carried out by means of or in a manner which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit; or
- (ii) it lacks commercial substance, in whole or in part ...

(b) ...

(c) in any context –

- (i) it has created rights or obligations that would not normally be created between persons dealing at arm’s length; or
- (ii) it would result directly or indirectly in the misuse or abuse of the provisions of this Act.’

[13] Section 80B allows the Commissioner to determine the tax consequences of any impermissible avoidance arrangement. This is done by making

² *Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA) (*CIR v Conhage*) para 1, where Hefer JA said, ‘Within the bounds of any anti-avoidance provisions in the relevant legislation, a taxpayer may minimise his tax liability by arranging his affairs in a suitable manner. If, for example, the same commercial result can be achieved in different ways, he may enter into the type of transaction which does not attract tax or attracts less tax. But, when it comes to considering whether by doing so, he has succeeded in avoiding or reducing the tax, the Court will give effect to the true nature and substance of the transaction and will not be deceived by its form.’

compensating adjustments to assessments to ensure consistent treatment of all parties to the arrangement. Section 80L defines important terms. An ‘arrangement’ includes any ‘transaction, operation, scheme, agreement or understanding, including all steps therein or parts thereof.’ An ‘avoidance arrangement’ is one that results in a tax benefit. A ‘party’ is any person, entity, partnership, or joint venture who ‘participates in or takes part in an arrangement.’

[14] Section 80G(1) provides that an avoidance arrangement is presumed to have been entered into or carried out for the sole or main purpose of obtaining a tax benefit. A party obtaining a tax benefit is required to prove that, in the light of the relevant facts and circumstances, obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement. Subsection (2) provides that the purpose of a step in or part of an avoidance arrangement may be different from a purpose attributable to the arrangement as a whole. In terms of s 80H, the Commissioner may apply the GAAR provisions to steps in or parts of an arrangement.

[15] Section 80J regulates the procedure to be followed prior to the determination made in terms of section 80B. It provides, in peremptory terms that:

‘ (1) The Commissioner must, prior to determining any liability of a party for tax under section 80B, give the party notice that he or she believes that the provisions of this Part may apply in respect of an arrangement and must set out in the notice his or her reasons therefor.

(2) A party who receives notice in terms of subsection (1) may, within 60 days after the date of that notice or such longer period as the Commissioner may allow, submit reasons to the Commissioner why the provisions of this Part should not be applied.

(3) The Commissioner must within 180 days of receipt of the reasons or the expiry of the period contemplated in subsection (2) -

(a) request additional information in order to determine whether or not this Part applies in respect of an arrangement;

- (b) give notice to the party that the notice in terms of subsection (1) has been withdrawn; or
 - (c) determine the liability of that party for tax in terms of this Part.
- (4) If at any stage after giving notice to the party in terms of subsection (1), additional information comes to the knowledge of the commissioner, he or she may revise or modify his or her reasons for applying this part or, if the notice had been withdrawn, give notice in terms of subsection (1).’

The section 9 review

[16] Section 9(1) of the TAA provides that:

‘A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act, excluding a decision given effect to in an assessment or a notice of assessment that is subject to objection and appeal, may in the discretion of a SARS official described . . . at the request of the relevant person, be withdrawn ...’

[17] The section appears in Part B of Chapter 2 of the TAA, under the heading ‘powers and duties of SARS and SARS officials’. It serves to describe discretionary powers which may be exercised by SARS officials. It contains an internal limiter. Decisions ‘given effect to in an assessment’ may not be withdrawn. So too, a notice of assessment that is subject to objection and appeal. The high court ventured a construction of the first category as relating to ‘assessments already given effect to.’ There is no need to interpret this section. It was common cause that s 9 contemplates the withdrawal of a notice such as one issued under s 80J. Indeed, s 80J(3) provides explicitly that such notice may be withdrawn upon consideration of the taxpayer's response to the s 80J notice.

[18] The review of the refusal to withdraw the s 80J notices was launched simultaneously with the submission of responses to the notices and some months prior to the letters and notices of assessment issued in terms of s 80B of the ITA. The application was founded upon two grounds. The first was that the Commissioner’s contention that the objection to the notices ought to be raised in

the responses to the notices was wrong in law. It was averred that this approach impermissibly limited the ambit of s 9 and that it denied a taxpayer a remedy which was available to it. The second was that disagreement about the interpretation and application of GAAR perpetuated the error of law in the issuing of the notices. Absa and United Towers contended that since the notices would have adverse effect irrespective of the issuing of assessments, the decision not to withdraw them was reviewable.

[19] The high court accepted, correctly in my view, that the decision to *issue* a s 80J notice was not a ‘final’ decision which placed any adverse burden upon the recipient. It was, the high court held, plainly not administrative action as contemplated by PAJA. The high court, however, found that a decision not to withdraw a notice, even if not final, had adverse consequences. It held that such a decision ‘was plainly a decision by an organ of state exercising a statutory power and its notional non-final attribute is not a bar [to review] precisely because it nevertheless had an impact’. The high court relied, in support of the proposition, upon two judgments of this Court, namely *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd*,³ and *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd*.⁴

[20] In those matters, however, the applicants sought declaratory relief relating to the interpretation of statutory provisions. The expressed interpretation of the provisions by SARS was held to be sufficiently definitive to warrant declaratory relief despite the fact that no final administrative decision had been taken. The circumstances of this matter are wholly different. In this case we are concerned

³ *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd* (1354/2018) [2019] ZASCA 163 (29 November 2019).

⁴ *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA).

with a decision not to withdraw a notice. The question is what effect or impact the decision has upon the taxpayer concerned?

[21] The short answer, it seems to me, is that such decision itself can have no adverse impact or affect. Its effect is to leave the s 80J notice in place until the process contemplated by the section is completed. If the issuing of a notice does not constitute administrative action susceptible to review then, as a matter of logic, a decision to keep it extant cannot constitute administrative action.

[22] Section 80J(3) sets out the powers and obligations of the Commissioner in relation to the application of the GAAR provisions. It contemplates three possible decisions that might be taken by the Commissioner in relation to a response submitted in terms of s 80J(2). The Commissioner may request further information from the taxpayer, thus deferring a final decision regarding the application of GAAR. In such a case, the s 80J notice necessarily remains extant until the further information is received, and the Commissioner takes a final decision. There are two possible final decisions. The notice may be withdrawn. In that event the Commissioner must give notice to that effect. The process of applying the GAAR provisions may be re-commenced, but then only upon the issue of a new s 80J notice. If, as a matter of fact, the notice is not withdrawn, the Commissioner must determine the taxpayer's liability for tax within the time period stipulated by the section. Once the Commissioner has decided the tax liability under GAAR and has issued an assessment, the prior notice issued to the taxpayer ceases to have any relevance, save to the extent that its existence evidences the peremptory requirements of s 80J. Its content may be relevant in proceedings consequent upon the issuing of the assessment. Apart from this, the s 80J notice, is overtaken by events. At that stage the taxpayer is faced with a final decision to impose a tax liability by assessment. It must then be dealt with

in accordance with the prescribed dispute resolution procedure provided by s 104 of the TAA.

[23] Section 80J(3) does not contemplate a separate decision not to withdraw the notice as a precondition for the decision to determine a tax liability under s 80B. The statutory power exercised by the Commissioner is to determine a tax liability under the GAAR provisions. Until that determination is made the issuing of a s 80J notice or a refusal to withdraw it, can have no adverse effect or impact. These steps are not reviewable. The high court, in my view, lost sight of the provisions of s 80J(3). It ought to have found that a decision not to withdraw the notice is not subject to review outside of a challenge to the decision to impose a tax liability pursuant to s 80B of the ITA.

[24] It is not necessary to decide the ambit of s 9 of the TAA and to address the ‘jurisprudential bristles’ to which the high court referred. As I have stated the s 9 review, accepting for the sake of argument that it is competent, is, on the facts of this case, entirely academic. Furthermore, for reasons which I shall set out below, the substantive basis of the review of both the refusal to withdraw the notices and the assessments is flawed, and the orders made in relation to the s 9 review cannot stand.

The assessment review

[25] Two questions arise: was the high court correct to characterise the dispute as wholly a question of law, and therefore exercise jurisdiction in terms of s 105 of the TAA? A negative answer is dispositive of the appeal since the high court then did not have jurisdiction to review the assessments. The second question, namely whether the high court was correct in its findings on the substantive review, only arises if the first question is answered affirmatively.

[26] This Court has recently stated the law in relation to the interpretation and application of s 105 in unequivocal terms. In *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd (Rappa Resources)*,⁵ Ponnann JA stated that:

‘The purpose of s 105 is clearly to ensure that, in the ordinary course, tax disputes are taken to the tax court. The high court consequently does not have jurisdiction in tax disputes unless it directs otherwise. In *Wingate-Pearse* it was put as follows: “Tax cases are generally reserved for the exclusive jurisdiction of the tax court in the first instance. But it is settled law that a decision of the Commissioner is subject to judicial intervention in certain circumstances . . . In its amended form, s 105 thus makes it plain that “unless a High Court otherwise directs”, an assessment may only be disputed by means of the objection and appeal process.”’

[27] In this instance the high court recognised that it could only exercise its jurisdiction in exceptional circumstances. It considered that a dispute concerning a question of law would constitute an exceptional circumstance entitling it to exercise its jurisdiction. It held that the dispute regarding the refusal to withdraw the s 80J notices and the legality of the assessments, involved a question of law. For this reason, it exercised its discretion to adjudicate the dispute.

[28] This Court in *Rappa Resources* endorsed the high court’s approach to the exceptional exercise of its jurisdiction in terms of s 105 of the TAA.⁶ The question, however, is whether the high court was correct in its characterisation of the nature of the dispute.

[29] The high court took the view that the s 80J notices and the assessments were ‘inextricably linked’. It stated that the factual basis upon which SARS

⁵ *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd (Rappa Resources)* [2023] ZASCA 28; 2023 (4) SA 488 (SCA) para 20. See also *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (1231/2021) [2023] ZASCA 29 (24 March 2023).

⁶ *Rappa Resources* fn 5 above para 22.

decided to apply the GAAR provisions was set out in the notices. It held that SARS had accepted the facts disclosed in the notices. On this basis, the high court held that SARS did not dispute that Absa and United Towers had no knowledge of the arrangement in which they had participated. They could therefore not have been parties to an arrangement which, unknown to them, had sought to avoid the payment of tax which they would otherwise have been required to pay. The high court therefore found that the application of the GAAR provisions in circumstances where they did not, as matter of fact, apply, was irrational and offended the principle of legality. Neither the assessments nor the s 80 J notices could stand.

[30] The high court's finding that SARS had accepted the facts as stated by Absa and United Towers, and in particular, their assertion that they had no knowledge of the nature and ambit of the scheme or arrangement, is incorrect. The notices do not state that SARS accepts the claim that Absa and United Towers had no knowledge of the full ambit of the scheme. The notices set out reasons for the belief that the GAAR provisions apply, no more. They are not statements of the accepted factual basis for application of the GAAR provisions. The correspondence relating to the s 80J notices pertinently states that SARS disputes the contentions raised by Absa and United Towers. These statements form part of the reasons given by SARS as to why it would not withdraw the s 80J notices. These averments are set out in the answering affidavits filed in opposition to the s 9 review. These affidavits were filed prior to the issuing of the notices of assessment which are the subject of the assessment review. There is accordingly no room for the conclusion that SARS accepted that Absa and United Towers were not parties to the avoidance arrangement. In the light of this the application of the GAAR provisions was not solely a question of law.

[31] On the common cause facts Absa and United Towers participated in steps forming part of an ‘arrangement’, the full ambit of which was described in the s 80J notices. Whether they had knowledge of the full nature of the transactions which comprised the arrangement, and whether their sole or main purpose in participating was to secure a tax benefit, are matters of disputed fact. Whether the ‘arrangement’ constituted an ‘impermissible avoidance arrangement’ is a factual enquiry. The same is true in respect of the ‘tax benefit’ requirement. Whether Absa and United Towers obtained a tax benefit by avoiding an anticipated tax liability that might otherwise have accrued from the transactions, is a question of fact. It is not a mere question of law, determinable upon the basis of the assessment as framed by SARS.

[32] In *CIR v Conhage* this Court held that the effect, purpose, and normality of a transaction are essentially questions of fact.⁷ What must be determined in every case is the subjective purpose of the taxpayer.⁸ In that matter the court was dealing with s 103(1) of the ITA which contained an anti-avoidance provision pre-dating the comprehensive GAAR provisions now set out in the ITA. Nevertheless, similar considerations relating to the determination of the purpose and effect of the transaction or arrangement applied.

[33] The high court predicated its finding that it had jurisdiction to review the assessments on the basis that the challenge to the assessments involved solely a question of law. That, as I have indicated, was incorrect. Since the dispute did not involve solely a question of law, no exceptional circumstances existed to justify the high court assuming jurisdiction in the matter. It follows that in relation to the

⁷ *CIR v Conhage* fn 1 above para 12.

⁸ *Ibid.*

assessment review, it did not have the required jurisdiction to deal with the matter. The high court ought therefore to have dismissed the application.

[34] In the circumstances, the orders granted by the high court cannot stand. The merits of any challenge to the notices of assessment must be adjudicated in accordance with the dispute resolution process provided by s 104 of the TAA. The appellant sought the costs of three counsel. Such order will only be made in rare circumstances. This, however, is not such a matter. The employment of two counsel was warranted.

[35] I make the following order:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The orders of the high court are set aside and substituted with the following order:
‘The application is dismissed with costs, including the costs of two counsel.’

G GOOSEN
JUDGE OF APPEAL

Appearances

For the appellant: A R Sholto-Douglas SC (with E W Fagan SC
and B E Mbikiwa)

Instructed by: State Attorney, Cape Town
State Attorney, Bloemfontein

For the respondents: M Janisch SC (with S Budlender SC
and L Mnqandi)

Instructed by: Allen & Overy, Sandton
Symington De Kok Attorneys, Bloemfontein