IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 21825/19

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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In the matter between:

ABSA BANK LIMITED First Applicant

UNITED TOWERS PROPRIETARY LIMITED Second Applicant

and

THE COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICE Respondent

In re:

ABSA BANK LIMITED First Applicant

UNITED TOWERS PROPRIETARY LIMITED Second Applicant

and

THE COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICE Respondent

JUDGMENT

FABRICIUS J

[1] This is an application in terms of Rule 28 of the Uniform Rules of Court in terms of which the Applicants' seek the following relief:

1. That the First and Second Applicant be granted leave to amend their Notice of Motion in the review application launched under the above case-number in accordance with the Notice of Intention to Amend dated 1 November 2019:

    a. By inserting additional paragraphs 2A and 2B before existing paragraph 3 of the Notice of Motion, as follows:

    "2A. Reviewing and setting aside the decisions of the Respondent taken during October 2019 to issue the Letter of Assessment and the Additional Assessments for the tax years 2014, 2015, 2016 and 2017 to the First Applicant; and

    2B. Directing, insofar as may be necessary, that it is in the interests of justice that the relief sought in prayer 2A be dealt with at this stage, prior to any internal remedies being finally exhausted;"

    b. By inserting additional paragraphs 4A and 4B before existing paragraph 5 of the Notice of Motion, as follows:

"4A. Reviewing and setting aside the decisions of the Respondent taken during October 2019 to issue the Letter of Assessment and the Additional Assessments for the tax years 2014, 2015, 2016, 2017 and 2018 to the Second Applicant;

4B. Directing, insofar as may be necessary, that it is in the interests of justice that the relief sought in prayer 4A be dealt with at this stage, prior to any internal remedies being finally exhausted;"

2. Directing that:

    a. The Respondent is entitled to file a further answering affidavit in the main application to deal with the relief sought in prayers 2A, 2B, 4A and 4B of the Notice of Motion within 15 days of the date of this order; and

    b. The Applicants are entitled to file a further replying affidavit in the main application within 10 days of the filing of the further answering affidavit.

3. Directing that the costs of this application be borne by:

    a. The Applicants, in the event of this application not being opposed; or

    b. The Respondent, in the event of the Respondent opposing the relief claimed herein.

[2] I am deciding this application on the papers and the written heads of argument. I also posed written questions to the parties concerning what I thought was the crucial point to be decided, and I received proper replies, which I appreciate.

[3] In most instances an application for an amendment to a Notice of Motion does not involve rousing the troops towards the main battle ground. It is more in the nature of a preliminary skirmish which may or may not, depending on the context, give one or other party an advantage in the main battle yet to follow. In most instances such amendments are allowed unless

they may deprive the opposing party of its main or most efficient weapon, in the future conflict, in which case it can truly be said that the amendment will cause such prejudice that cannot be remedied in future.

[4] In my view this is the question that must be asked and answered in the present proceedings.

[5] Background to the application (I rely on the applicant's heads of argument for the sake of convenience):

5.1 Part IIA of the Income Tax Act deals with "Impermissible tax avoidance arrangements".

Section 80B of the Income Tax Act empowers SARS to determine the tax consequences of any impermissible avoidance arrangement in various ways.

Section 80J of the Income Tax Act provides that, prior to making a determination of liability for tax under section 80B, SARS must give the party notice that it believes that the provisions of Part IIA of the Act apply and must set out in the notice the reasons therefor.

5.2 On 13 November 2018, SARS officials issued a section 80J Notice ("80J Notice") to each of the Applicants regarding certain preference share and security arrangements that had been entered into.

5.3 For present purposes, it is not necessary to deal with the details of those arrangements or SARS's reasons for adopting the view that they amount to impermissible tax avoidance arrangements. It suffices to say that the Applicants are of the view that there is no legal basis for such a conclusion.

5.4 Section 9 of the TAA empowers the Commissioner to withdraw a notice issued to any person.

On 19 February 2019, each of the Applicants addressed a request to the Commissioner in terms of section 9 of the TAA, requesting that the relevant 80J Notice be withdrawn on various grounds.

On 5 March 2019, these section 9 Requests were refused by SARS.

5.5 On 29 March 2019, the Applicants launched the Main Application in this Court seeking to review and set aside this decision. The Applicants did so relying on PAJA, alternatively the principle of legality.

5.6 However, after the Replying Affidavits had been filed and while the Main Application was still pending, in October 2019 SARS delivered Letters and Notices of Assessment to the Applicants.

These Letters of Assessment effectively embraced and adopted the findings contained in the 80J Notices. In substance, they are identical to the 80J Notices.

The Notices of Assessment rendered the Applicants liable for additional tax and penalties running to a total of approximately R 78 million in respect of Absa and R 161 million in respect of United Towers (in both cases, excluding interest at the prescribed rate of interest).

5.7 In light of these new factual developments, the Applicants delivered a Further Supplementary Affidavit dealing with the Letters and Notices of Assessment.

In the Further Supplementary Affidavit, the Applicants contend that the decisions by SARS to issue the Letters and Notices of Assessment fall to be reviewed and set aside in terms of PAJA, alternatively the principle of legality.

[6] The Applicants rely on two grounds of review in this regard.

6.1 First, in the Main Application, the Applicants contend that the decisions by SARS to refuse to withdraw each of the 80J Notices were invalid and should be reviewed and set aside. If that contention is ultimately upheld by this Court in the Main Application, it follows that the decisions by SARS to issue the Letters and Notices of Assessment are then also invalid and fall to be reviewed and set aside. This is because in the absence of valid 80J Notices, the decisions to issue the Letters and Notices of Assessment were themselves unlawful and invalid.

6.2 Second, and in any event, the decisions by SARS to issue the Letters and Notices of Assessment were taken because of material errors of law on the part of SARS. These are the very same substantive errors of law referred to in the Founding, Supplementary and Replying papers in the Main Application. On this basis too, the decisions to issue the Letters and Notices of Assessment were unlawful and invalid.

6.3. The Applicants also squarely plead that it is in the interests of justice for the review of the assessment decisions to be entertained at this stage:

> "It is plainly in the interests of justice for this Court to entertain a review of the decisions to issue the Letters and Notices of Assessment at issue at this stage. This is

> so given, inter alia, that the review of these decisions is closely connected and inextricably linked to the review of the decisions regarding the Applicants' section 9 Requests; the issues raised are primarily questions of law; SARS has already (albeit incorrectly) taken the view that the Applicants' legal contentions are without merit; and it would be prejudicial in a/I the circumstances for the Applicants to have to subject themselves to a lengthy and costly objection and appeal process."

[7] Together with the Further Supplementary Affidavit, the Applicants delivered a Notice of Intention to Amend their relief claimed, so that it included orders reviewing and setting aside the decisions to issue the Letters and Notices of Assessment ("the Rule 28 Notice").

[8] In response, SARS objected to the Rule 28 Notice on various grounds ("the Objection").

[9] This accordingly necessitated the present application for leave to amend.

[10] Little will be achieved by again repeating tried and tested authorities on the topic when amendments should be allowed, even if they add a new cause of action or introduce a new topic. These are all discussed in great detail in Erasmus, Superior Court Practice, 2nd Ed., Vol 2, Van Loggenberg, and Herbestein & Van Winsen, The Civil Practice of the High Court of South Africa, 5th Ed, Vol 1, by Cilliers et al, at 678 and further, and also from 685 to 688 in the context of the introduction of new causes of action and new claims. It is clear that the purpose of Rule 28 is to obtain a proper ventilation of the dispute between them (on the main battlefield, I may add), so that justice may be done. An important, if not almost decisive comment appears in: Affordable Medicine Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at par 9. The practical rule is that amendments will be allowed unless such would cause an injustice to the other side. In this

decision the following general principles referred to in Commercial Union Assurance Co Ltd v Waymark No 1995 (2) SA 73 (TK) were approved by the Constitutional Court:

10.1 The Court has a discretion to grant or refuse an amendment;

10.2 Some explanation must be offered therefor;

10.3 The Applicant must show that a triable issue will exist;

10.4 The modern tendency is to allow an amendment if it results in the proper ventilation of the dispute;

10.5 The application must be bona fide;

10.6 It must not cause an injustice which cannot be compensated by costs.

This list is not intended to be exhaustive.

[11] A technical approach is to be avoided nor should an excessively formalistic approach in the application of the Rules be adopted. One should aim at an expeditious and inexpensive approach to determine cases on their real merits.
See: Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 278 F-G.

[12] In recent times the above well-known considerations have been amplified by the notion that Rules of Court should be seen and given life against the back-ground of relevant constitutional law considerations, such as the right of access to Courts, provided for in section 34 of the Bill of Rights contained in the Constitution. The core function of a Court is after all to dispense justice without being hamstrung. The object of Court Rules is twofold: the first is to

ensure a fair trial or hearing. The second is to "secure the inexpensive and expeditious completion of litigation and … to further the administration of justice.

See: Eke v Parsons [2015] ZACC 30 at par [39] and [40], as well as Kgolane v Minister of Justice 1969 (3) SA 365 (A) at 369 H.

[13] Respondents' main basis for resisting the amendment application is the reliance available to taxpayers under the Tax Administration Act 28 of 2011 (the "TAA") and especially sections 104 to 107 which deal with the manner in which assessments may be disputed. Section 104 provides that a taxpayer who is aggrieved by an assessment may object thereto. Section 107 provides that if such objection is rejected, the taxpayer may appeal to the Tax Court. Important for present purposes is section 105 which provides as follows: a taxpayer may only dispute an assessment or "decision" as described in section 104 in proceedings under this chapter, unless a High Court otherwise directs".

[14] Section 105 therefore clearly preserves the jurisdiction of the High Court in that context.

See: Ackerman v Commissioner SARS 2015 (6) SA 364 (GP) at paras 15-20.

Furthermore, in Metcash Trading LTD v CSARS 2001 (1) SA 1109 (CC) at 31-45 it was held that the mere fact that a tax statute creates a "tailor-made mechanism" does not mean that the ordinary right to approach the High Court for relief is ousted. It was therefore contended on behalf of applicant that the Court hearing the main application will have the jurisdiction to grant review relief in respect of the decisions to issue the letters and notices of assessment. The only question for the Court hearing the main application will be whether it is appropriate to exercise that jurisdiction in all the circumstances, as opposed to requiring the applicants to pursue the mentioned statutory remedies.

[15] This will require a consideration of the facts in the main application, the facts concerning the decisions to issue the Letters and Notices of Assessments, the effect of section 105 of the TAA and most probably the effect of s 7(2)(c) of PAJA which deals with the exhausting of internal remedies, and the exception thereupon if it is in the interests of justice. Applicants contention therefore was in essence that that Court will then have the benefit of the full papers including SARS's Answering Affidavits in defence of its assessment decisions. This is not for me to decide now in the context of an application for leave to amend.

[16] Granting leave to amend means that if the judge hearing the main application upholds the applicants contentions that the decisions to refuse the section 9 requests were invalid, he or she will be well-placed to grant effective, just and equitable relief. The only two grounds on which the applicants seek to review and set aside the relevant mentioned decisions are directly connected, to the applicants' grounds of review in respect to the decisions to refuse the section 9 requests.

[17] I must add at this stage that I also had my doubts whether it can serious be contended that applicants amendments can properly be said to be the introduction of "new" causes of action, but even if they were, they should not be refused merely on that basis.

[18] Lastly, and by contrast, Applicants' pointed out the peculiar consequences that would result were leave to amend be refused. The applicants would then simply have to launch a fresh substantive application for review which would then be sought to be consolidated with the main application which would be counter-productive in the context of costs and time, which Eke v Parsons *supra* deemed important considerations as I have said.

[19] Having considered all relevant submissions and authorities I posed the following question to the parties on 12 August 2020: "if the court entertains the application after the amendment, which rights will SARS be deprived of as it can raise all its issues at the hearing of the main application and the

mere granting of the amendment will have no final effect on any of its rights or arguments pertaining to the relevant statutory scheme in place?" Applicant replied: "None" and referred again to what I mentioned in par 18 above. Respondent obviously contended otherwise and submitted that section 105 of the TAA was relevant to the amendment application and that I had to decide that question now. No such request had however been made by applicants, and that was fatal to this application.

[20] I do not agree. I agree with applicants' submissions of what the court has to decide in the main application as mentioned in paras 15 and 16 above. That approach is in line with modern authorities which I have referred to. Respondents view is overly formalistic and cannot be upheld. In the exercise of my discretion the following order is therefore made:

Prayers 1 and 2 of Applicants Notice of Motion in the Rule 28 Application are granted with costs, including the costs of 2 counsel.

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H FABRICIUS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: NO ORAL HEARING

DATE OF JUDGMENT: 25 AUGUST 2020

FOR THE APPLICANTS: ADV S BUDLENDER SC & ADV L MNQANDI

INSTRUCTED BY: ALLEN & OVERY C/O TIM DU TOIT & CO INC

FOR THE RESPONDENT: ADV E FAGAN SC & ADV T SIDAKI

INSTRUCTED BY: STATE ATTORNEY