IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. **23651/2021**

Case No: **014002/2022**

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

[redacted]

05 JULY 2024

SIGNATURE **DATE**

In the matter between:

ATLANTIS MINING SA (PTY) LTD Applicant

and

THE SOUTH AFRICAN REVENUE SERVICES Respondent

EDWARD KIESWETTER N.O. Second Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 05 July 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant, Atlantis Mining SA (Pty) Ltd [Atlantis], operates a mining company. It carrying on business as a contract miner providing mining services to three different mining sites, being Black Wattle Colliery, Vaalbult Colliery and Roodepoortjie Colliery [collectively the sites]. Atlantis is registered as a taxpayer with the respondent [SARS] as contemplated in terms of the Tax Administration Act 28 of 2011 [TAA] read with the Income Tax Act, 58 of 1968 [the ITA].

[2] Atlantis has brought two applications one under case number 23651/2021 and another under case number 014002/2022. Both these applications are between the same parties and concern the same subject matter. To avoid a piecemeal approach the parties have consented to both the applications being heard together. In the first application, under case number 23651/2021, Atlantis seeks declaratory relief concerning, *inter alia*, the interpretation of section 36(7F) of the ITA [section 36(7F)] [declarator application]. In the second application, under case number 014002/2022, Atlantis seeks interim relief pending a judicial review [review application]. The review application has subsequently been withdrawn and the only issue to be dealt with is the aspect of costs.

[3] For the sake of clarity and because Atlantis, in the declarator application, cited SARS as the first respondent and the Commissioner, in his official capacity, as the second respondent, this Court corrects such reference and makes reference herein only to SARS.

[4] The remaining dispute, the declarator application will be dealt before considering the costs argument in the review application.

LEGISLATIVE FRAMEWORK AND LEGAL BACKGROUND

DECLARATOR APPLICATION

[5] The nub of the declarator application concerns the interpretation of section 36(7F) and the applicability thereof on Atlantis as a contract mining company. To contextualise section 36(7F) in general terms assists. Section 15(a) of the ITA permits deductions of capital expenditure against income derived from mining operations. In broad terms, capital expenditure refers to expenditure which is incurred to enquire, enhance or upgrade the infrastructure or equipment used in the production of income such as mining equipment which is used to extract minerals.

[6] In terms of section 11(e) of the ITA and related provisions, a taxpayer is entitled to claim depreciation allowances in respect of capital expenditure they have incurred. Taxpayers carrying on mining operations are entitled, in terms of section 15(a) read with section 36, to claim capital expenditure deductions in lieu of depreciation deductions. As such, mining taxpayers can claim full deduction of their capital expenditure against their mining income, as opposed to annual instalments of a depreciation allowance. This special concession is also afforded to contract miners.[1]

[7] In auditing terms, section 36(7F) introduces a "capex per mine ringfence" which essentially provides that, where a taxpayer carries on mining operations through two or more mines, the deduction of capital expenditure, as determined in terms of section 36(7C), from each mine is limited to the taxable income derived, by the taxpayer, from mining in that specific mine. In other words, capital expenditure for one mine is not deductible against the taxable income derived from mining in another mine. Accordingly, the capital expenditure deduction is "*ring-fenced*" from crossing over to reduce or wiping out mining income from other mines.[2]

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1 Contract miners are entitled to the benefits conferred by s15(a) and s36(7C), see **Benhaus Mining v C: SARS** 2020 (3) SA 325 (SCA) (165/2018) at para [41].

2 **Armgold / Harmony Freegold Joint Venture v C: SARS** 2013 (1) SA 353 (SCA).

[8] Notwithstanding, Atlantis contends that for income tax purposes it is a contract miner not owning the mining rights nor the property of the three sites where it performs its mining activities. In consequence, its mining activities are not site-specific, and the machinery owned and used on such sites is not exclusive to any one site. In fact it contends that the machinery is moved from site to site, depending on the job requirements and the nature of the tasks. The mining income relates directly to all the assets owned by the company as a whole. Therefore, it argues it is allowed to claim deductions on the capital expenditure on the machinery which is used in a manner which is not site-specific. If not, a *lacuna* in the ITA exists in respect of contract miners verses conventional miner..

[9] SARS conversely argues that section 36(7F) is applicable to contract miners like Atlantis and as such the ringfencing provisions of section 36(7F) apply in conjunction with sections 36(7C)-(7G). In fact, SARS contends it is a matter of accounting for each site, each mine must have its own mining equipment and account for its own capital expenditure and income separately from other mines. SARS contends that Atlantis, in preparing its capital expenditure schedules in support of the income tax returns did not comply with section 36(7F) in that, it did not separately calculate the capital expenditure for each mine (per site).

[10] Atlantis brought this application at a time when the assessments for the tax years of 2018 and 2019 [the assessments] were imminent and when it was aware that SARS would apply section 36(7F) to the information it had already submitted and which it had failed to submit. Absent compliance of further information repeatedly requested in terms of section 46 of the TAA, Atlantis was forewarned of the outcome of assessments.

[11] The assessments did follow after this application was launched. After receiving the assessments Atlantis did not trigger the machinery of Chapter 9 of the TAA and object to the assessments nor, did it lodge an appeal. It rather launched the review application attacking SARS's decision not to suspend the payment of the raised assessed tax. The review application was brought absent a directive from

this Court in terms of section 105 of the TAA[3] and Atlantis too, significantly has failed to challenge the decision to apply section 36(7F) when SARS assessed it in the review application.

[12] Atlantis argues that the issue for deliberation concerns only a question of law, vis-à-vis the interpretation of section 36(7F) whilst SARS conversely argues that Atlantis has usurped the jurisdiction of the Tax Court in that the question before this Court is not only of law, but concerns the applicable facts. SARS expanded its contention by stating that this Court is asked to decide whether Atlantis has complied with the provisions governing the deduction of mining capital expenditure. This it says is evident from the nature and extent of the declarator relief Atlantis seeks. In consequence, SARS raises a point in *limine* regarding this Court's jurisdiction to entertain the application on the merits and the relief. SARS relies on section 105 of the ITA to support its objection.

[13] In consequence, this Court first deals with the jurisdictional objection and does so by first considering the common cause facts as a backdrop.

COMMON CAUSE FACTS

[14] In the tax years of 2017 to 2019, Atlantis submitted tax returns claiming capital expenditure without applying the ring-fencing requirements of section 36(7F).

[15] On 3 December 2019, SARS informed Atlantis that it was, for the tax period ending 28 February 2018, conducting a tax review. SARS confirmed the directors report contended that section 36(7F) was not applicable. To evaluate SARS called for the submission of reasons and supporting documents within 14 (fourteen) calendar days.

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[3] Section 105 provides: "*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.*"

[16] Atlantis's tax advisors, Tayfin Forensic & Investigative Auditors [Tayfin] responded 3 (three) months later and on 6 March 2020, Tayfin provided reasons relying on the Supreme Court of Appeal matter [SCA] of Benhaus Mining v SARS,[4] and stated, *inter alia*, that:

> "*Like Benhaus, Atlantis is a contract miner who claims deductions in each year of the capital expenditure on the machinery used. The machinery is used for extracting minerals from the ground and that is regarded as mining for the purposes of the Act.*
>
> *Mining operations commence when Atlantis moves onto site and starts the preparation for digging the minerals out of the earth. Atlantis is conducting mining operations and is entitled to the benefits conferred by section 15(a). In terms of section 1 of the Income Tax Act, 58 of 1968, mining is defined as – 'every method or process by which any mineral is one from the soil."*

[17] Tayfin contended that the mining income is therefore directly linked to the machinery which is owned by the company as a whole. The machinery is not site-specific and consequently Atlantis is correct in its imposition that section 36(7F) does not apply. Tayfin did not supply any supporting documents from which SARS could glean the facts relied on nor, for that matter did it was inform SARS that it was unable to comply with the request.

[18] SARS on 21 August 2020 then issued a notification of audit for tax period 2017-2019 and at paragraph 9.4 reiterated Atlantis' failure to provide information in support of the factual circumstance Atlantis relies on in its letter of 6 March 2020. Atlantis was forewarned that failure to provide the relevant material would result in SARS: *"- would then be unable to ensure that the provisos of section 36(7F) were properly applied, and hence no amount(s) can be allowed under section 37(7C) read with section 36(7F) of the Act*".

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[4] *Supra*: Footnote 1.

[19] Approximately 6 (six) months later and after a meeting with SARS *via* zoom on 12 February 2021, Tayfin on 19 February 2021 responded. The response was not met with the submission of further information as per the 21 August 2020 request. Atlantis now stated that it had one set of financial statements consolidating all assets, all liabilities and equity in totality and that it would be 'incongruous' to comply with SARS' request by accounting for the capital expenditure and income derived and expenses incurred from each site separately. It stated that SARS' 'interpretation' of the provisions (sections 36(7C)-(7G)) would create an imposition as it would be hazardous, impractical and nearly impossible for them to maintain and record. Therefore, Atlantis submitted that "-*the imposition of the relevant acts, namely 36(7C), 36(7E),36(7F) and 36(7G) cannot be applied or imposed on any entity trading within the nature of "contract mining*". Ostensibly due to the impracticality thereof alternatively impossible in support of the *lacuna* in the ITA argument. It was on this basis, the imposition, that Atlantis then informed SARS that it wished to bring the declarator application.

[20] On 3 March 2021, SARS warned Atlantis that any technical merits or technical views it held were best addressed *via* a dispute resolution forum or either *via* an objection catered for in the TAA and that in the circumstances they did not support approaching this Court for declaratory relief. They again confirmed that the request for relevant material had still not been attended to and that such failure had impeded the finalisation of the audit. SARS once again stated they wanted and awaited relevant information as without it, they would not be in a position to issue a letter of findings. SARS reserved its right to not issue a letter of finding and potentially proceed to raising the additional assessment based on the current information it had at its disposal.

[21] On 4 March 2021, Atlantis' attorneys of record [Aphane], still did not provide further information to assist SARS, but informed SARS that it was preparing an application for the declarator application. On 19 March 2021, SARS provided Atlantis with its audit findings and concluded at paragraphs 16 and 17: "*In view of this, <u>following your failure to provide the requisite information, SARS will therefore have to disallow all capital expenditure claimed</u>* (own emphasis) *for the period under*

review. Please note that failure to respond within 21 days will result in SARS proceeding to the assessment stage."

[22] Atlantis now within the 21 days, and on the 29 April 2021, instead of supplying information, responded with the statutory a section 11 'notice to institute proceedings' in terms of the TAA, stating at paragraph 7 thereof that: "*Despite being aware of our client's stance, SARS issued an Audit finding letter, disregarding our client's auditor's advice*." SARS was still not in receipt of the documents called for since the first request on 3 December 2019.

[23] Notwithstanding the statutory notice, SARS again on 30 April 2021 sent a request for clarification requesting the information, warning that such failure, if wilful, is a criminal offence. Finally, warned of the criminality of its default, and on 3 May 2021, Aphane confirmed to SARS that Atlantis was now in a position to furnish information but that "*in the circumstances, we shall transmit all of the Capital Expenditure as requested and the debacle pertaining to ringfencing provisions will be dealt with in court*".

[24] The accounting form in which the capital expenditure was transmitted to SARS after the undertaking is unknown as it does not form part of the papers nor does Atlantis deal with it on the basis of the imposition or inability to do in support of its argument.

[25] The declarator application was launched on 13 May 2021 and on 15 June 2021, SARS issued additional assessments. No objection in terms of the TAA lies against the assessments.

[26] It is against these common cause facts and background that the jurisdictional objection is now considered.

POINT IN *LIMINE*

Does this Court possess jurisdiction to entertain the merits of this application?

[27] It is common cause that Atlantis launched this application prior to SARS issuing the assessments. SARS now relies on the Supreme Court of Appeal's [SCA] reasoning in Lueven Metal (Pty) Ltd v Commissioner for South African Revenue Services[5] [Lueven matter] to support its contention that, in terms of section 105 of the TAA, the High Court lacks jurisdiction to hear tax disputes even if such legal proceedings were instituted prior to the issued assessments.

[28] This contention is not correct vis a vis the reliance of section 105 of the TAA. Ponnan JA in the Lueven matter emphasised two aspects. The first aspect is that the legislative scheme of the TAA is designed to ensure that the resolution of tax disputes including objections and appeals were to be resolved by means of alternative dispute resolution and that the Tax Board or the Tax Court should be approached before a taxpayer resolves to approach the High Court. The learned Judge's reasoning was based on the utilised language, context, history and purpose of the TAA. In so doing, the learned Judge used section 105 as an illustration and did not apply it to the facts. He noted that section 105 emphasised the clear design of the legislative scheme by stating that default rule is that a taxpayer had to follow the prescribed procedure, unless a High Court directs otherwise as statutorily catered for in terms of section 105. Ponnan JA bolstered his argument by considering the legislative scheme of the TAA against the change in the legal landscape which he reiterated had significantly changed since the decision of the Constitutional Court [CC] in Metcash.[6] The change was that prior to the amendment of section 104 of the TAA, a taxpayer could elect to take an assessment on review to the High Court instead of following the prescribed procedure. "*That is no longer the case. The amendment was meant to make clear that the default rule is that a taxpayer had to follow the prescribed procedure, unless a High Court directs otherwise.*"[7]

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5 [2023] ZASCA 144 (8 November 2023).

6 **Metcash Trading Limited v Commissioner for the South African Revenue Services and Another** [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC), par 44 (Metcash).

7 *Ibid*. par [21].

[29] The second aspect in the Lueven matter was that Ponnan JA reaffirmed that tax relief sought by way of a declaratory order is rare and only, in exceptional circumstances. Generally therefore, it is for the Judge at that time and, on the facts and circumstances presented to it, to exercise of a broad general discretion to decide that a declaratory order is appropriate in circumstances where there are specific statutory remedies available in the TAA. This broad general discretion referred to is to be exercised before ventilating the merits and is not to be confused with the discretion exercised by a Judge when, after having heard the merits applies stage 2 enquiry of and exercises it its discretion to determine whether it is just that declaratory relief should be granted.

[30] In short, the ouster of a Court's jurisdiction when applying the Lueven matter lies in the application of the default rule unless a Court directs otherwise in terms of section 105 of the TAA ,if applicable, or when, faced with declaratory relief, a Judge exercises his/her broad discretion not to entertain the merits.

[31] Atlantis correctly argues that section 105 of the TAA does not apply to the facts. However relying on the unreported judgment of Van Der Westhuizen J in Richards Bay Mining (Pty) Ltd v SARS[8] [Richards Bay matter] who relied on Metcash,[9] contented that the default rule does not apply when a Court, which possesses the requisite jurisdiction to entertain declaratory relief, is asked to determine a question of law. Furthermore a Court's jurisdiction is to be determined on the pleadings.

[32] Atlantis argued that, as in the Richard's Bay matter, the issue to be determined was a question of law and that in so far as facts were relevant to the determination, they were common cause. On the pleadings it argued its case was confined to declaratory relief relating to the interpretation of section 36(7F) of the TAA. In that way not distinguishable from the Richard's bay matter.

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8 **Richards Bay Mining (Pty) Ltd v Commissioner for South African Revenue**, case no. 045310/2023 (unreported).

9 Ibid. para [12].

[33] Atlantis's argument in not correct, the issues to be determined are not only confined to a question of law but also require a determination of facts which, have not been established in the founding papers. In fact, the only evidence relied on by Atlantis appear from the correspondence between itself and SARS. This Court is in a similar position to SARS, not in possession of sufficient facts to obtain a clear picture.

[34] On this basis having regard to the relief, Atlantis seeks this Court to understand what its activities factually are and/or what they entail at each site in order to determine whether section 36(7F) during the tax years 2017-2020 (as amended) [tax period] applies *per se* to it, to determine whether Atlantis is under an obligation to compute capital assets separately for each mining operation, on the facts provided, to determine whether Atlantis is able to compute capital assets separately for each mining operation during the tax period by ascertaining which machinery is used at which site and for how long during the tax period according to the contractual needs and obligations, to determine on the facts whether it can be considered as one mine, to determine what the term 'one mine' according to the ITA read with the TAA is and/or what the term according to accounting principles means and is, to determine whether it is entitled to the section 15(a) of the ITA benefits and to determine whether its operation and activities are not indeed not catered for by the ITA. None of this factual information is clear from the founding papers.

[35] However what is clear from the papers is Atlantis's view. What else does the correspondence them demonstrate? From the correspondence relied on it is clear that SARS was never placed in a position to consider nor reconsider or alter its view for lack of further information in support of Atlantis' adopted view. Atlantis had no information or intention of supplying the further information. This is not only evident from the numerous request since December 2019 but also evident from the last correspondence Atlantis had with SARS after the section 11 notice when Aphane stated that although their client was in a position to supply information but did not wish a response thereto and simply stated "- *and the debacle pertaining to ringfencing provisions will be dealt with in court*". It appeared that Atlantis had pre-empted the reply from SARS before, and after it finally provided the additional information. From the facts it appears that Atlantis genuinely never sought to engage

with SARS other than to provide its adopted opinion. No room for meaningful engagement is apparent.

[36] The correspondence also illustrates a display of disregard for the need to exhaust internal remedies, which internal remedies SARS had already alluded to in its letter of 3 March 2021 when it stated the following:

> "*It is further our opinion that any technical merits or technical views, as canvassed by the taxpayer in its response to SARS in the correspondence dated the 19th of February 2021, will be better addressed via Dispute Resolution forum i.e. via an objection and subsequent appeal which caters for such arguments to be raised, deliberated upon and ultimately concluded.*
>
> *We further note that no response to our request for relevant material ("RFRM") issued on 21 August 2020 has been received to date despite various requests and extensions granted in this regard. We wish to advise that the non-provision of a response to the RFRM is impeding the finalisation of the audit* (own emphasis)*, and this will consequently have a negative financial impact on your client.*"

[37] Divergent views were apparent from 3 December 2019 and because Atlantis chose, by its own failure to supply further information, no meeting of minds nor narrowing of views emerged. The consequence spilled over into the founding papers in that no set of clear, sufficient, uncontested facts existed for this Court to deal with in order to make the determinations Atlantis seeks,[10] and as such the declaratory relief not appropriate. This distinguishable from the Richards Bay matter.

[38] Atlantis did not, as it should have, follow the default rule by adopting the special machinery created by the TAA.

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[10] **Mobile Telephone Network (Pty) Ltd v Commissioner for the South African Revenue Services** [2022] ZASCA 142, [2023] 1 All SA 330 (SCA); 2023 (1) SA 420 (SCA): 85 SATC 235, par 27.

[39] Considering the above, adopting the considerations in the Lueven matter and accepting that the Richards Bay matter is distinguishable on the reliability of relevant common cause facts, this Court exercises its discretion against entertaining the merits of this application.

[40] In consequence, the objection, albeit by not applying section 105 of the TAA on principle is successful, and the necessity to deal with merits unnecessary. In consequence the application is to be dismissed on that basis.

COSTS

[41] There is no reason why the costs of the declarator application should not follow the result. In particular, SARS forewarned Atlantis to follow the default rule, a factor this Court considered. Furthermore, what of the costs of the review application?

[42] SARS contended that each party should bear their own costs however, Atlantis is of the view that up until 6 February 2024, SARS had not given its undertaking not to institute collection proceedings against it and if SARS had done that earlier when it was requested of them, the necessity to launch the review application would have been negated. The costs therefore wasted.

[43] Atlantis is correct with its timing assertion and that is a factor for consideration. However, although Atlantis has withdrawn the review application this Court in exercising its discretion had regard to a number of factors. One factor was the whether the costs were truly wasted. Simply put, if SARS did not provide the undertaking, would Atlantis have been able to proceed with the review application? To ascertain the answer, one only has to look at the formulation of the prayers in Part A of the review application's notice of motion. Prayer 1.1 dealing with the interdictory relief incoherently and incorrectly refers to "*-until such time that the final under relief in respect of the review application filed under case number: 2365/2021, is granted*". Factually no review application was filed under 2365/2021. The review application was filed under 014002/2022 and the declaratory application under case

number: 23651/2021. Case number 2365/2021 is not applicable for want of relevance.

[44] Furthermore, prayer 2 states that "*That the orders under paragraph 1(a) and 1(b) shall operate as interim orders*-". No prayers 1(a) nor (b) exist and reference incorrectly to the review application and the incorrect under case number 2365/2021 is perpetrated yet again. In the circumstances, Atlantis in all likelihood would or could not proceed with the papers as they stood at the relevant time, the weight of the wasted cost argument is diluted. In consequence, each party to bear their own costs appears to be balanced and just.

[45] The following order:

1. The application under case number 23651/2021 is dismissed with costs on scale B, including the costs of two Counsel if so employed.

2. Each party is to bear their own costs in respect of the application under case number: 014002/2022.

L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Date of hearing:	17 April 2024
Date of judgment:	05 July 2024