IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

17-07-2019
DATE

P.A. MEYER

Case no: 29208/15

In the matter between:

MARTIN FRASER WINGATE-PEARSE	Applicant
and	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
JOHANNES HENDRIKUS VAN LOGGERENBERG	Second Respondent
IVAN VISVANATHAN PILLAY	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
MINISTER OF POLICE	Fifth Respondent
MINISTER OF STATE SECURITY	Sixth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Seventh Respondent

Case Summary: **Revenue – Income Tax - Income Tax Act, 58 of 1962 (s 79(1)) - Tax Administration Act, 28 of 2011 (s 92 read with s 99(1) and (2) – SARS empowered to raise an additional assessment if it 'is satisfied' of the existence of a particular state of affairs - although the words 'is satisfied' confer a subjective discretion on SARS, the discretion is not unfettered and an objective approach must be adopted to that subjective discretion - SARS, therefore, must show that its subjective satisfaction was based on reasonable grounds. Furthermore, given the wording of s 79(1) of the Income Tax Act, and presently of 92 read with s 99(1) and (2) of the Tax Administration Act, and the subjective nature of the discretion conferred on SARS, the scope for judicial review is limited.**

JUDGMENT

MEYER J

INTRODUCTION

[1] This litigation emanates from additional estimated income tax assessments, which the first respondent, the Commissioner for the South African Revenue Service (SARS), issued during April 2006 in respect of the 1998 to 2005 years of assessment (the relevant period of assessment) of the applicant, Mr Martin Fraser Wingate-Pearse. SARS investigated his tax affairs, established non-compliance and estimated his alleged under-declared taxable income for the relevant period of assessment in terms of s 78 of the Income Tax Act, 58 of 1962 (the Income Tax Act). Where applicable, SARS re-opened the original assessments older than three years as provided for in s 79 of the Income Tax Act. Mr Wingate-Pearse objected to the assessments, which objections were partially disallowed, and, on 1 August 2007, he filed a notice of appeal to the tax court against the partial disallowance of his objections. The dispute before the tax court has not yet been finalised (the tax appeal).

[2] Almost a decade later, on 17 August 2015, Mr Wingate-Pearse launched the present review application. In terms of the notice of motion he seeks a mix of declaratory and review orders in respect of various alleged actions and decisions taken by SARS. He also seeks a declaratory order, a mandamus and a structural interdict against SARS and the fourth respondent, the Minister of Finance (the minister). On 19 April 2018, Mr Wingate-Pearse instituted an interlocutory application in which he applies for his notice of motion in the review application to be amended and for leave to file a supplementary founding affidavit, which affidavit was simultaneously filed. In terms of the proposed amendment, he further seeks, *inter alia*, the review and setting aside of SARS' *decisions* to issue the additional estimated assessments for the relevant period under s 6(1) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), an extension, in terms of s 9(1), of the 180-day period prescribed in terms of s 7(1), a declaration that, insofar as he seeks the review and setting aside of the impugned actions and decisions under the principle of legality, that the delay in initiating the review application was not undue, or if it is held to be undue,

that condonation be granted for the undue delay, and for a declaratory order that the burden to prove that SARS was entitled to issue the additional estimated assessments rests on SARS and that it has the duty to begin with the leading of evidence in the tax appeal.

[3] SARS and the minister oppose the review application. SARS also opposes the interlocutory application: First on the grounds of procedural irregularities. Second, it opposes the interlocutory application on the same grounds it is opposing the review application. Third, that the amendment would still render the review application subject to preliminary objections of lack of jurisdiction and *lis pendens*. Because of the overlapping grounds of objection, counsel agreed that I should hear and determine both applications at the same time. I propose to deal with the relief claimed in terms of the notice of motion in its unamended form before dealing with the additional relief that is sought to be introduced in terms of the proposed amendment. But, first the background facts, which are largely uncontroversial.

BACKGROUND FACTS

[4] Mr Wingate-Pearse is a businessman. He is a shareholder, *inter alia*, in Carnilinx (Pty) Ltd (Carnilinx), a mid-tier cigarette manufacturer, and a member and director of various other entities with interests in the clothing industry. With regard to his business activities, he states in his second supplementary affidavit:

'The mainstay of my business activities has since the 1980s been the importation from different European countries and the United States of America of second-hand clothing and the wholesale distribution of such clothing in South Africa. I had identified suppliers in various European countries and the USA where I bought second-hand clothing in bulk. These were baled and the bales stuffed into containers that were transported by sea to South Africa. The containers were unpacked at warehouses where the merchandise was sold to traders who distributed it to points of sale, mostly in rural areas. I also pursued other interests and my businesses and interests were housed in various corporate entities, to which I refer in what follows as "the legal entities"'.

[5] SARS investigated Mr Wingate-Pearse's tax affairs from early to mid-2002. It applied for a warrant of search and seizure in terms of s 74D of the Income Tax Act and s 57D of the Value Added Tax Act, 89 of 1991. (These provisions have since been repealed. Since the coming into force of the Tax Administration Act, 28 of 2011 (the Tax Administration Act), on 1 October 2012, SARS' power to apply for warrants

for search and seizure is now contained in Part D of Chapter 5 of that Act (sections 58 to 66).) Such application was brought in the high court before a judge in chambers, and the warrant for search and seizure was issued on 30 November 2004 (the warrant). SARS executed the warrant from 14 April to 21 April 2005. It also conducted a search in terms of s 4 of the Customs and Excise Act, 91 of 1964, simultaneously with the execution of the warrant. Searches were also conducted at Mr Wingate-Pearse's residence. On 14 July 2005, SARS supplied an inventory and index of the documentation seized to Mr Wingate-Pearse's mother, Ms MA Wingate-Pearse, who acted on his behalf; approximately 2 000 documents were seized. SARS instructed Price Waterhouse Coopers (PWC) to assist in considering the seized documentation and to conduct an audit in respect of *inter alia* Mr Wingate-Pearse's tax affairs. SARS estimated that he had grossly under-declared his taxable income for the relevant period of assessment. SARS' estimate was based on a capital reconciliation (colloquially known as a 'lifestyle audit') – a process by which it considered whether his declared income, including his non-taxable accruals and receipts, were sufficient to have financed the growth of his net asset position, taking his living expenses into account. According to SARS, it established a substantial shortfall, indicating that Mr Wingate-Pearse had income from sources that he failed to declare in his tax returns for the relevant period of assessment.

[6] During April 2006, SARS issued additional income tax assessments to assess Mr Wingate-Pearse to tax on the estimated under-declared taxable income for the 1998 to 2005 years of assessment. This was done in terms of s 78(1) of the Income Tax Act, which at the time provided that '[i]n every case in which any person makes default in furnishing any return or information or the Commissioner is not satisfied with the return or information furnished by any person, the Commissioner may estimate either in whole or in part the taxable income in relation to which the return or information is required'. This resulted in Mr Wingate-Pearse's total assessed tax liability increasing from an amount of R350 142.92 to an amount of R41 725 868.29 for the relevant period of assessment.

[7] On 27 June 2006, Mr Wingate-Pearse filed notices of objection against the additional estimated assessments. SARS partially allowed and partially disallowed his objections. On 23 March 2007, SARS notified him accordingly and, to give effect to the partial allowance, it issued reduced assessments to him for the relevant period.

His total assessed tax liability was reduced to R22.7 million. On 1 August 2007, Mr Wingate-Pearse filed notices of appeal to the tax court against the partial disallowance of his objections. SARS considered his notice of appeal and, on 14 May 2008, issued further reduced assessments for the relevant period of assessment. His total assessed tax liability was further reduced to R9 267 630. SARS filed its statement of grounds of assessment on 13 June 2008 and Mr Wingate-Pearse his statement of grounds of appeal on 11 March 2009.

[8] On 31 May 2007, Mr Wingate-Pearse applied for amnesty in terms of the Small Business Amnesty and Amendment of Taxation Laws Act, 9 of 2006, and the Second Small Business Amnesty and Amendment of Taxation Laws Act, 10 of 2006. SARS granted him amnesty on 21 February 2008. On 12 March 2009, it caused a tax judgment to be entered against him in terms of s 91(1)(b) of the Income Tax Act. Its amnesty unit advised him, by letter dated 12 March 2009, that amnesty had been granted and that the relevant statutory provisions excluded the amounts that had been assessed prior to the submission of his application for amnesty. On 13 March 2009, Mr Wingate-Pearse launched an urgent application against SARS in this court under case number 10991/09, *inter alia* seeking an order interdicting SARS from taking collection steps based on the tax judgment. The matter was settled and their written settlement agreement made an order of court on 20 March 2009. In terms of the settlement, SARS would hold back recovery steps pending the outcome of the tax appeal and Mr Wingate-Pearse would make an interim payment and cede, *in securitatem debiti*, his right, title and interest in and to his shareholding and members' interest in some eleven close corporations, which were also parties to the settlement agreement.

[9] At a pre-trial conference that was held 13 September 2010 as part of the tax appeal, Mr Wingate-Pearse informed SARS that he intends to raise the following points *in limine* before the tax court: (a) whether the small business tax amnesty granted to him invalidates the additional estimated assessments for the relevant period of assessment and renders the tax appeal academic; (b) whether the search and seizure was unlawful and any document or step taken pursuant thereto inadmissible; and (c) whether his constitutional rights, including his rights as a taxpayer, were infringed through the search and seizure and the appeal as a result incapable of prosecution. SARS advised him of its stance that it considered that the tax court does

not have the necessary jurisdiction to hear the three points *in limine*. This was conceded by Mr Wingate-Pearse, and at a further pre-trial conference that was held on 2 November 2010, he gave notice that he intends to request a postponement of the tax appeal that was set down for hearing from 15 to 19 November 2010, in order to pursue his points *in limine* in a court with the necessary jurisdiction. The tax appeal, therefore, was postponed and Mr Wingate-Pearse was given an opportunity to launch his proposed review application.

[10] On 15 February 2011, Mr Wingate-Pearse caused a review application under case number 10498/2011 to be issued in the North Gauteng Division of the high court (the first review application). Apart from seeking an extension of the time period for the institution of the first review application in terms of s 9(1) of PAJA, or condonation for the delay in bringing the application, and costs, he only sought the review and setting aside of SARS' decisions to issue the assessments and/or not to withdraw them once amnesty had been granted to him and, in the alternative, for such decisions to be declared in conflict with the constitutional principle of legality and thus unconstitutional, unlawful and invalid. In dismissing the first review application on 2 May 2012, Prinsloo J noted that Mr Wingate-Pearse elected only to rely 'on the first of the three grounds, clearly abandoning the other two grounds'.

[11] The tax appeal was set down for hearing on 4 February 2013, and a further pre-trial conference was held on 11 December 2012. On 4 February 2013, the tax appeal was postponed due to the unavailability of Mr Wingate-Pearse's counsel. It was again set down for hearing from 13 to 20 November 2014, but again postponed. It was thereafter set down for hearing for the period 9 to 16 February 2015. At the commencement of the hearing on 9 February 2015, Mr Wingate-Pearse sought a ruling on the question of the onus and the duty to begin adducing evidence. The matter was argued before Khumalo J, who reserved his judgment, which was handed down on 23 April 2015. Khumalo J found against Mr Wingate-Pearse on the question of onus and duty to begin. On 26 August 2016, Khumalo J granted him leave to appeal to the Supreme Court of Appeal against his judgment and ruling. The appeal was heard on 26 August 2016, and, in striking the matter off the roll and ordering Mr Wingate-Pearse to pay SARS' costs including those of two counsel, the Supreme Court of Appeal held that an interlocutory ruling on onus and the duty to begin is not a decision in terms of s 129(1) and (2) of the Tax Administration Act, and not appealable.

[12] Ms Belinda Walter, an attorney, represented Carnilinx since June 2012. From 2009, her law practice has been focusing on the tobacco industry: advising clients on customs and excise issues and matters pertaining to bonded warehouses for excisable items such as cigarettes; assisting the State Security Agency (SSA) in initiatives relating to crimes and syndicates, particularly in the tobacco industry; and, in conjunction with the SSA, she initiated the establishment of the Fair-Trade Independent Tobacco Association (FITA) in June 2012. Through being a shareholder in Carnilinx, Mr Wingate-Pearse met Ms Walter in May 2013, whereafter she also assisted him in the tax appeal, although he also retained his attorneys of record. She met the second respondent, Mr Johann van Loggerenberg, for the first time on 4 September 2013, in her capacity as the chairperson of FITA. He was employed by SARS from 1999 until his resignation on 4 February 2015. The two of them became involved in a romantic relationship, which ended during May 2014. It is the evidence of Ms Walter on which Mr Wingate-Pearse strongly relies in support of his allegations that SARS employed illegal intelligence gathering measures against him, to which I return.

[13] On 17 August 2015, Mr Wingate-Pearse launched the present (second) review application. SARS caused the record to be filed for purposes of the review application on 14 September 2015. Although not opposing the review application, Mr Van Loggerenberg (the second respondent) and the third respondent, Mr Ivan Visvanathan Pillay, filed their answering affidavits on 2 and 7 October 2015 respectively. On 30 October 2015, Mr Wingate-Pearse demanded that the record be amplified, which SARS did on 20 November 2015. He then filed his first supplementary founding affidavit on 6 April 2016. SARS filed its answering affidavit on 28 September 2016 and the minister's answering affidavit was filed on 9 November 2016.

[14] The tax appeal was again set down for hearing from 22 November to 5 December 2017, and a further pre-trial conference was held on 27 September 2017. The registrar of the tax court reduced the days for which the tax appeal was set down to one week due to the unavailability of a judge to preside for longer than a week during that period. Fourie J, who was allocated to preside in the matter, required an undertaking from the parties that it would be finalised within a week, which undertaking SARS could not give. The tax appeal was therefore postponed.

[15] Mr Wingate-Pearse's interlocutory application in which he applies for the notice of motion in the review application to be amended and for leave to file a second supplementary affidavit, was issued on 19 April 2018. His replying affidavit in the review application was filed on 13 July 2018. On 10 October 2018, SARS filed its opposing affidavit in the interlocutory application. Mr Van Loggerenberg, who, due to financial constraints, was unrepresented when his initial answering affidavit was prepared and filed, filed a further (and proper) affidavit on 15 November 2018. On 29 April 2019, SARS filed an interlocutory application for a further affidavit to be admitted in evidence, essentially to introduce the findings of the Presidential Commission of Inquiry headed by retired Judge Nugent pertaining to a 'rogue unit' at SARS. This interlocutory application is unopposed. By arrangement with Deputy Judge President Mojapelo of this division, the review and interlocutory applications were specially allocated for simultaneous hearing during the week commencing on 20 May 2019.

[16] On Friday, 16 May 2019, shortly before the commencement of the hearing of the review and the interlocutory applications on Monday, 20 May 2019, Mr Wingate-Pearse gave notice that he was no longer pursuing *inter alia* the declaratory order, mandamus and structural interdict sought against SARS and the minister (paragraphs 1, 2 and 3 of the notice of motion). Although his counsel, Adv AJ Daniels SC, informed me that he did not hold instructions to abandon the balance of the relief claimed in terms of the unamended notice of motion, he confined his argument to the relief that is sought to be introduced in terms of the proposed amendment, except the relief relating to the onus and duty to begin.

RELIEF CLAIMED

[17] It is Mr Wingate-Pearse's case that he was a victim of what he described as SARS' 'covert intelligence unit' that was known as 'Tiger Group', 'Special Projects Unit' or 'SPU', 'National Research Group' or 'NRG' or 'HRIU' (HRIU). Messrs Van Loggerenberg and Pillay were, according to him, linked to the HRIU. He alleges that the HRIU was established to conduct illegal covert intelligence operations and that Mr van Loggerenberg, on behalf of SARS, conducted covert surveillance operations of and concerning him and he intercepted and monitored his communications. He contends that the operations of the HRIU infringed several of his constitutionally protected rights. The relief sought in paragraphs 1, 2, 3 and 4 of the notice of motion, so he contends, is appropriate relief to vindicate the rule of law.

[18] In paragraphs 1, 2 and 3 of the notice of motion, he sought a declaratory order that the establishment by SARS of the investigating unit, HRIU, was without statutory authority, unlawful, inconsistent with the Constitution and invalid, and that HRIU abused its power and resources by engaging in activities which it had no lawful authority to perform. He then sought a mandamus against SARS and the minister, jointly and severally, to investigate and inquire into the activities, funding and management of HRIU. He also sought a structural interdict against SARS and the minister to report to this court by means of affidavit evidence on the results of their investigations and inquiries. In paragraph 4 Mr Wingate-Pearse seeks a declaratory order that the conduct of SARS and of Mr Van Loggerenberg in respect of him 'was biased and/or prejudicial and/or discriminatory, and accordingly inconsistent with the Constitution and invalid', which relief he did not abandon.

[19] Mr Wingate-Pearse contends that the search and seizure was unlawful and unconstitutional and that all documents obtained pursuant thereto were illegally obtained and all actions taken throughout the process, illegal and invalid. He states that he and Mr Norbert Glenn Agliotti commenced a working relationship in 1988 and thereafter also met socially from time to time until 1997, when he discovered that Mr Agliotti together with the then National Commissioner of the South African Police Service, the late Mr Jacob Selebi, had been competing directly with his business interests. He states that some time after their fall-out he discovered that Mr Agliotti had given 'false and maliciously motivated information' about him to Superintendent SJ Taljaard of the Organised Crime Unit, SAPS and also to Mr Selebi. That false information, so he alleges, in turn was conveyed to SARS. The relief which he seeks in paragraphs 5 – 8 of the notice of motion, he contends, is appropriate relief to correct the illegal conduct of SARS. Furthermore, as I have mentioned, he accuses SARS of having employed illegal intelligence gathering measures against him.

[20] In paragraph 5 of the notice of motion Mr Wingate-Pearse accordingly seeks a declaration that the following conduct of SARS *vis-à-vis* him be declared inconsistent with the Constitution and invalid: (5.1) in investigating him on the basis of false information provided by Mr Selebi, Supt SJ Taljaard and Mr Agliotti and information arising from the unlawful monitoring and interception of his communications, including information intercepted by Mr Van Loggerenberg from Ms Walter; (5.2) in applying for

the warrant on the basis of that information; (5.3) in executing the warrant; (5.4) in making a determination in terms of s 78 of the Income Tax Act that he had defaulted in furnishing information or in not being satisfied with the returns or information that he had furnished; (5.5) in estimating his taxable income for the 1998 to 2005 years of assessment in terms of s 78 of the Income Tax Act in the total amount of R25 634 610 on 19 April 2006, and in the reduced amounts of R14 014 048 on 23 March 2007 and R12 063 868 on 14 May 2008; (5.6) in making a determination in terms of s 79(1) of the Income Tax Act that the amounts of income for the relevant period of assessment had not been assessed to tax owing to fraud, non-disclosure of material facts or misrepresentation by him; and (5.7) in utilizing any or all of the false and intercepted information in preparation for or during the conduct of the tax appeal.

[21] Paragraph 6 of the notice of motion seeks the review and setting aside of SARS' decisions to apply for the warrant, to unlawfully investigate Mr Wingate-Pearse and to unlawfully surveil and intercept his communications. Paragraph 7 seeks a declaration that the evidence obtained by SARS on the strength of the warrant was obtained unlawfully, unconstitutionally, in a manner that violated his right to privacy and is inadmissible on the basis that it will render the tax appeal unfair to him and will be detrimental to the administration of justice. Paragraph 8 seeks the review and setting aside of SARS' investigations of him, and the results of such investigations, where they were based on information provided by Mr Selebi, Supt Taljaard and Mr Agliotti and obtained as a result of the unlawful monitoring and interception of his communications and those of Ms Walter.

[22] In terms of the proposed amendment, Mr Wingate-Pearse *inter alia* seeks to introduce the following additional relief:

'7.5 Declaring that:

(a) The first respondent [SARS] has the burden to prove that it was entitled to issue the said additional assessments in terms of section 78 of the Income Tax Act 58 of 1962 and section 99(1) of the Tax Administration Act 28 of 2011 in the tax appeal pending in the Tax Court . . . and;

(b) The first respondent has the duty to commence with the leading of evidence in those proceedings.

[23] At the eleventh hour before the commencement of the hearing of the review and interlocutory applications, Mr Wingate-Pearse also gave notice that he was no

longer pursuing the above-quoted relief relating to the onus and duty to begin. That is not surprising, because the issue relating to the onus and duty to begin had already been dealt with by the tax court, which made a ruling directing that the burden of proof lies with the appellant in the tax appeal, Mr Wingate-Pearce, and, on appeal to the Supreme Court of Appeal, it was held, as I have mentioned, that an interlocutory ruling on onus and the duty to begin is not a decision in terms of s 129(1) and (2) of the Tax Administration Act, and not appealable. The declaratory relief relating to the onus and duty to begin that he sought thus became moot and, if it has to arise, should only arise before the tax court and not before this court; otherwise it will lead to piecemeal litigation. The further anomaly is that the high court was requested to issue binding orders concerning pending litigation, directing how another court, i.e. the tax court, should conduct its proceedings. This ought not to be countenanced.

[24] The further additional relief which Mr Wingate-Pearce seeks in terms of the proposed amendment is the addition of a new paragraph 6.4 to the notice of motion in which he claims the review and setting aside of SARS' decisions to issue additional estimated assessments for the 1998 to 2005 years of assessment and the addition of the following new paragraph 6B:

'6B.1 Declaring that the delay in bringing the application for the relief set out in paragraphs 2, 5 and 6 above was not unreasonable, alternatively, that condonation be granted for such delay in the interests of justice;

6B.2 in the alternative to paragraph 6B.1 and in the event of it being held that the acts referred to in paragraphs 4, 5 and 6 constitute administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and that the present proceedings are for judicial review in terms of section 6(1) of PAJA;

6B.2.1 that the proceedings pending in the Tax Court between the applicant and the first respondent under case number 1247/2008 that were commenced with the applicant's objection delivered on 15 May 2006 in which the issues raised in the said paragraphs 4, 5 and 6 above were raised, are parallel proceedings to this application and were instituted within 180 days from:

(a) 26 April 2005, being the date on which the applicant was informed of the application for the search warrant referred to in paragraph 5.2 above;

(b) 19 April 2005 being the date on which the warrant was executed, as alleged in paragraph 5.3 above;

(c) 19 April 2006 being the date on which the estimated assessments referred to in paragraph 5.5 above, were issued, alternatively

6B.2.2 that the period of 180 days referred to in section 7(1) of PAJA be extended to 17 August 2015, the date of the institution of these presents.'

MATERIAL DISPUTES OF FACTS

[25] The central themes underlying the substantive relief claimed is firstly the alleged illegal intelligence gathering measures that SARS, through its HRIU, allegedly employed against Mr Wingate-Pearse. He relies heavily on the affidavit of Ms Walter wherein she *inter alia* states that Mr Van Loggerenberg told her 'in no uncertain terms that he had, on behalf of SARS, intercepted and monitored [Mr Wingate-Pearse's] communications'. Secondly, he again raises the alleged unconstitutionality and illegality of the search and seizure operation that followed upon the issuing of the warrant by the high court on 30 November 2004, and the alleged inadmissibility of all evidence obtained as a result thereof. SARS, so Mr Wingate-Pears argues, was not legally entitled to rely on the documents seized in its decision to issue additional estimated assessments for the relevant period of assessment; such documents could not establish the required satisfaction as contemplated in s 79(1) Income Tax Act for SARS to make additional assessments.

[26] But this being motion proceedings in which final relief is sought, SARS' version should be adopted as the yardstick in determining whether Mr Wingate-Pearse can succeed with the relief he seeks. (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 634 I.) Motion proceedings in which final relief is sought 'cannot be used to resolve factual issues because they are not designed to determine probabilities' (*per* Harms JA in *National Director of Public prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D-E). I, therefore, have to accept the facts alleged by SARS, unless they constitute bald or uncreditworthy denials or are palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. Such finding 'occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of the evidence. (*Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) at 18A-B). That test for rejecting the facts alleged by SARS is not satisfied.

[27] HRIU was established in 2007 and disbanded in October 2014, weeks after Mr Tom Moyane was appointed as the commissioner for SARS. The seven-member unit reported to Mr Van Loggerenberg, who, in turn, reported to one of SARS' most senior

employees at the time, Mr Gene Ravele. The unit was later referred to in the media as the 'rogue unit'. In support of his accusations against HRIU, Mr Wingate-Pearse relies on a report of a panel chaired by Adv Sikhakhane SC regarding the establishment and activities of HRIU (the Sikhakhane report). On 28 April 2015, the SARS Advisory Board, chaired by Judge Kroon, issued a media statement on the Sikhakhane report, saying that the establishment of HRIU was unlawful. Based *inter alia* on the Sikhakhane report, Mr Wingate-Pears accuses SARS of committing illegal activities through HRIU, which ultimately resulted in the issuing of the additional estimated assessments that are the subject of this review. He *inter alia* contends that these review proceedings are appropriate, because '[t]he tax appeal would be limited to the tax calculations, whilst in truth the proverbial elephant in the room, namely SARS' illegal conduct, would escape scrutiny'.

[28] However, the Commission of Inquiry into Tax Administration and Governance by SARS appointed by President Cyril Ramaphosa and chaired by retired Judge Nugent (the Commission), made findings in its final report that support SARS' stance that Mr Wingate-Pearse's allegations about the existence of a rogue unit within the ranks of SARS are without a sound factual basis. The Commission found *inter alia* that there was an onslaught upon those who managed SARS founded upon allegations once peddled by the *Sunday Times* to a beguiled public for a year or more, about a 'rogue' unit that was alleged to have existed within SARS; the *Sunday Times* itself withdrew its allegations and apologised some two years later; although the establishment of HRIU was termed unlawful by a panel chaired by Adv Sikhakhane SC, there was nothing in the report to persuade the Commission why that was so; and 'the SARS Advisory Board chaired by Judge Kroon, reported to the Minister, and issued a media statement, saying the unit was unlawful, but in evidence he told the Commission that was not a conclusion reached independently by the Board, but had been adopted from the Sikhakhane panel, and he had come to realise it was wrong. Indeed, he supported the re-establishment of capacity to investigate the illicit trades, which he recommends'. In his testimony before the Commission, Judge Kroon said:
'Yes, as I have said in my report, my first comment was that the statement relating to the unlawfulness of the establishment of the unit were not thought through properly and were (*sic*) in fact incorrect.'

[29] Furthermore, when SARS conducted investigations into Mr Wingate-Pearse's tax affairs, HRIU was not even in existence. It was, as I have mentioned, only established in 2007, long after SARS had investigated Mr Wingate-Pearse's tax affairs and raised the additional estimated assessments. HRIU or Mr Van Loggerenberg was not in any way involved in the investigation into Mr Wingate-Pearse's tax affairs, nor did Mr Van Loggerenberg provide any oversight. The deponent to SARS' first answering affidavit, Mr Pieter Engelbrecht, was involved and he did not report to Mr Van Loggerenberg. It follows from this that Mr Van Loggerenberg was also not involved in the tax appeal. He left the employ of SARS on 4 February 2015. The allegation that he somehow intercepted confidential communications between Mr Wingate-Pearse and his lawyer, Ms Walter, is demonstrably without evidential basis, and so is the suggestion that he somehow influenced the tax appeal.

[30] Mr Van Loggerenberg denies that he, as an official of the state, infringed upon Mr Wingate-Pearse's constitutional rights. He states that he 'had no role in any respect, or any form of influence over, the manner in which SARS dealt with the tax audits of [Mr Wingate-Pearse]'. According to him, he was not 'ever involved in the investigation or audit into [Mr Wingate-Pearse's] tax affairs' nor 'was [he] involved at all in [his] tax appeal to the Tax Court'. He denies the allegations that he intercepted Mr Wingate-Pearse's legally privileged communications and he states that he 'never indicated to Ms Walter, either "in no uncertain terms" or at all, that [he] had on behalf of SARS intercepted and monitored [Mr Wingate-Pearse's] communications'. Manifestly, Mr Wingate-Pearse has seized, *ex post facto*, on what was at the time reported in the public domain as irregularities in SARS (and which have since been refuted, *inter alia* by those who made them).

[31] It is SARS' evidence that certain officers of the SAPS' Organised Crime Unit approached it during early to mid-2002 with information relating to Mr Wingate-Pearse, other individuals and various entities linked to Mr Wingate-Pears and those individuals. SARS thereafter investigated the matter. Its investigation was based on the sharing of information as envisaged in s 73 of the Prevention of Organised Crime Act 121 of 1998 (POCA), and its role in the investigation was limited to an investigation into alleged tax non-compliance. It identified certain risks relating to income tax, VAT and Customs and Excise issues in regard to the taxpayers under investigation, including Mr Wingate-Pears.

[32] SARS made a decision to apply for the warrant, the application was brought in the high court before a judge in chambers, and issued on 30 November 2004. SARS executed the warrant from 14 April to 21 April 2005. The deponent to SARS' first answering affidavit, Mr Pieter Engelbrecht, states that he oversaw the execution of the warrant and acted as the 'control centre' for any issues that the SARS officials encountered. The SARS officials executing the warrant reported to him. SARS, according to him, at all relevant stages acted in terms of the warrant and the empowering legislation. Any unlawful conduct on the part of SARS in obtaining the warrant and in the execution thereof is disputed.

[33] In summary, it is SARS' case that it acted lawfully throughout the process that ultimately resulted in the raising of the additional estimated assessments for the relevant period of assessment. It conducted an investigation into Mr Wingate-Pearse's tax affairs; it detected and established that he was not compliant in respect of his tax affairs for the relevant period of assessment; it took steps, including enforcement steps, as it was permitted to do in terms of the empowering legislation, including conducting an investigation into Mr Wingate-Pearse's tax affairs, gathering information from third party sources and using such information *inter alia* to obtain a warrant for search and seizure; it issued the additional estimated assessments after evaluation of numerous documentation obtained during the search and seizure and an audit conducted into Mr Wingate-Pearse's tax affairs by SARS officials with the assistance of PWC; and it issued the additional estimated assessments based on what is indisputably an acceptable method of capital reconciliation.

[34] Mr Wingate-Pearse cannot succeed with the relief he seeks once the *Plascon Evans* rule is applied and the facts alleged by SARS accepted. The affidavits filed on behalf of SARS refute his hypothesis that there was a tainted process, a conspiracy full of malice and bias, directed at him. But there are further reasons that also compel the dismissal of his review and interlocutory applications and which have a bearing on the appropriate costs order that should be made.

RELIEF CLAIMED IN SEVERAL RESPECTS ALSO BAD IN LAW AND NOT VIABLE

Departing premise fatally defective

[35] I believe that the premise from which Mr Wingate-Pearse departs in his quest to have the decisions to raise the additional estimated assessments set aside, is fatally

defective and bad in law. The stance adopted by him is that should the relief in paragraph 1 of the notice of motion – a declaration that the establishment by SARS of HRIU was without statutory authority, unlawful, inconsistent with the Constitution and invalid – 'be granted, it would follow that every item of information gathered by the Unit had been obtained illegally and may, on first principles, not be used by any organ of state against a person.' Thus, if an irregularity or illegality of some kind can be shown, Mr Wingate-Pearse felicitously pays no tax. Such starting premise, in my view, is patently wrong and untenable.

[36] Even if evidence is irregularly obtained, it is for the court to decide, upon the facts of each case, whether the circumstances are such that fairness requires the evidence to be excluded. *Key v Attorney-General, Cape Provincial Division, and another* 1996 (4) SA 187 (CC), concerns a search and seizure that was conducted in terms of s 6(1) of the Investigation of Serious Economic Offences Act 117 of 1991, which section is concerned with the procurement of information relating to suspected serious economic offences. There, Kriegler J said this:

'[11] . . . Even if one were to accept that the section was constitutionally invalid, and even if one were further to assume that such invalidity in turn rendered the prior searches and seizures unlawful, it does not follow that the evidence obtained directly or derivatively as a result of such searches and seizures would necessarily be inadmissible in criminal proceedings against the person from whom the documents containing, or pointing to, the evidence were seized.

. . .

[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin* [1995 (2) SA 148 (C) para 153], fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take the decision. At times fairness might require that evidence unconstitutionally

obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'

[37] There are, of course, fundamental differences between civil and criminal proceedings which are of considerable importance in the context of improperly obtained evidence. Section 35(5) of the Constitution, 1996, which provides that '[e]vidence obtained in a manner that violates any right in the Bill of rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice', has no application to civil cases. Even prior to the advent of the Constitution, however, courts recognised a discretion, in a civil case, to exclude improperly obtained evidence. (E.g. *Shell SA (Edms) Bpk en Andere v Voorsitter, Dorpsraad van die Oranje-Vrystaat en Andere* 1992 (1) SA 906 (O) at 916-917.) Such discretion in civil cases has also been recognised post-constitutionally. In *Fedics Group (Pty) Ltd and Another v Matus and Others; Fedics Group (Pty) Ltd and Another v Murphy and Others* 1998 (2) SA 617 (C) at 636D-E, Brand J said that it would be a 'retrogressive step in the development of our law' to deny such discretion. In *Harvey v Niland and Others* 2016 (2) SA 436 (ECG) para 47, Plasket J considered that it was clear from the case law that in the exercise of the discretion to exclude unlawfully obtained evidence, all relevant factors had to be considered, including-

'. . . the extent to which, and the manner in which, one party's right to privacy (or other right) has been infringed, the nature and content of the evidence concerned, whether the party seeking to rely on the unlawfully obtained evidence attempted to obtain it by lawful means and the idea that "while the pursuit of truth and the exposure of all that tends to veil it is cardinal in working true justice, the courts cannot countenance and the Constitution does not permit unrestrained reliance on the philosophy that the end justifies the means".'

Paragraph 4 of the Notice of Motion

[38] The declaratory order claimed in paragraph 4 of the notice of motion - that the conduct of SARS and of Mr Van Loggerenberg in respect of Mr Wingate-Pearse 'was biased and/or prejudicial and/or discriminatory, and accordingly inconsistent with the Constitution and invalid' - is too generalized and vague to render the relief incompetent. It is an absurdly wide abstract declarator about unspecified conduct being biased, prejudicial and or discriminatory in some unspecified manner and inconsistent with an unspecified provision or provisions of the Constitution. As was

recently said by Schippers AJA in *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and others* 2018 (4) SA 71 (SCA) para 35-

'Section 165(5) of the Constitution provides that an order or decision of a court binds all those to whom and organs of state to which it applies. This Court has held that parties who are required to comply with court orders must know with clarity what is required of them; otherwise they risk being held in contempt of court. The doctrine of vagueness, which is founded on the rule of law, is a foundational value of our constitutional democracy. It requires laws to be written in a clear manner, with reasonable certainty and not perfect lucidity. Orders of court must comply with this standard: vague provisions in a court order violate the rule of law. (Footnotes omitted.)

Paragraphs 5.1, 5.2, 5.3, 6 and 8 of the Notice of Motion

[39] The declaratory orders sought in paragraphs 5.1, 5.2 and 5.3 of the notice of motion - that SARS' conduct in investigating Mr Wingate-Pearse on the basis of information provided by Mr Selebi, Supt Taljaard and Mr Agliotti and information obtained as a result of the alleged unlawful monitoring and interception of his communications, including information intercepted from Ms Walter, in applying for the warrant on the basis of that information and in executing the warrant, be declared inconsistent with the Constitution and invalid - and the review and setting aside he seeks in paragraphs 6 and 8 of SARS' decisions to apply for the warrant, to investigate him and of the investigations and the results thereof where they were based on such information - are moot and the judicial review under PAJA of preliminary steps is not permissible since they do not have direct and external legal effect; they lack the attribute of concreteness required to constitute administrative action.

[40] SARS received information relating *inter alia* to Mr Wingate-Pearse during early to mid-2002, whereafter it investigated his tax affairs. The warrant was issued pursuant to an order of the high court, on 30 November 2004, and executed during April 2005. That order was never set aside despite numerous threats by Mr Wingate-Pearse during the years that he will apply for the setting aside of the warrant. Furthermore, he abandoned the alleged unlawfulness of the search and seizure as a ground of review when he initiated his first review application against SARS on 15 February 2011. The issues surrounding the information that SARS had obtained prior to taking the decision to apply for the warrant, its decision to apply for the warrant and the issue of the warrant have thus become academic. *Prima facie* a delay of more

than a decade in any case is unreasonable, and it is for Mr Wingate-Pearse to show why it should not be regarded as unreasonable; he should explain the long delay, which he dismally failed to do. (See *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 43A-F.)

[41] SARS' receipt of information relating to Mr Wingate-Pearse from officers of the SAPS Organised Crime Unit, its decision to investigate his tax affairs, the process of investigation or the decision to apply for the warrant, could not in itself adversely affect the rights of Mr Wingate-Pearce in a manner that has a direct and external legal effect and could hardly be said to constitute an administrative action. In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC), Mogoeng J said this:

'[37] PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect. This includes 'action that has the capacity to affect legal rights'. Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.

[38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of state decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.'

Paragraphs 5.4, 5.5 and 5.6 of the Notice of Motion

[42] Although Mr Wingate-Pearse states that he does not intend to challenge the correctness of the additional estimated assessments as part of this review application and although the declaratory relief that he seeks in paragraphs 5.4, 5.5 and 5.6 of the notice of motion (that the conduct of SARS *vis-à-vis* him in making a determination that he had defaulted in furnishing any information, in not being satisfied with the returns or information furnished by him and that the amounts of income for the relevant period of assessment had not been assessed to tax owing to fraud, misrepresentation, or non-disclosure of material facts on his part, and in estimating his taxable income for the 1998 to 2005 years of assessment in the total amount of R25 634 610 on 19 April 2006, and in the reduced total amounts of R14 014 048 on 23 March 2007 and R12 063 868 on 14 May 2008, be declared inconsistent with the Constitution and invalid)

is couched in review terminology and said to be a remedy that is 'just and equitable' to vindicate the rights allegedly violated, in substance what he seeks here is for this court to adjudicate upon the merits of the additional estimated assessments, which issues should best be decided by the tax court, a specialist court legislated to address disputes arising from assessments.

[43] Mr Wingate-Pearse's affidavits establish that he is disputing the correctness of the additional estimated assessments, claiming that they are materially wrong and the assessed amounts materially overstated. Such are claims that are being asserted in the tax appeal and that should best be determined by the tax court. In his founding affidavit Mr Wingate-Pearse states, *inter alia*:

'102. The tax appeal is predicated, *inter alia*, on my submissions that, at the very least, SARS's estimates of my income are grossly incorrect and that as a consequence there is not now nor was there ever any reason for SARS to levy additional tax and penalties against me at all.

103. A further consequence of SARS's grossly erroneous estimates is to allow SARS to presume any one or more of fraud, misrepresentation or non-disclosure of material facts by me, which in turn allows SARS to avoid the effect of the three year prescription period on tax assessments, as contemplated in the now repealed section 79 of the Income Tax Act 58 of 1962 and section 99 of the Tax Administration Act 28 of 2011.

104. I have already described . . . how SARS had to effect very significant revisions to their estimates of my aggregate tax liability.

105. In the process of prosecuting the tax appeal, SARS has made further concessions in the calculation of the estimates but has not revised the assessments accordingly.

106. These revisions and concessions made by [SARS] have certainly suggested to me that SARS has never had substantiated, rational and properly considered estimate of my income in the years of assessment 1998 to 2005.'

[44] And, in the second supplementary founding affidavit, he states:

'73. I have already pointed out that SARS' estimates were, on its own version, substantially over-stated and were thus substantially incorrect. How that can be categorized as responsible and reasonable administrative conduct that qualifies under the legality requirement of the Constitution is impossible to comprehend. I had the right to just administrative action that was lawful, reasonable and procedurally fair. SARS breached these constitutionally protected rights in the most egregious manner possible.

. . .

89. Although there can be no quarrel, in principle, with SARS utilizing so-called lifestyle audits and capital reconciliations as methods by which to determine whether taxpayers understated their incomes in their income tax returns, the capital reconciliation that was produced by PWC on behalf of SARS and that was adopted by SARS with respect to me is so detective that it renders the whole exercise invalid. . . . '

[45] It follows from the nature of the disputes raised here that this court in hearing the review will have to evaluate the basis and merits of the assessments. 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. One such circumstance is that the high court has jurisdiction to hear and determine tax cases turning on legal issues. (See *United Manganese of Kalahari (Pty) Ltd v SARS* 2018 (2) SA 275 (GP) paras 18-19.) Another exception is provided in s 105 of the Tax Administration Act. Prior to its amendment and at the time when Mr Wingate-Pearse instituted this review application on 17 August 2015, s 105 provided that '[a] taxpayer may not dispute an assessment or "decision" as described in section 104 in any court or other proceedings, except in proceedings under this Chapter *or* by application to the High Court for review'. A taxpayer was thus specifically compelled to make an election in instances where both the tax court and the high court have jurisdiction. Section 105 was amended by s 52 of Act 23 of 2015 with effect from 8 January 2016, and now provides that '[a] taxpayer may only dispute an assessment or "decision" as described in section 104 in proceedings under this Chapter [dispute resolution], unless a High Court otherwise directs'. 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.

[46] The tax court is a specialist tribunal composed of persons presiding who possess expertise not ordinarily possessed by a high court judge sitting alone. The Constitutional Court in *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC) para 47, considered the status of the special court, the predecessor of the tax court under the Income tax Act, and held that:

'In any event, by the very referral of cases to that specialist tribunal, the Act can be seen to have designated an independent and impartial tribunal specifically tooled to deal with disputed tax cases. The Special Court operates to all intents like an ordinary court and has extensive powers to interfere with, amend or set aside decisions of the Commissioner. Although the

procedure is referred to in the legislation as an appeal, it is a full hearing more akin to a trial. The relevant provisions of the Income tax Act that establish the Special Court and prescribe its procedure, principally contained in s 83 thereof, are eminently fair and afford a dissatisfied vendor more than a merely formal right of appeal. The Court is presided over by a Judge, who sits with an accountant and a representative of the business community. There is a right to legal or other expert representation, to adduce evidence or to challenge or rebut adverse evidence in a full-blown trial on the issues raised in the taxpayer's notice of appeal. Withal, therefore, a hearing before the Special Court meets the criteria of s 34 of the Constitution.'
(Footnotes omitted.)

[47] The fact that the determination of Mr Wingate-Pearse's tax appeal might entail the tax court considering the legality of an administrative decision, that was integral to the making of the additional estimated assessments, does not deprive that court of its jurisdiction to decide the tax appeal. In *South Atlantic Jazz Festival (Pty) Ltd v Commissioner, South African Revenue Service* 2015 (6) SA 78 (WCC) at 89E-90C, Binns-Ward J said this:

'PAJA regulates the bringing and determination of review applications in terms of s 6 of the statute; it is not directed at the bringing and determination of appeals in terms of the tax laws administered under the TAA. The appellant in the current matter was exercising a right of appeal to the tax court against the assessments; it was not seeking the review and setting-aside of a decision in terms of s 16(2)(f) of the VAT Act. The fact that the determination of the appeal might entail the tax court in considering the legality of an administrative decision, that was integral to the making of the assessments, does not deprive the court of its jurisdiction to decide the appeal. To interpret and apply the legislation, as requiring the dichotomous procedures enjoined in the argument advanced on behalf of the Commissioner, would in many cases defeat the very purpose of the establishment of the specialist tax court. The jurisdiction of the tax court to determine tax appeals is conferred without any limitation in s 117(1) of the TAA. The court must be taken to have been invested with all the powers that are inherently necessary for it to fulfil its expressly provided functions.'

[48] This, in my view, is not a case in which this court ought to exercise the discretion to grant the declaratory relief sought in the paragraphs of the notice of motion under consideration. It is trite that the granting or refusal of declaratory relief is discretionary. It is a discretion that must be exercised with due regard to the circumstances of a particular case. (See *United Manganese of Kalahari* para 21.) The tax court, consisting of a judge of the high court, an accountant and a representative of the commercial community, is best suited at first instance to deal with the tax dispute

relating to the merits of the additional estimated assessments. The tax dispute here hinges almost exclusively on the factual findings SARS had made as part of the capital reconciliation in determining Mr Wingate-Pearse's alleged undeclared taxable income. It is a technical assessment that Mr Wingate-Pearse wishes this court to undertake, also in the absence of proper evidence. Proof of the claim that the additional estimated assessments are materially wrong and the assessed amounts materially overstated is dependent on evidence which has not been fully and adequately ventilated in the affidavits. (See *United Manganese of Kalahari* paras 25-26.)

Paragraph 5.7 of the Notice of Motion

[49] The relief which Mr Wingate-Pearse seeks in paragraph 5.7 of the notice of motion that the conduct of SARS *vis-à-vis* him in utilizing any or all of the information set out in paragraph 5.1 of the notice of motion in preparation for or during the conduct of the tax appeal, be declared inconsistent with the Constitution and invalid, ought not be countenanced. If permitted, it will invariably lead to piecemeal litigation. A further anomaly is that a parallel court is requested to issue binding orders concerning pending litigation in the tax court, directing what evidence it should admit or refuse. The tax court is the appropriate forum that may decide the question in due course.

Paragraph 7 of the Notice of Motion

[50] The declaration which Mr Wingate-Pearse seeks in paragraph 7 of the notice of motion (that the evidence which had been obtained by SARS as a result of the issue and execution of the warrant, was obtained unlawfully, unconstitutionally, in a manner that violated his right to privacy and is inadmissible on the basis that it will render the tax appeal unfair to him and will be detrimental to the administration of justice) is not only factually unsustainable when the *Plascon Evans* test is applied to the factual disputes *in casu*, but a continuation of his flawed premise of departure that evidence is to be excluded if any irregularly is shown to exist in the obtaining thereof. Furthermore, a declarator that evidence which may be adduced in the tax appeal is inadmissible *inter alia* on the basis that 'it will be detrimental to the administration of justice', is beggars description. In *Key* the applicant brought an urgent application in which he contended that a pending criminal case against him had been built up on the basis of documents unlawfully seized during unlawful searches of his offices, consequent interviews with witnesses and a report prepared by investigative accountants to whom the documents were made available and he consequently

sought an order, *inter alia*, declaring that such evidence is inadmissible and may not be used against him in the criminal proceedings. In concluding that he was not entitled to the order sought, the Constitutional Court held that (para14) -

'[i]f the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded.'

Additional paragraph 6.4 in terms of the proposed amendment

[51] In the additional paragraph 6.4, which Mr Wingate-Pearse proposes to introduce in terms of the amendment, he seeks the review and setting aside of SARS' decisions to issue the additional estimated assessments for the relevant period, first on the ground that the jurisdictional requirement for the issuing of additional assessments had not been met, and, second that the requirement of *audi alteram partem* had not been satisfied prior to the issuing of the additional estimated assessments.

[52] Prior to its amendment by the Tax Administration Act 28 of 2011, s 79(1) of the Income Tax Act partly provided that '[i]f at any time the Commissioner is satisfied- (a) that any amount which was subject to tax and should have been assessed to tax under this Act has not been assessed to tax; or (b) that any amount of tax which was chargeable and should have been assessed under this Act has not been assessed . . . he shall raise an assessment or assessments in respect of the said amount or amounts, notwithstanding that an assessment or assessments may have been made upon the person concerned in respect of the year or years of assessment in respect of which the amount or amounts in question is or are assessable . . . Provided that the Commissioner shall not raise an assessment under this subsection (i) after the expiration of three years from the date of the assessment (if any) in terms of which any amount which should have been assessed to tax under such assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, unless- (*aa*) the Commissioner is satisfied that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed, was due to fraud or misrepresentation or non-disclosure of material facts . . . '.

[53] The Commissioner's satisfaction that any amount which should have been assessed to tax under an assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, was, in terms of s 79(1)(a) and (b) of the Income Tax Act, a prerequisite for the Commissioner's power to raise an additional assessment. The taxpayer, however, enjoyed statutory immunity from further assessment once three years had expired since the original assessment, because the proviso to s 79(1) prohibits the Commissioner from raising an additional assessment after the lapse of three years, unless he or she 'is satisfied' that the non-assessment was caused by the taxpayer's fraud or misrepresentation or non-disclosure of material facts. Section 92 of the Tax Administration Act empowers SARS to make an additional assessment if it 'is satisfied' that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the *fiscus*, but such assessment may, in terms of s 99(1)(b) read with s 99(2)(b), *inter alia* not be made, in the case of self-assessment for which a return is required, five years after the date of assessment of an original assessment by way of self-assessment by the taxpayer, unless the fact that the full amount of tax chargeable was not assessed due to fraud or intentional or negligent misrepresentation or non-disclosure of material facts.

[54] Mr Wingate-Pearse argues that the 'satisfaction' contemplated in s 79(1) of the Income tax Act, and now in s 92 read with s 99 of the Tax Administration Act, sets a very high hurdle for SARS to jump before it may re-open an original assessment and issue an additional one. SARS, he argues, must be satisfied on reasonable grounds, which test according to him is objective, that the original assessment is 'wrong'. SARS, he argues, re-opened the assessments for the relevant period of assessment on the basis that the full amount of the tax chargeable was not assessed due to fraud, material misrepresentation or non-disclosure of material facts on his part. SARS' allegations of fraud, misrepresentation and non-disclosure, he argues, 'are very heavy allegations that require substantial evidence' and are 'not lightly inferred', which evidentiary burden he contends has not been met. He relies on the decisions in *Natal Estates Ltd v Secretary for Inland Revenue* 1975 (4) SA 177 (A) at 208 and *Secretary for Inland Revenue v Trow* 1981 (4) SA 821 (A) at 825I-826B, as authority in support of the meaning of the phrase 'is satisfied' in s 79(1) of the Income Tax Act, and now in s 92 read with s 99(1) and (2) of the Tax Administration Act, which he propounds.

[55] Mr Wingate-Pearse, in my view, reads too much into *Natal Estates* and *Trow*. Those judgments do not support his argument on how the jurisdictional prerequisite of SARS' satisfaction for its power to make an additional assessment must be met; whether the jurisdictional fact is objective or subjective. Both judgments concern similar, but repealed, provisions and rather suggest that the required jurisdictional fact is subjective. In *Natal Estates* Holmes JA said that-

'. . . because three years had expired since the original assessment, the taxpayer enjoyed statutory immunity from further assessment. If the Secretary wished to displace that immunity, it was for him to state that he was 'satisfied' that the non-assessment in question was caused by the taxpayer's fraud or misrepresentation or non-disclosure of material facts. This is because the proviso to sec. 79(1) of the Act, read with para (a) thereof, prohibits the Secretary from raising an additional assessment, after the lapse of three years, unless he is so satisfied.'

And in dismissing the appeal by the then Secretary for Inland Revenue in *Trow*, Wessels JA agreed with the reasoning of the court *a quo* that 'in the absence of any other evidence before the Court *a quo* establishing the required satisfaction either directly or inferentially' the immunity had not been displaced. In the circumstances of that case it was held-

'. . . that the additional assessment could only have been raised if the Commissioner were to have satisfied himself (1) that there had been a non-disclosure of material facts by the taxpayer, and (2) that the fact that the profit in question was not assessed to tax prior to the expiration of the relevant period of three years was *due* to such non-disclosure, ie that the non-assessment was causally related to the non-disclosure of material facts.'

[56] Cora Hoexter *Administrative Law in South Africa* 2nd Ed at 296-297, states:

'Whether a jurisdictional fact is objective or subjective involves the interpretation of the empowering legislation. Subjective jurisdictional facts are generally identifiable by the language used, such as 'if satisfied that'. The point of including such clauses in legislation is to confer very wide and 'free', 'unfettered' or unguided discretion, and thereby to minimize the scope of judicial review. In fact, subjectively phrased clauses operate as a kind of overt ouster clause and, in the pre-democratic era, were often a more effective technique than a conventional ouster clause for restricting a court's jurisdiction. While they tended to react contrarily to a crude attempt to oust their jurisdiction altogether, the courts felt constrained to acknowledge instances in which Parliament had clearly vested a discretion exclusively in the administrator.'

(Footnotes omitted.)

[57] The pre-constitutional judgment of Rabie CJ, *Kabinet van die Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A), on the subjectively phrased clause 'is satisfied' was extensively followed in older South African cases. (See Professor Hoexter (*supra*) at 299 fn 308.) There it was held that that phrase appearing in delegated legislation conferred a subjective discretion on the Administrator-General of South West Africa to arrest and detain certain persons. The administrator's onus of showing that his action was legally taken could be discharged by asserting that he was 'satisfied' that the detainee was a person as described in the legislation; his *ipse dixit* that he allowed the detainee to be arrested and detained because he was so satisfied is sufficient. It would then be up to the applicant to show that the administrator had failed to apply his mind to the decision to arrest and detain, or that it was tainted with bad faith or an ulterior motive (at 735E-J).

[58] But, as was said by Jafta AJ in the majority judgment in *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 60, since the advent of the constitutional era more than the decision-maker's *ipse dixit* is now required if the subjective prerequisite of his or her being satisfied that a state of affairs exists, is challenged. In this regard he said: 'In the past, when reasonableness was not taken as a self-standing ground for review, the [decision-maker's] *ipse dixit* could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds.'

[59] Professor Hoexter (*supra*), at 300-302, in my respectful view correctly, points out that s 33(1) of the Constitution implies that the court must be satisfied of the lawfulness of administrative action, including any factual assumptions on which the action is based and that the constitutional principle of legality is to the same effect in relation to the exercise of public powers that do not amount to administrative action. She also states:

'The effect of *Walele* is to make all jurisdictional facts objectively justiciable, whatever their wording. Does this mean that the use of subjective language now makes no difference at all – that the words chosen by the legislature are, in fact, irrelevant? While there may be support for this approach, my own view is that subjective language will still be capable of signaling the legislature's desire for deference on the part of the courts in particular cases. That is as it should be. After all, the demise of parliamentary sovereignty does not mean that the courts are now entitled to ignore the wishes of the legislature. On the contrary, the voice of the

legislature actually deserves to be taken more, not less, seriously than it used to be in the pre-democratic era. The real challenge for our courts is to achieve an appropriate balance between heeding that voice and protecting the rights of affected persons.'
(Footnotes omitted.)

[60] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), O'Regan J said the following about what will constitute a reasonable decision and about judicial deference:

'[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

[46] In the SCA Schutz JA held that this was a case which calls for judicial deference. In explaining deference he cited with approval Professor *Hoexter's* account as follows:

'(A) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'

(Footnotes omitted.) Schutz JA continues to say that '[j]udicial deference does not imply judicial timidity or unreadiness to perform the judicial function'. I agree. The use of the word 'deference' may give rise to misunderstanding as to the true function of the review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'

[61] Although the words 'is satisfied' used in s 79(1) of the Income Tax Act – and now in s 92 read with s 99(1) and (2) of the Tax Administration Act - confer a subjective discretion on SARS, I accept that the discretion is not unfettered, and an objective approach must be adopted to that subjective discretion. SARS, therefore, must show that its subjective satisfaction was based on reasonable grounds. The raising of an additional assessment in the case of income tax, as was said by Ponnan JA in *Commissioner, South African Revenue Service v Pretoria East Motors (Pty) Ltd* 2014 (5) SA 231 (SCA), para 11, 'must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified'. But, given the wording of s 79(1) of the Income Tax Act, and presently of s 92 of the Tax Administration Act, and the subjective nature of the discretion conferred on SARS, the scope for judicial review is limited. (See *Laingville Fisheries (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2008] ZAWCHC 28 (30 May 2008) paras 74-6.)

[62] SARS, as I have mentioned, explained that as a result of information received from certain officers of the SAPS' Organised Crime Unit, *inter alia*, relating to Mr Wingate-Pearse, it investigated him for alleged tax non-compliance, which investigation revealed income tax non-compliance on his part. It applied for the warrant, executed it and, in the process, seized approximately 2 000 documents, which revealed under-declaration by Mr Wingate-Pearse of income for the relevant period of assessment. It instructed PWC to assist in considering the seized documentation and to conduct an audit in respect of his tax affairs. SARS estimated – based on a capital reconciliation indicating that he had income from sources that he had failed to declare in his income tax returns submitted for the relevant period – that he had grossly under-declared his taxable income for the relevant period of assessment. Thus, SARS' additional estimated assessments were issued after evaluation of numerous documentation obtained during the search and seizure and an audit conducted into Mr Wingate-Pearse's tax affairs by SARS' officials with the assistance of PWC and it raised the additional estimated assessments based on an acceptable method of capital reconciliation. This resulted in Mr Wingate-Pearse's total assessed tax liability increasing from an amount of R350 142.92 to an amount of R41 725 868.29. Applying the *Plascon Evans* test to the factual disputes *in casu*, it must be accepted that the additional estimated assessments were issued pursuant to due process involving the engagement of external expertise from PWC.

[63] To say, as Mr Wingate-Pearse does, in substantiation of his criticism of SARS' methodology in raising the additional estimated assessments, that the fact that SARS had reduced the amounts of the additional estimated assessments after he had lodged his objections and filed an appeal against the partial disallowance of his objections, is indicative that the additional estimated assessments were a result of guesswork, is wholly unfounded. There is nothing untoward when SARS reduces a taxpayer's assessment when new information comes to light. Section 93 of the Tax Administration Act now specifically provides for instances where SARS may issue a reduced assessment. Such is the scheme of the Act.

[64] The resultant substantial increase in Mr Wingate-Pearse's assessed tax liability for the relevant period of assessment inferentially establishes SARS' required satisfaction that the full amount of tax chargeable was not assessed due to fraud or material misrepresentation or non-disclosure of material facts, and the statutory immunity enjoyed by him from further assessment was thus displaced. Having regard to the subjective nature of the discretion conferred on SARS and the limited scope for judicial review as well as the principles enunciated in *Bato Star*, and giving due weight to the finding made by those with special expertise in taxation and accountancy, SARS' decision to issue the additional estimated assessments can, in all the circumstances, not be said to be one that a reasonable decision-maker could not reach. SARS' required subjective satisfaction has been shown to have been founded on reasonable grounds.

[65] Mr Wingate-Pearse also seeks the review and setting aside of SARS' decisions to issue the additional estimated assessments for the relevant period on the ground that SARS has breached the principle of *audi alteram partem*. In terms of this complaint SARS has allegedly raised the additional estimated assessments without taking Mr Wingate-Pearse's responses into account. There is, in my view, also no merit in this ground of review. There was at the time when SARS raised the additional estimated assessments no statutory right afforded to a taxpayer to be informed of audit findings before an assessment is raised and to respond in order to avoid the assessment. Such rights are now afforded to a taxpayer in terms of s 42 of the Tax Administration Act.

[66] Furthermore, on SARS' version it substantially complied with the common law requirement of *audi alteram partem*. Mr Wingate-Pearse was granted opportunities to comment on the additional estimated assessments and, where he provided grounds that SARS considered sound, these were accepted by SARS. In addition, he was invited to evaluate the documents in possession of SARS and to engage with it, which he declined. There have also been several engagements by means of exchanges between SARS' experts and audit team and Mr Wingate-Pearse's experts and audit team regarding matters that are the subject of the assessments, which engagements were terminated by him.

[67] Mr Wingate-Pearse can also not succeed with his claim for the review and setting aside of SARS' decisions to issue the additional estimated assessments for the relevant period, because, as I have mentioned earlier in this judgment, s 105 of the Tax Administration Act, prior to its amendment on 8 January 2016, provided that a taxpayer may not dispute an assessment in any court or other proceedings, except in proceedings under the dispute resolution provisions of that Act *or* by application to the High Court for review, and after its amendment, only in proceedings under the dispute resolution provisions 'unless a High Court otherwise directs'. A taxpayer disputing an assessment was thus specifically compelled to make an election in which *forum* to institute proceedings in instances where both the tax court and the high court have jurisdiction and, with effect from 8 January 2016, such taxpayer requires the direction of the high court to dispute an assessment outside the dispute resolution provisions of the Tax Administration Act. Here, Mr Wingate-Pearse is attempting to dispute the estimated assessments in the tax court *and* in the high court, which cannot be countenanced.

Additional paragraph 6B in terms of the proposed amendment: Undue delay and extension in terms of s 9(2) of PAJA of the 180-day period prescribed in terms of s 7(1)

[68] In terms of the proposed additional paragraph 6B, Mr Wingate-Pearse seeks a declaration that, insofar as he seeks the review of SARS' impugned actions and decisions under the principle of legality, the delay in the initiation of the review application was not unreasonable, or if the delay is held to be undue or unreasonable, that condonation be granted for the delay in the interests of justice, and, insofar as he seeks the review of the impugned actions and decisions under PAJA, an extension in

terms of s 9(2) of PAJA of the 180-day period prescribed in terms of s 7(1). SARS takes issue with the inordinate delay in initiating this review application. It argues that the delay is unreasonable and ought to non-suit Mr Wingate-Pearse.

[69] In *Khumalo and another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 44, Skweyiya J said this:

'Nevertheless, it is a long–standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution. However, because there are no express legislated time periods in which the MEC was required to bring her application, there is no requirement that a formal application for condonation needs to have been brought.'

[70] Insofar as Mr Wingate-Pearse's review application is brought under PAJA, an extension of the 180–day period for instituting the review application is required in terms of s 9(2) of PAJA. The issue of unreasonableness is pre-determined by the Legislature; a delay exceeding 180 days is unreasonable *per se*. A court is then only empowered to entertain a review application under PAJA if the interests of justice dictate an extension in terms of s 9.

[71] In *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) para 26, Brand JA said the following:

'At common law, application of the undue delay rule required a two-stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) at paragraph 47 [also reported at [2004] 4 All SA 133 (SCA) – Ed]). Up to a point, I think, s 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the Legislature: it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay (see eg *Associated Institutions Pension Fund (supra)* at para 46). That of course does not mean that, after the 180-day

period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable, and if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) at paragraph 54).'

[72] In *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA), the Supreme Court of Appeal considered the question how the judicial discretion on whether to condone a delay and extend the 180–day period in terms of s 9 of PAJA should be exercised. In this regard Navsa JA said the following (para 80):
'In *Tasima (Pty) Ltd v Department of Transport* [2016] 1 All SA 465 (SCA) ([2015] ZASCA 200) paras 29–30 this court observed that in considering whether to extend the 180-day period in terms of s 9, a court would be guided by what the interests of justice dictate. In order to determine that question, regard should be had to all the facts and circumstances. This equates with how the judicial discretion on whether to condone a delay was exercised before the advent of PAJA. There is no maximum period provided for in PAJA and the cases in which the 180-day period was extended are diverse in relation to the period of delay. Simply put, whether one is considering condoning a delay either under the provisions of PAJA or beyond it, the same determining criterion applies, namely the interests of justice. Viewed thus, a definitive classification of the nature of the impugned decision is not strictly necessary, particularly if regard is had to the challenge essentially being one of legality.'
(Footnotes omitted.)

[73] In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15, Theron J, who wrote the majority judgment, said the following:
'[50] The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to section 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay.
[51] The second difference between PAJA and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two-step *Khumalo* test to ascertain whether the delay is undue and, if so, whether it should be overlooked.
[52] The second principle relating to delay under legality is that the first step in the *Khumalo* test, the reasonableness of the delay, must be assessed on, among others, the explanation

offered for the delay. [This applies equally to assessing the delay of PAJA reviews.] Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay. But, as was held in *Gijima*, where there is no explanation for the delay, the delay will necessarily be unreasonable.

[53] Even if the unreasonableness of the delay has been established, it cannot be "evaluated in a vacuum" and the next leg of the test is whether the delay ought to be overlooked. This is the third principle applicable to assessing delay under legality. Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available factors.'

[74] Mr Wingate-Pearse's review application was launched almost a decade after SARS had conducted the investigation into his tax-affairs and had raised the additional estimated assessments for the relevant period, during April 2006. He failed to seek condonation for the delay when his review application was initiated on 17 August 2015, but delayed another two years and eight months before instituting the interlocutory application in which he sought to amend the notice of motion and supplement his founding affidavit in order also to seek an extension of the 180–day period for instituting the review application in terms of s 9(2) of PAJA and condonation for his failure to initiate it without undue delay insofar as it is brought under the legality principle. Insofar as the review application is brought under PAJA, the delay of almost a decade, as I have mentioned, is unreasonable *per se*. However, as was held in *Van Zyl*, an enquiry into the reasonableness remains relevant and the extent of the unreasonableness a factor to be taken into account in determining whether an extension should be granted or not. Application of the undue delay rule in a legality review requires, as a first step, an enquiry into the reasonableness of the delay. It is thus to the question of the reasonableness of the delay that I first turn.

[75] An acceptable explanation, let alone one that covers the entire period of the inordinate delay, is lacking. The high-water mark of the explanation proffered by Mr Wingate-Pearse for the delay in initiating the review application and the further delay of two years and eight months before instituting the interlocutory application in which he for the first time seeks an extension of the 180–day period for instituting the review application under s 9(2) of PAJA and for this court to overlook the delay if it is held to

be undue or unreasonable, is that he is essentially raising the same grounds of review in these proceedings as were raised by him in his statement of grounds of appeal in the tax appeal that was filed on 1 August 2007, amongst others that-

'[t]he exercise and performance of raising estimated assessments by the Respondent on the Appellant in terms of Section 78 of the Income Tax Act in respect of the 1998 to 2005 years of assessment *are so unreasonable that no reasonable person could have so exercised the power or performed that function in the circumstances* on the basis that the aforesaid assessments are based on the Respondent's assumption of the Appellant's movement in net asset position, living and other expenditure, foreign exchange transactions and losses and largely unfounded, incorrect and without merit and do not support the decision by the Respondent that the Appellant has under-declared his income for the following reasons. . . .' (Emphasis added.)

[76] It is common cause that SARS' legal representatives repeatedly made it clear, as is stated by Mr Wingate-Pearse, 'in the run-up to the aborted Tax Court hearings' in discussions with his lawyers as well as in open court that they would object to the raising of any matter in the tax appeal concerning the alleged illegality of the actions and decisions of and processes followed by SARS and infringements of his constitutionally protected rights, because those issues fall outside the ambit of the tax appeal. Whether correct or incorrect (and I need not decide the question), the same stance was again adopted by SARS at the pre-trial conference which preceded the scheduled hearing of the tax appeal from 22 November to 5 December 2017 and in discussions when it was postponed due to SARS' inability to give the presiding judge an undertaking that the hearing would be finalised within the week. Mr Wingate-Pearse states that he 'was advised that there is a prospect that SARS' legal team might be correct and that the Tax Court does not have the jurisdiction to deal with the issues raised [in this review application]'. The interlocutory application was therefore instituted and the second supplementary affidavit filed, on 4 April 2018.

[77] Mr Wingate-Pearse contends that a distinction should be drawn between the constitutional and the administrative review relief he seeks. He has two major complaints about his treatment by SARS: The first concerns the additional estimated assessments, which SARS issued during April 2006 in respect of the 1998 to 2005 years of assessment. He argues that the decision to issue the additional estimated assessments constituted unlawful administrative action, which he, in terms of the

additional relief included in his proposed amendment, seeks to have reviewed and set aside in terms of PAJA. These issues are referred to by him as the 'administrative issues'. He also challenges the additional estimated assessments, contending they are in any event materially wrong and the assessed amounts grossly overstated. This, he states, is a matter for the tax court to decide. His second complaint concerns the alleged illegal intelligence gathering measures that SARS had employed against him as a result of which he challenged the constitutionality of the establishment of HRIU and its conduct. These issues are referred to by him as the 'constitutional issues'.

[78] According to Mr Wingate-Pearse, the constitutional issues were the main focus when the review application was instituted during August 2015, and the administrative issues were originally a secondary topic. He had intended to traverse the administrative issues in the tax court. However, because of the stance adopted by SARS that it would object to him traversing the administrative issues in the tax court and the advice he received that SARS was probably correct, the amendment of the notice of motion in the review application is sought in order for this court to determine his challenge of SARS' decision to issue the additional estimated assessments on administrative law grounds. Furthermore, he argues that the proceedings pending in the tax court are 'parallel' proceedings to these review proceedings and were commenced on 15 May 2006 (when his objection was delivered in which the issues raised in paragraphs 4, 5 and 6 of the notice of motion had been raised) within 180 days from 26 April 2005 (the date upon which he was informed of the warrant), 19 April 2005 (the date on which the warrant was executed) and 19 April 2006 (when the additional estimated assessments were issued), and he seeks a declaratory order to that effect, contending that '[w]hat has occurred here is simply the transfer of that issue [the administrative issues] from the Tax Court to this court'. This contention is fallacious; the initiation of a tax appeal in the tax court can by no stretch of the imagination be said to equate to the initiation of review proceedings nor does a tax appeal constitute review proceedings under PAJA or under the legality principle. Mr Wingate-Pearse's calculation that 15 May 2006 was within 180 days from 19 and from 26 April 2005, is also patently erroneous.

[79] Mr Wingate Pearse's attempt at an explanation neither explains the delay of almost a decade in initiating this review application and the further substantial delay before seeking an extension of the 180-day period or condonation, nor does it justify

the delays. He does not explain why he did not initiate review proceedings in the high court within a reasonable time and no longer than 180 days after SARS had issued the additional estimated assessments for the relevant period of assessment, why he abandoned the grounds of review relating to the alleged unlawfulness of the search and seizure and the infringement of his constitutional rights when he instituted his first review application against SARS on 15 February 2011, and why he did not in that review application raise the further grounds of review that are presently being raised by him in these review proceedings. There is also no satisfactory explanation proffered why he, only when the hearing of the tax appeal did not proceed during the period 22 November to 5 December 2017, elected to seek the review and setting aside of the decisions to raise the additional estimated assessments under PAJA in this court, and not before, and why he only then elected to seek an extension of the prescribed 180-day period or condonation.

[80] Where the delay is not satisfactorily explained and justified, as in this case, it is not reasonable. Having regard to all the circumstances of this case and given the extent of the unreasonableness of the delay, the lack of merits of the challenges under PAJA and under the legality principle, the sound judicial policy and public interest requirement that there be finality and certainty in matters, and the prejudice to SARS in its ability to address Mr Wingate-Pearse's contentions evidentially as a result of the inordinate delay (see *Khumalo* paras 47-8), I am also unable to hold that the interests of justice dictate that an extension in terms of s 9 of PAJA should be granted or that the undue delay should be overlooked. There is no sound basis established for condoning or overlooking the undue or unreasonable delay.

COSTS

[81] Finally, the matter of costs. No good grounds exist for a departure from the general rule that costs follow the event, in other words that the successful party should be awarded its costs. I am unable to hold that the litigation was undertaken to assert constitutional rights. It was undertaken rather to assert the financial interest of Mr Wingate-Pearse. I am not persuaded, therefore, that the rule that unsuccessful litigants who have sought, in good faith, to vindicate constitutional rights, ought not to have costs awarded against them, should find application in this case. (See *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape*

and another v Hans Ulrich Platz NO and another (495/2017) [2017] ZASCA 175 (1 December 2017).) SARS as the overall successful party is clearly entitled to its costs.

[82] What has to be considered though, is SARS' request that costs should be awarded on the scale applicable as between attorney and client. In support of the claim that SARS had been vexed by these proceedings, Mr Gauntlett SC QC relied on the following oft-cited passage in *In Re Alluvial Creek, Ltd* 1929 CPD 532 at 534-535 (Gardiner JP):

'. . . It seems to me therefore very unfortunate, in view of the settlement which was arrived at on his behalf, that Mr. Keyser should again have come to Court in this matter and have put the liquidators to a lot of expense.

An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of the a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case.'

[83] In *Nel v Waterberg Landbouwers Ko-operatiewe Vereeninging,* 1946 AD 597 at 607, Tindall JA demonstrated that the award of attorney and client costs is not so much intended as a penalty to be imposed but rather where justice requires that the winning party should not be out of pocket because of the limitations inherent in the usual party and party order. (See *Marsh v Odendaalsrus Cold Storages Ltd* 1963 (2) SA 263 (W) at 270C-G.)

[84] This is such a case where the proceedings are vexatious in effect. SARS has been put to unnecessary trouble and expense which it ought not to bear. This conclusion is inevitable when regard is had to the manner in which Mr Wingate-Pearse elected to prosecute the review application, *inter alia*: in instituting it almost a decade after the alleged events had occurred and the alleged actions and decisions had been taken by SARS and in only seeking condonation for the inordinate delay almost three years after the institution of the review application, without giving an acceptable

explanation for the inordinate delays, let alone one that covers the entire period of the delays, and despite him having launched a review application previously (during February 2011) in which he did not raise all the grounds of review that are presently raised and elected to abandon grounds of review relating to the lawfulness of the search and seizure, the admissibility of the evidence so obtained, the alleged infringements of his constitutional rights and the consequences thereof that he now seeks to raise again; in seeking final relief despite the material disputes of fact that have arisen on the papers; and, in claiming relief which in several respects is bad in law and not viable. Justice, in my view, requires that SARS should not be out of pocket in respect of the expenses caused to it by this litigation.

[85] The Minister of Finance at the time, Minister Pravin Gordan, opposed the relief sought against him in paragraphs 1, 2 and 3 of the notice of motion. In his answering affidavit, he states *inter alia* as follows:

'4. This application is solely directed at the first to third respondents. The founding affidavit does not level a single substantive or (even) procedural allegation against me. The case therefore has nothing to do with me. Despite this, however, the applicant has in prayers 2, 3.1, 3.2 and 3.3 of his notice of motion sought relief against me. There being nothing in the founding affidavit justifying the relief sought in these prayers, I oppose the granting of the relief sought against me.

5. The foundation of the applicant's case against me (paragraph 26 of the founding affidavit), and my joinder, are misconceived, regard being had to the provisions of section 216 (read with section 92) of the Constitution, and 2 of the South African Revenue Service Act 34 of 1997 ("the SARS Act"). I am advised this is further a matter for legal argument.

6. My executive responsibilities as Minister of Finance entail as a matter of law, in particular, I am advised, that as a matter of important constitutional and statutory-law principle I do not have the power to intervene in SARS' handling of individual tax cases. But that is exactly what the applicant is asking this Court to do in the relief he seeks. This whole application is, at base, about the applicant's tax dispute with SARS. The relief sought against me is in aid of that main dispute: it is subsidiary to it, and is part of that dispute. That means that the applicant seeks my interference with SARS' handling of an individual tax dispute. Nor by law do I have access to confidential 'taxpayer information' in terms of Chapter 6 of the Tax Administration Act. My joinder ignores these fundamentals, and is manifestly not pursued for any *bona fide* legal reason.'

[86] It is not surprising that Mr Wingate-Pearse gave notice, even though belatedly, that he was no longer pursuing the declaratory and interdictory relief regarding HRIU. By doing so he effectively withdrew the review application against the minister. However, he did not offer to pay the minister's costs of opposition. Rule 41(1)(a) of the Uniform Rules of Court provides that '[a] person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party. The minister's consent was not obtained for the withdrawal of the proceedings against him nor did Mr Wingate-Pearse offer to pay his costs of opposition. The review application falls to be dismissed also as against the minister and costs should follow the event also on the scale as between attorney and client. It was unreasonable to have drawn the minister into the dispute and litigation between Mr Wingate-Pearse and SARS. SARS, initially, and later on President Ramaphosa, initiated investigations into the allegations of a 'rogue unit' within SARS.

ORDER

[87] In the result, the following order is made:

(a) The review application is dismissed with costs on the attorney-and-client scale, which costs shall include:

(i) the first respondent's costs of opposition, including those of two counsel; and

(ii) the fourth respondent's costs of opposition, including those of two counsel whenever incurred.

(b) The interlocutory application dated 4 April 2018 is dismissed and the applicant is to pay the first respondent's costs of opposition on the attorney-and-client scale, including those of two counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	20 May 2019
Date of judgment:	17 July 2019
Applicant's Counsel:	AJ Daniels SC (assisted by CT Picas)
Instructed by:	KWP Attorneys, Bordeaux, Randburg
First Respondent's Counsel:	JJ Gauntlett SC QC (assisted by HGA Snyman SC and L Sigogo)
Instructed by:	MacRobert Inc, Brooklyn, Pretoria C/o Tasneem Moosa Inc., Houghton, Johannesburg
Fourth Respondent's Counsel:	JJ Gauntlett SC QC (assisted by L Sisilana)
Instructed by:	State Attorney, Johannesburg