IN THE HIGH COURT OF SOUTH AFRICA GAUTENG, PRETORIA

JUDGMENT

Case No: 90307/2018

In the matter between:

JOSEPH NYALUNGA **APPLICANT**

and

THE COMMISIONER, SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Joseph Nyalunga v The Commissioner, of South African Revenue Services* (90307/2018) [2020] ZAGP (06 May 2020)

Coram: Hughes J

Heard: 06 February 2020

Delivered: 06 May 2020

Summary: Revenue – Income Tax – Assessments – review and setting aside of an 'audit finding' and 'finalisation of audit'.

ORDER

1. The review application is dismissed with costs, such costs to include the employment of two counsel where so employed.

JUDGMENT

Hughes J

Introduction

[1] The applicant in these proceedings seeks to review and set aside two decisions made by the respondent five years ago. The first relates to a decision in an audit finding letter of 3 September 2013 being, 'the audit findings letter'. The second appears in a finalisation of audit letter of 24 February 2014, 'the finalisation of audit letter'.

[2] The applicant seeks the aforesaid relief in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in the alternative the applicant seeks the relief sought on the basis of legality and non-compliance with the Constitution of the Republic of South Africa (the Constitution).

Background

[3] The applicant a former warrant officer in the South African Police force who retired in 2010 was arrested during 2011 on the N4 Highway near Middelburg, Mpumalanga. At the time of his arrest he was driving his Range Rover Sport wherein a cash amount of R3 280 800.00 was found. The money was seized by the police and the applicant was charged for money laundering and later released on bail.

[4] The applicant was again arrested on 2 March 2012. In a police sting operation, the police searched premises belonging to the applicant and found a cash amount of R5 846 400.00 in a trunk in his garage. togetherwith rhino horns and various weapons.

The cash in the sting and two vehicles, a Toyota Fortuner purchased by the applicant at R290 000.00 and his Range Rover Sport purchased in cash for R640 000.00, were seized by the police.

[5] Having been arrested for the second time the applicant was refused bail and was eventually released on 24 March 2014, some two years later. The money and vehicles were forfeited to the state in terms of proceedings brought by the Assets Forfeiture Unit (AFU) in accordance with the Prevention of Organised Crime Act 121 of 1998 (POCA).

[6] On 3 April 2013 and whilst the applicant was still incarcerated an employee of the respondent (SARS) hand delivered a notification of its intention to audit the applicant, known as an audit letter. This notification sets out which official of SARS, in this case Mr Tsumaki, would be conducting the audit and the scope of such audit. The scope narrated was for 'possible under-declaration of taxable income' to wit the tax period 2009 to 2012. The investigations into the tax affairs of the applicant commenced on 4 April 2013. An audit findings letter dated 3 September 2013 reflecting the tax period 2006 to 2012 was subsequently delivered to the applicant personally on 4 September 2013 by Mr Tsumaki. Relevantly, this audit finding letter sets out the following caution:

'Please note that this letter does not constitute an assessment as contemplated in the Tax Administrative Act No. 28 of 2011(the "Act"). This letter merely notifies you of our intention to raise an assessment, and our reasons therefore. It also offers you a further opportunity to provide us with any relevant material that may not have been available during the audit which could negate the necessity of issuing an assessment.

However, if no further documentation is forwarded to this office within **21 business days** from the date of delivery of this letter, we would proceed in raising the estimate assessment in terms of section 91 and 92 read with section 95 of the TA Act.'

[7] The applicant failed to respond to the notification of audit and even in light of the caution sounded in the audit finding letter. He also failed to provide any relevant material which resulted in the finalisation of audit letter dated 24 February 2013 being delivered to the applicant on the very same day. Critically, when the applicant confirmed receipt of this letter he endorsed it as follows:

'I won't be able to respond to SARS on the stated time because I am unable to get any documents because I am still al prison with no bail since March 2012. I will submit some receipts immediately when I am out from prison. Objection of 30 days won't be made due to the reason I mentioned.'

[8] The finalisation of audit letter advised the applicant that 'this letter constitutes an assessment as contemplated in the Tax Administration Act No. 28 of 2011(the "Act"), section 92 read with section 95 of the TA Act forthe 2006, 2007 and 2009 years of assessment and section 91 read with section 95 of the TA Act for the 2008, 2010, 2011, 2012 and 2013 years of assessment' and that he had 30 business days to deliver his objection.

[9] It must be pointed out that all these letters, that is, the notification of audit, the audit finding and the finalisation of audit were handed to the applicant personally whilst he was incarcerated. As stated above he was released in 24 March 2014 and an objection was due to be filed by 8 April 2014. SARS submits that the 30-day period to file an objection commence from the applicant's release, then the applicant had until 7 May 2014 to file an objection.

[10] In terms of the recovery process instigated by SARS, a final demand for payment was issued on 24 February 2014, and on 23 June 2014 SARS obtained a tax judgment in terms of section 172 of the Tax Administration Act No. 28 of 2011 for an amount of R15 166 511.89. Subsequently, warrant of execution was issued on 21 January 2016 and instructions to the sheriff to execute were given on 2 February 2016.

[11] During the course of 2016, March and October specifically, the sheriff attempted to execute the warrant but was unsuccessful. On 14 June 2017 further final demand was sent via the applicant's postal address and eventually on 10 April 2018 the sheriff was able to serve the warrant of execution personally on the applicant at 562 Swartpau Street Hazyview Mpumalanga, being an address where the applicant recorded he resides. However, the sheriff was not able to conduct an attachment at the residence as he was informed that the movable goods did not belong to the applicant but to a Ms Mathumba.

[12] According to SARS after the sheriff's unsuccessful attachment they followed up with the applicant regarding his outstanding tax returns from August 2018, whence the applicant undertook to visit his nearest SARS office to submit the outstanding returns. Needless to say this did not materialise.

[13] Ultimately, on 18 September 2018 the sheriff successfully attached goods belonging to the applicant and proceeded to advertise a sale by public auction of these goods. This prompted the applicant to bring an urgent application to stay the auction. Hence this review application was launched.

Condonation

[14] The applicant sought condonation for the late filing of his 'written submissions outside the determined date as agreed upon'. This application was not opposed by SARS as they sought to have the review finalised once and for all.

[15] The applicant accepted that his heads of argument were filed four months late and submitted that the delay arose as a result of financial constraints, which result in him not timeously instructing his attorney and advocate. As there is no opposition, in my view, there is clearly no prejudice that SARS would suffer. Both parties want finality in the matter and for this reason as the applicant seeks an indulgence, there would be no prejudice upon SARS that a costs order could not placate, if condonation is granted.

[16] In the circumstance, I grant condonation accordingly with costs in favour of the respondents.

The case of the Applicant

[17] The applicant premises his challenge against SARS audit findings on the following grounds:

(a) The crux of the applicant's assertions is that he was not able to actively participate as a normal tax payer would, as he was incarcerated when the assessment was conducted. Thus he was not able to comply;

(b) The applicant attacks the procedure and the process followed by SARS as being unfair. He highlights procedural irregularities, some of which includes him not receiving the lifestyle questioner from SARS and the fact that the scope of the assessment was extended to include 2013 without him being notified;

(c) The applicant further attacks the audit and calculations conducted by SARS, stating that no explanation is advanced as to the origin of specific amounts; and

(d) Finally, he states that the decision of SARS was unconstitutional and infringed on his constitutional rights and the rule of law.

The case of SARS

[18] Firstly, SARS contends that the applicant's review application is out of time having been launched only on 24 August 2014. Thus, this application is brought 4 years out of time. Second, this court does not have jurisdiction to hear this application and only the tax court has jurisdiction in these circumstances. Third, in terms of the allocated time frames to object, of which the applicant was notified of and made aware of, the assessments have prescribed. Lastly, the relief sought has no practical effect

[19] In my analysis below I propose to deal with the defences raised which leads me to the conclusion reached.

Analysis

[20] It is common cause that the applicant received the audit findings on 4 September 2013 and the finalisation of audit on 24 February 2014. It is further common cause that this review application ought to have been brought on 24 August 2014.

[21] In terms of the relief sought by the applicant, he ought to have sought to review the decision within 180 days in terms of section 7(1) of PAJA[1]. In the alternative, on

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[1] Promotion of Administrative Justice Act 3 of 2000 (PAJA)
Section 7(1) Procedure for Judicial Review
(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-
(a) Subject to section (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
(b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

the basis of legality within a reasonable time. SARS contends that this review is out of time and though the applicant acknowledges same, he contends that he received the documentation from SARS whilst he was still incarcerated. As such his freedom to communicate was severely limited and thus, he could not respond in the required time stipulated. In addition, he argues that the calculated assessment figures where never explained to him by SARS.

[22] In the applicant's bid in seeking condonation for the late filing of this application he further acknowledged that there were internal remedies available to him in terms of the Tax Administrative Act. However, he contended that these were not accessible to him as these required compliance with the stipulated time frames. He submits that the only remedy that is available to him is by way of this review application.

[23] In his quest for condonation it also emerged that the applicant was ignorant as to the effect of the findings delivered on 3 September 2013 and 24 February 2014. He also submitted that he was not aware of the judgment taken against him by SARS. He alleges that he was not notified nor was the judgment served and he only came to know of it on 18 September 2018. As he had not heard from SARS nor had he received further notices or assessments for the period February 2014 up until September 2018 he thought the matter had 'become stagnant'.

[24] SARS argues that the applicant could not have been under any misapprehension. This is so because he was advised, in the finalisation of audit letter that SARS had assessed him and he was aware of the amount due by him. Further, if he was aggrieved he could object. Bearing in mind that he had received the finalisation of audit letter personally and his note thereon indicates he knew what was required. There could have been no misapprehension, so SARS argument goes.

[25] I agree with SARS that there was clearly no misapprehension on the part of the applicant. This is especially so on examination the applicant's note penned on receipting of the finalisation audit letter personally. The applicant wrote the following: 'Received by Joseph Nyalunga on the 24 February 2014 at Middelburg Prison I won't be able to respond to SARS on the stated time because I am unable to get any documents because I

am still at prison with no bail since 2nd March 2012. I will submit some receipts immediately when I am out from prison. Objecton period of 30 days won't be made due to the reason I mentioned.' [My emphasis]

Consequently, in my view, by 24 February 2014 the applicant was well aware that he had to object within 30 days, which he failed to do.

[26] Notably, the applicant on his own accord notes that this review application is 'extremely late'. The fact that he was incarcerated does not take away from the fact that he understood what process SARS was engaged in and hence, under the circumstances, his reasons advanced for the delay in bringing this review must fail.

[27] Was the delay reasonable in the circumstances and can it be condoned in the interest of justice? This question speaks to the issue of legality and the explanation advanced by the applicant, as I have addressed earlier in the judgment does not stand muster, hence granting condonation cannot be justified. Further, would it be in the interest of justice to overlook the delay? SARS, in my view, is correct in their assertion that on the papers the applicant has failed to address the requirements of the legality challenge, that being the explanation for the delay is unreasonable, the delay is undue and does not warrant being overlooked. Thus it can't be said that it would be in the interest of justice to overlook the delay as under the circumstances no clear or persuasive argument has been advanced by the applicant. The legality challenge therefore must also fail.[2]

[28] Section 105, duly amended by section 52, of the Tax Administrative Act 23 of 2015, dictates when a tax payer may dispute an assessment or decision by SARS, specifically, subsection (a) ofsection 105 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'

[29] Hence, it is imperative that we understand that 'unless a High Court otherwise directs' an assessment may only be challenged by means of an objection and appeal process. The operative words being 'unless a High Court otherwise directs'.

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[2] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA331 (CC) at 50 to 53

[30] Does the assessment in this instance fall within the purview of section 104 of the Tax Administrative Act? Bearing in mind that the case of the applicant involves his gross income assessed by SARS. The applicant's challenges the calculation contending that SARS assessment is flawed and in addition he was entitled to certain deductions in terms of the Income Tax Act 23 of 2015 which SARS did not take into account. Section 104 reads:

104. Objection against assessment or decision. —

(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment.

(2) The following decisions may be objected to and appealed against in the same manner as an assessment—

(a) a decision under subsection (4) not to extend the period for lodging an objection;

(b) a decision under section 107 (2) not to extend the period for lodging an appeal; and

(c) any other decision that may be objected to or appealed against under a tax Act.

(3) A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'.

(4) A senior SARS official may extend the period prescribed in the 'rules' within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection.

(5) The period for objection must not be so extended—

(a) for a period exceeding 21 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodgingthe objection;

(b) if more than three years have lapsed from the date of assessment or the 'decision'; or

(c) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the 'decision'.

[31] In view ofthe fact that more than three years have lapsed since the assessment of the applicant by SARS and in light of the fact that according to the applicant he's entitled to deductions in terms of the Inceme Tax Act this assessment falls within the realm of section 104. Hence, in terms of section 105 this court will only have jurisdiction if leave is sought to direct otherwise and/or a legal issue is raised, and not as it is in this instance, where the applicant seeks a determination whether SARS assessment was right or wrong. In my view, in terms of section 105 this court would not have jurisdiction if the applicant is challenging the assessment and decision by SARS. In

addition, the applicant has not made out a case on the papers for this court to 'otherwise direct' that it be heard.[3]

[32] Further to the issue of this court's lack of jurisdiction raised by SARS is the fact that the applicant has acknowledged that in terms of the Tax Administrative Act he ought to have first exhaust all internal process before he proceeded with this review application. He contends that he was time barred to engage these internal processes and only had the option to review. This explanation is not plausible as in terms of PAJA the review is also time barred, that being 180 days. In my view, this is an unacceptable and unreasonable reason preferred. In the result this court does not have jurisdiction to entertain this matter.

[33] Section 100(1) of the Tax Administration Act makes provision for finality of an assessment and this particular case section 100(1)(a) and (b) set out below are relevant:

> '**100 Finality of assessment or decision**
> (1) An assessment or decision referred to in section 104(2) is final if, in relation to the assessment or decision-
> (a) It is an assessment described –
> (i) In section 95(1) and no return described in section 91 (5) (*b*) has been received by SARS; OR
> (ii) In section 95(3)
> (b) No objection has been made, or no objection has been withdrawn;'

[34] Firstly, it is common cause that no objection was raised by the applicant. In terms of section 95(1), if a taxpayer has not submitted any returns, SARS is entitled to make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate.

[35] In this instance, the applicant having failed to submit tax returns to SARS and having failed to lodge an objection in respect of the assessments, it is thus evident that finality of the assessment was reached in terms of section 100(1)(a) and (b). The time period to raise an objection in terms of 104 (5) has come and gone, especially so in terms of section 104(5)(b) which curtails one seeking an extended objective period if

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[3] *Wingate Pearse v Commissioner for the South African Revenue Service* 2019(6) SA 196 (FJ) at 45; *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another* 2001 (1) SA 1109 (CC) at 47.

three years has lapsed after the assessment. In this case four years have passed, thus the assessment has prescribed.

[36] SARS contends that the relief sought by the applicant is not competent. This is so SARS argues, that in seeking to review the assessment, the order by SARS in terms of section 174 and the writ of execution still stand and are not set aside.[4] This is a sensible argument and cannot be faulted.

[37] In the result, for the reasons I have set out above the applicant's challenge to review the assessment by SARS must fail and ought to be dismissed.

Order

[38] Consequently, the following order is made:

1. The review application is dismissed with costs, such costs to include the employment of two counsel where so employed.

W Hughes
Judge of the Gauteng
High Court, Pretoria

[4] **174 Effect of a statement filed with the clerk or registrar**
A certified statement filed under section 172 must be treated as a civil judgment lawfully given in favour of SARS for a liquid debt for the amounts specified in the statement.

APPEARANCES:

For the Appellant:	Adv. H J Potgieter Instructed by: H J Groenewald Inc. Attorneys
For the Respondent:	Adv. H G A Snyman SC Adv. K Ramaimela Instructed by: VZLR Attorneys