Tax Administration Weekly—protecting your clients' rights under the law
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Negotiating the Swampland that is Chapter 9

Absa Bank Limited and Another v CSARS (21825/19) [2020] ZAGPPHC 414 (25 August 2020)

An application under Rule 28 of the Uniform Rules of Court before Fabricius J to amend a notice of motion. The applicants, ABSA Bank Ltd and United Towers (Pty) Ltd, were successful, save on the issue of costs.

Amendment of pleadings and documents

This is how the rule reads:

URC rule 28

28 Amendment of Pleadings and Documents

(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in [rule 28(1)] shall state that unless written objection to the proposed amendment is delivered within **10 days** of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with [rule 28(3)] is delivered within the ***period*** referred to in [rule 28(2)], the party wishing to amend may, within **10 days**, lodge an application for leave to amend.

(5) If no objection is ***delivered*** as contemplated in [rule 28(4)], every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within **10 days** after the expiration of the ***period*** mentioned in [rule 28(2)], effect the ***amendment*** as contemplated in [rule 28(7)].

(6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than **10 days** after such authorization.

(7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.

(8) Any party affected by an amendment may, within **15 days** after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the ***steps*** contemplated in rules 23 and 30.

(9) A party ***giving notice of amendment*** in terms of [rule 28(1)] shall, unless

> the court otherwise directs, be liable for the costs thereby occasioned to any other party.
>
> (10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.
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> [GN R 181 *GG* 15464 of 28 January 1994]

The question to be asked and answered

It is always a pleasure to read any judgment of Fabricius J, who, despite scoring only a single reference in *SALR*, and that in a footnote, achieves twenty-six independent hits in the eclectic Case Law directory of the *Tax Shock, Horror Database*, which is by no means limited to tax cases. The question to be asked and answered in the proceedings before him, he said, was:

> In most instances an application for an amendment to a Notice of Motion does not involve rousing the troops towards the main battle ground. It is more in the nature of a preliminary skirmish which may or may not, depending on the context, give one or other party an advantage in the main battle yet to follow. In most instances such amendments are allowed unless they may deprive the opposing party of its main or most efficient weapon, in the future conflict, in which case it can truly be said that the amendment will cause such prejudice that cannot be remedied in future.

In this time of covid-19, if I may tender my ha'p'orth, the stigma previously attaching to detailed heads of argument has transmogrified into a virtue, and, if judges are consequently encouraged specifically to reproduce passages from them, rather than resort to the creepy practice of incorporating bits and pieces into a judgment, *sans* attribution, so much the better, especially if they are at the same time weaned from relying upon secretaries and encouraged to interface with actual keyboards, thus being exposed to both the delights and perils of Copy and Paste. (I continue to encounter professionals, and their overpaid support staffs, who do not realize that they can copy and paste from a PDF file; who think I am joking when I demand R350,000—before VAT—for any Word document from me containing my precious template, so I am here touching upon major paradigm-shifts in the field of technology, at least as it concerns the lay person.)

Such ambitious applications are becoming common

Thus, with a typographical flourish, was Fabricius J able to set out, first, the background to the application, and, then, the applicants' two grounds of review, not in the present skirmish, and not even in the main theatre of war, but in the 'Main Application', an ambitious skirmishing effort by the applicants to have SARS's decisions to issue letters and notices of assessment reviewed and set aside, under either PAJA or the principle of legality. In that endeavour, I wish them plenty of luck, but they had better understand well what they are doing, other than running up prodigious legal costs. They risk having their efforts 'swamped by Chapter 9', in a happy phrase I recently coined in analogous circumstances.

While impressed with their idea that SARS must launch an attack against an allegedly impermissible tax-avoidance arrangement with proper notice given under s 80J of the Income Tax Act, I would worry about SARS simply and cheaply remedying any defect, should the taxpayers prove to be successful in their endeavours under the Main

Application. As for their other grounds, as a dispassionate observer, I am free to be free:

> Beware! Here lies Swampland!

When amendments should be allowed

Nevertheless, we have the taxpayers to thank for this succinct exegesis, and must thank them also for the consequent saving to our own pockets:

> Little will be achieved by again repeating tried and tested authorities on the topic when amendments should be allowed, even if they add a new cause of action or introduce a new topic. These are all discussed in great detail in *Erasmus, Superior Court Practice*, 2nd Ed, Vol 2, Van Loggenberg, and Herbestein & Van Winsen. *The Civil Practice of the High Court of South Africa*, 5th Ed, Vol 1, by Cilliers *et al*, at 678 and further, and also from 685 to 688 in the context of the introduction of new causes of action and new claims. It is clear that the purpose of Rule 28 is to obtain a proper ventilation of the dispute between them (on the main battlefield, I may add), so that justice may be done. An important, if not almost decisive comment appears in: *Affordable Medicine Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at par 9. The practical rule is that amendments will be allowed unless such would cause an injustice to the other side. In this decision the following general principles referred to in *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (TK) were approved by the Constitutional Court:
>
> 10.1 The Court has a discretion to grant or refuse an amendment;
> 10.2 Some explanation must be offered therefor;
> 10.3 The Applicant must show that a triable issue will exist;
> 10.4 The modern tendency is to allow an amendment if it results in the proper ventilation of the dispute;
> 10.5 The application must be *bona fide*;
> 10.6 It must not cause an injustice which cannot be compensated by costs.
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> This list is not intended to be exhaustive.
>
> A technical approach is to be avoided nor should an excessively formalistic approach in the application of the Rules be adopted. One should aim at an expeditious and inexpensive approach to determine cases on their real merits. See: *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278 F–G.
>
> In recent times the above well-known considerations have been amplified by the notion that Rules of Court should be seen and given life against the background of relevant constitutional law considerations, such as the right of access to Courts, provided for in section 34 of the Bill of Rights contained in the Constitution. The core function of a Court is after all to dispense justice without being hamstrung. The object of Court Rules is twofold: the first is to ensure a fair trial or hearing. The second is to 'secure the inexpensive and expeditious completion of litigation and…to further the administration of justice.
>
> See: *Eke v Parsons* [20 15] ZACC 30 at par [39] and [40] as well as *Kgolane v Minister of Justice* 1969 (3) SA 365 (A) at 369 H.

Refused applications under s 9

The taxpayers had, under s 9(1), requested that SARS withdraw its

decision to issue its s 80J notices. SARS refused. This being an area of the act lying well outside of Chapter 9, their only remedy (other than simply proceeding with their objections and appeals under Chapter 9) was to seek the reviews already noted. The trouble was that, while the Main Application was pending, SARS delivered letters and notices of assessment, identical to the s 80J notices. (Letters of assessment are a nullity, unless they conform with the requirements of s 96—'Notice of assessment', which, these days, they seldom do.) The taxpayers responded accordingly, with further supplementary affidavits, in which they contended that the decision to issue the letters and notices fell to be reviewed and set aside, again, under PAJA or the principle of legality.

And so to the nub of the present matter:

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

SARS relied on good old Swampland

Altogether properly, SARS asked why the taxpayers did not simply rely upon ss 104 to 107 of the Tax Administration Act, which is to say, Chapter 9, thus broaching one of the most critical issues in tax law, and a nasty trap for the unwary, including Fabricius J, who said:

> …. Important for present purposes is section 105 which provides as follows: a taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this chapter, unless a High Court otherwise directs.
>
> Section 105 therefore clearly preserves the jurisdiction of the High Court in that context.
>
> See: *Ackerman v Commissioner SARS* 2015 (6) SA 364 (GP) at paras 15; 20.

Oops! I am sure that a formal application has to be made by a taxpayer under s 105, although perhaps not necessarily in its founding papers or even specifically:

TAA s 105

Forum for dispute of [assessment] or decision

[✎ Checked against the original text of Act 23 of 2015]
[✎ Checked against the original text of Act 28 of 2011]

105. A taxpayer may only dispute an assessment or ***'decision' as described*** in section 104 in proceedings under this Chapter [Chapter 9; Dispute resolution], unless a *High Court* otherwise directs.

[✎ Checked against the original text of Act 23 of 2015]
[✎ Checked against the original text of Act 28 of 2011]

I am even more sure that there has to be *good cause* (205 *TSH* 2020) given for a taxpayer's release from the exigencies of Chapter 9. On the other hand, Chapter 9 is by no stretch of the imagination an 'internal remedy'; see *Gold Kid Trading CC v CSARS* (31842/2016; 40732/2017) [2018] ZAGPJHC 709 (21 November 2018) (9 *TAW* 2020).

Ackermans...**that** *Ackermans*?

The reference to *Ackerman* is unfortunate. In *SALR* it is cited as *Ackermans Ltd v Commissioner, South African Revenue Service* 2015 (6)

SA 364 (GP), while SAFLII lists only the subsequent refusal of leave to appeal, *Ackermans Limited v Commissioner for the South African Revenue Service* (16408/2013) [2015] ZAGPPHC 684 (23 September 2015), which I have somehow missed, as has SARS. The matter earned a rough but ultimately forgiving passage in *Tax Shock, Horror*:

> High Court case—20 February 2015: *Ackermans Limited v CSARS* (16408) [2013] ZAGPPHC. An application for an order to review & set aside past additional assessments under PAJA or, in the alternative, on the principle of legality! It doesn't get more unusual (or expensive/lucrative) than this. The additional assessments tackled what SARS considered to be simulated loans but were issued after an extraordinary delay. Were the assessments time-barred, unreasonable, procedurally unfair or wrong in law? Despite s 105 (appropriate forum) of the Tax Administration Act, the court found that it enjoyed jurisdiction to hear the review application. Said Mothle J:
>
> > It is indeed imperative that all Constitutional obligations executed by organs of State in the exercise of public power, must be performed diligently and without delay. An unreasonable delay will result in a procedurally unfair administrative action, which is a reviewable conduct in terms of Section 6 of PAJA. The decision to raise Additional Assessments is an administrative action which is an exercise of public power and it falls within the ambit of Section 237 of the Constitution, as quoted above.
> >
> > The Courts frown upon unreasonable or inordinate delay in the exercise of public power and performance of public duties.…
>
> But good sense prevailed, with the court effectively saying: 'Why the hell didn't you follow the procedures laid down in the Tax Administration Act in the first place, & object to the tax court?' Snap! After all, the time-barring issue could not be decided upon without a hearing of the merits of the matter. I am all for thinking out of the box, but this type of waste of money does no one any good, save for the obvious beneficiaries.

In *TSH*'s 'Cases', Julian Ware commented as follows:

> *Ackermans Ltd v CSARS* 77 SATC 191: Gauteng Division, Pretoria (2015)—77 SATC 191 (judgment delivered by Mothle J): SARS raised additional assessments upon the taxpayer after a delay of six years. Was the delay unreasonable and procedurally unfair? There are two distinct matters in this case, which the court appears to have blurred. Yet the outcome was surely correct. The first dealt with the question whether the Commissioner's delayed actions were procedurally unfair under PAJA or unconstitutional under the principle of legality. The second was whether, in the absence of fraud or nondisclosure by the taxpayer, the Commissioner was time-barred from raising the assessments. Since SARS alleged that various arrangements were simulated and not appropriately disclosed by the taxpayer in its returns, the court referred the matter to a tax court for adjudication.

Here is the *ratio* of Mothle J in *Ackermans*

> Having regard to the views expressed above, I am of the opinion that it would be appropriate to defer to the internal remedies in the ITA, which Ackermans may resort to by way of appeal to the Tax Court, should it not be satisfied with the decision on the objection. Consequently, and in view of the conclusion I have reached, there is no need for this Court to consider other points of argument raised by both SARS and Ackermans in this application.

Again, a reference is made here to Chapter 9 as an 'internal remedy', via the Income Tax Act. If it relies upon s 105, it is unexceptionable. If it is made in the context of PAJA, it is flat wrong. Either way, it offers scant support to the point made by Fabricius J.

Then, horror of horrors, *Metcash*

Alas, by my book it gets worse, with Fabricius J, like Mothle J, referring to *Metcash*, the greatest instance of *per incuriam* (142 *TSH* 2015) in the history of taxation, and the sources of the nation's cruel and unlawful oppression by unworthy, nation-wrecking commissioners as from 1999 (7 *TAW* 2020) to (and with knobs on) date. I don't care what gems of wisdom it might contain; it was the anvil upon which taxpayers' rights were smashed by the sinister promoters of the Tax Administration Act, and ought to be unmentionable, the more so on account of the undenied lustre of the responsible judge, now—more strength to his arm—in honourable retirement.

How ironic, in any event, that one of the actors *in casu* was instrumental in (for a fee) blessing the constitutionality of the Tax Administration Act, while it was (Good grief!) in draft form, while under amendment (101, 102 *TSH* 2011, 115 *TSH* 2012), another forever unforgivable act. But I bear no grudges, merely a message:

> Dear members of the establishment, just remember that 'pay now argue later' actually means 'you pay before you owe', and that one day you, too, will be a victim of SARS. I wish you the legal representation you deserve, which, unerringly, you will seek out and find—among your own kind.

Resolution

This is how this present matter was disposed of:

> Granting leave to amend means that if the judge hearing the main application upholds the [applicants'] contentions that the decisions to refuse the section 9 requests were invalid, he or she will be well-placed to grant effective, just and equitable relief. The only two grounds on which the applicants seek to review and set aside the relevant mentioned decisions are directly connected, to the applicants' grounds of review in respect to the decisions to refuse the section 9 requests.
>
> I must add at this stage that I also had my doubts whether it can [seriously] be contended that applicants amendments can properly be said to be the introduction of 'new' causes of action, but even if they were, they should not be refused merely on that basis.
>
> Lastly, and by contrast, Applicants' pointed out the peculiar consequences that would result were leave to amend be refused. The applicants would then simply have to launch a fresh substantive application for review which would then be sought to be consolidated with the main application which would be counter-productive in the context of costs and time, which *Eke v Parsons supra* deemed important considerations as I have said.
>
> Having considered all relevant submissions and authorities I posed the following question to the parties on 12 August 2020:'if the court entertains the application after the amendment, which rights will SARS be deprived of as it can raise all its issues at the hearing of the main application and the mere granting of the amendment will have no final effect on any of its rights or arguments pertaining to the relevant statutory scheme in place?' [Applicants] replied: 'None' and referred again to what I mentioned in par 18 above.

> Respondent obviously contended otherwise and submitted that section 105 of the TAA was relevant to the amendment application and that I had to decide that question now. No such request had however been made by applicants, and that was fatal to this application.
>
> I do not agree. I agree with applicants' submissions of what the court had to decide in the main application as mentioned in paras 15 and 16 above. That approach is in line with modern authorities which I have referred to. Respondents view is overly formalistic and cannot be upheld. In the exercise of my discretion the following order is therefore made:
>
> Prayers 1 and 2 of Applicants Notice of Motion in the Rule 28 Application are granted with costs, including the costs of 2 counsel.

I hate to say it but SARS's point about s 105 is not *formalistic* but central to the interpretation of the Tax Administration Act, once you get its structure. By allowing the amendment, I say, Fabricius erred, although not to the detriment of SARS's rights, since the amendment merely added to the taxpayers' ample pre-existing troubles in its Main Application, especially since everyone seemed to agree that the full set of their grounds, as amended, were 'connected'. In that sense, Yes, SARS was quibbling.

Beware the swamp

To finesse Chapter 9 is the current *idée fixe*. Whether or not it springs from any great understanding of fiscal administrative law (generally speaking, I very much doubt it), it's a great generator of professional fees, but only the smartest kids on the block will pull it off. Simpler (and much poorer) souls will try s 9(1), so as not to leave any possible remedy unexhausted, but will then, honour and PI insurers satisfied, move on to the certainties of objection and appeal, with its ample opportunities for preliminary skirmishes in the far more accessible tax court, and without attracting the attention of the SARS big guns, litigation-wise.

Besides which, I am keen to see a war on the merits of the present matter. What might ABSA have been getting up to? It is, as I often like to say, no coincidence that *bank* is a four-letter word. Yet, surely, ABSA can be in no real danger, Part IIA of Chapter II of the Income Tax Act having been expressly designed in order to fail, as was its predecessor provision, s 103(1), after its cynical amendment by another member of the establishment, with respect, a great friend—and well-rewarded servant—of big business.

—Costa Divaris