TAX & EXCHANGE CONTROL
ALERT

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CLIFFE DEKKER HOFMEYR

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An argument that did not age well – High Court rejects taxpayer's request to convert an urgent application into a review

What happens if you've approached the High Court to compel the South African Revenue Service (SARS) to consider your assessment, but then belatedly realise that you have selected the wrong procedure? Would a quick convert-and-continue be plausible?

In the case of *L'Avenir Wine Estate (Pty) Ltd v Commissioner for the South African Revenue Service* (16112/2021) [2022] ZAWCHC 28 the High Court had to consider this question and more.

THE VINTAGE RETURN

L'Avenir (Taxpayer) is a South African wine producer. In 2006 the Taxpayer applied to the Registrar of Companies to make March the end of its current financial year. Again, in 2010, the Taxpayer applied to change the end of its current financial year, this time to December. Both were approved at the relevant times.

The Taxpayer believed that the 2010 change had a retrospective effect for its 2009 tax year, meaning that the period of 1 April 2009 to 31 December 2009 (the disputed period) would be included in the 2009 tax year. SARS, on the other hand, maintained that the approval applied to the Taxpayer's 2010 tax year (rather than 2009) and that the disputed period had to be included in the 2010 return.

Despite these arguments, both parties acknowledged that the Taxpayer had not submitted a return (in either the 2009 or the 2010 tax years) for the disputed period. This meant that SARS assessed the Taxpayer for both 2009 and 2010 without the disputed period being included.

The Taxpayer sought relief from SARS contending that this was a *"readily apparent undisputed error in the assessment"* (by either SARS or L'Avenir) or that it was a *"processing error"* (by SARS), as availed in sections 93(1)(d) and 93(1)(e)(ii), respectively, of the Tax Administration Act 28 of 2011 (TAA).

Broadly, section 93 deals with reduced assessments and the circumstances under which SARS may reduce an assessment. It appears that the Taxpayer had an alleged loss falling in this disputed period, hence its various attempts at compelling SARS to assess the disputed period.

Despite its arguments, SARS refused to allow the Taxpayer to submit a separate return for the disputed period or issue reduced assessments for the 2009 or 2010 tax years.

This refusal resulted in the current case where, in 2021, the Taxpayer brought an urgent application before the High Court requesting permission to submit an income tax return for the disputed period and for SARS to then assess it for that period.

Notably, the Taxpayer did not seek the court's consideration on the merits of its return; only for the court to direct SARS to receive and to assess the return.

In response to the application, SARS raised three main arguments:

1. The relief sought by the Taxpayer effectively sidestepped the dispute resolution process contained in Chapter 9 of the TAA.
2. Section 105 of the TAA states that a taxpayer can only dispute an "assessment" in terms of Chapter 9 – unless a High Court directs otherwise.

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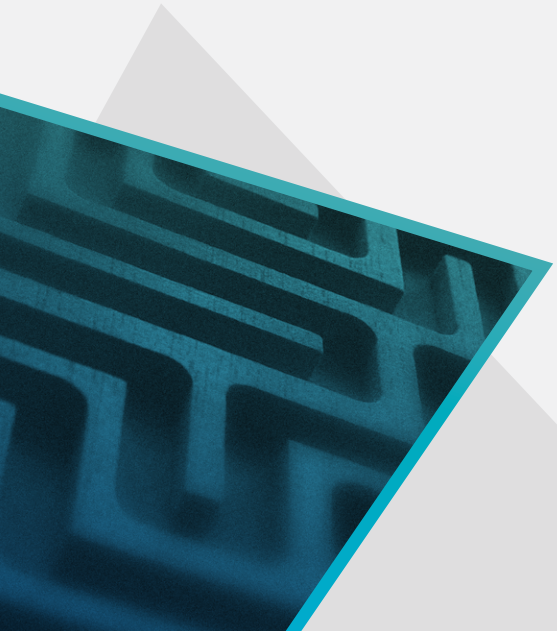

3. Since the Taxpayer could not object or appeal SARS' decision to decline the section 93(2) requests for reduced assessments, this meant that Chapter 9 of the TAA did not apply, and the Taxpayer should have followed a review of SARS' decision under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) (it is unclear from the judgment whether this argument was made in the alternative to the first two arguments).

Essentially, SARS submitted to the court that the Taxpayer was not entitled to approach the court to compel SARS to accept the return. Rather, the Taxpayer should have brought a review of SARS' decision before the court. The Taxpayer conceded this point. The parties then made further representations to the court to aid it in determining whether the supplemented papers before it could form the basis for a review – thus, converting the urgent application to a review.

The Taxpayer contended that its papers were sufficiently detailed to form the basis for a review application and that SARS' view that the application should be dismissed on form (rather than merits), was formalistic and ignored the interests of justice.

SARS argued that the conversion should not be allowed on the basis that the court was duty bound to determine the dispute defined in the papers only. The Taxpayer's notice of motion did not include review relief, and neither of the parties dealt with review in their papers.

THE COURT'S DISTILLING CONSIDERATIONS

The court noted that, as a starting point, even if it permitted the Taxpayer to make out a case under PAJA, it still would have needed to overcome the requirement that PAJA provides a 180-day period in which to bring a review application. Considering that 180 days had passed since SARS' decision, the Taxpayer would have needed to first apply for condonation. Either way, the court held, the Taxpayer would need to make out a fresh case to explain its delay. Furthermore, the court indicated that the Taxpayer is required to set out the specific grounds it is relying on for review, and SARS must be afforded an opportunity to deal with these grounds before the matter is ripe for hearing. Before a matter can be reviewed before a court, the record of the disputed decision must also be placed before the court (in terms of Rule 53 of the Uniform Rules of Court) so that it has all the relevant facts against which to consider the lawfulness of the decision.

Lastly, the court held that even if SARS' decision was unlawful, it remains valid and binding (i.e. continues to have legally valid consequences) until it is set aside.

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Overall, the court found that the Taxpayer, in seeking a conversion, wished to introduce fundamentally different relief when the case in question was essentially aimed at forcing SARS to change the decision it had already made. The court concluded that "*there is no reasonable possibility that the two can simultaneously co-exist on the same set of papers*". Consequently, the Taxpayer's application was dismissed.

CONCLUSION

It is interesting that SARS argued that the Taxpayer pursue a review under PAJA, in terms of its third argument. Historically, SARS has been inclined to rebuff attempts at review under PAJA, preferring taxpayers to pursue recourse under the dispute resolution process in the TAA. Nevertheless, this case confirms that the appropriate mechanism to review SARS' decisions under section 93 is under PAJA. What's more, it is not appropriate for a party to seek a conversion from an urgent application to a review application on the same papers. The correct approach is to institute fresh review proceedings. Like a fine wine, court processes cannot be rushed, and no steps must be overlooked.

TAIGRINE JONES (OVERSEEN BY HOWMERA PARAK)

OUR TEAM

For more information about our Tax & Exchange Control practice and services in South Africa and Kenya, please contact:

Emil Brincker
Practice Head
Director
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com

Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Lance Collop
Director
T +27 (0)21 481 6343
E lance.collop@cdhlegal.com

Mark Linington
Director
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com

Gerhard Badenhorst
Director
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com

Jerome Brink
Director
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com

Petr Erasmus
Director
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com

Dries Hoek
Director
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com

Heinrich Louw
Director
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com

Howmera Parak
Director
T +27 (0)11 562 1467
E howmera.parak@cdhlegal.com

Stephan Spamer
Director
T +27 (0)11 562 1294
E stephan.spamer@cdhlegal.com

Tersia van Schalkwyk
Tax Consultant
T +27 (0)21 481 6404
E tersia.vanschalkwyk@cdhlegal.com

Louis Botha
Senior Associate
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com

Varusha Moodaley
Senior Associate
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com

Ursula Diale-Ali
Associate
T +27 (0)11 562 1614
E ursula.diale-ali@cdhlegal.com

Louise Kotze
Associate
T +27 (0)11 562 1077
E louise.Kotze@cdhlegal.com

Tsanga Mukumba
Associate
T +27 (0)11 562 1136
E tsanga.mukumba@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA