



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case no: 728/2022

In the matter between:

**LUEVEN METALS (PTY) LTD**

**APPELLANT**

and

**COMMISSIONER FOR THE SOUTH AFRICAN**

**REVENUE SERVICE**

**RESPONDENT**

**Neutral citation:** *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* (Case no 728/2022) [2023] ZASCA 144 (8 November 2023)

**Coram:** MOLEMELA P and PONNAN and MEYER JJA and KEIGHTLEY and MALI AJJA

**Heard:** 31 August 2023

**Delivered:** 8 November 2023

**Summary:** Tax law – declaratory order – whether appropriate not considered by high court – narrow basis for entertaining application for declaratory relief in tax matters.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (N Davis J, sitting as court of first instance):

The appeal is dismissed with costs including those of two counsel.

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## JUDGMENT

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**Ponnan JA (Meyer JA and Keightley and Mali AJJA concurring):**

[1] This is an appeal against a judgment of the Gauteng Division of the High Court, Pretoria (per Davis J) (the high court), dismissing an application for declaratory relief pertaining to s 11(1)(f) of the Value Added Tax Act 89 of 1991 (the VAT Act).<sup>1</sup>

[2] The appellant, Lueven Metals (Proprietary) Limited, is engaged in the business of the trade and refining of precious metals, such as gold, as well as the silver by-product derived from the gold refining process. It is a registered Category C vendor in terms of the VAT Act.<sup>2</sup> The appellant purchases lesser purity gold in manufactured form (such as scrap jewellery) or in unwrought form (such as gold bars) (described as gold-containing material) from certain preapproved suppliers. The gold sourced by the appellant is invariably of a lesser purity than pure gold because the latter is usually too soft, susceptible to scratches and thus not suited for everyday use as jewellery. Hence, gold is alloyed with other metals to manufacture jewellery. The alloying of gold with other metals (such as copper and silver) reduces the special characteristics and quality of gold – the colour changes and the density and purity reduces.

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<sup>1</sup> Section 11(1)(f) provides: 'Where, but for the provisions of this section, a supply of goods would be charged with tax under section 7(1)(a), such supply of goods shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where the supply is to the South African Reserve Bank, the South African Mint Company (Proprietary) Limited or any deposit-taking institution registered under the Deposit-taking Institutions Act, 1990 (Act No. 94 of 1990), of gold in the form of bars, ingots, buttons, wire, plate or granules or in solution, which has not undergone any manufacturing process other than the refining thereof or the manufacture or production of such bars, ingots, buttons, wire, plates, granules or solution.'

<sup>2</sup> Category C means the category of vendors whose tax periods are periods of one month ending on the last day of each of the 12 months of the calendar year.

[3] The appellant has contracted with Absa Bank Limited, a bank registered under the Banks Act 94 of 1990 (Absa), to supply pure gold bars, after such gold has been refined to a purity level of at least 99.5%, namely pure or fine gold. According to the appellant, the gold-containing material sourced by it (in its lesser state of purity) is not acceptable to Absa, who requires pure (fine) gold refined by a refinery accredited by the London Bullion Market Association (LBMA). The gold-containing material is therefore melted and refined on behalf of the appellant for supply to Absa.

[4] As the appellant is not accredited to refine the gold-containing material to meet the standards of the LBMA required by Absa, the appellant deposits its lesser purity gold bars with Rand Refinery, who is so accredited. All gold-containing material deposited with Rand Refinery for further refining must comply with certain specifications. Where these specifications are not met, Rand Refinery will either reject the deposit or impose penalties or additional fees. The appellant therefore refines and processes all gold-containing material in-house to remove deleterious elements to enable it to deposit the gold with Rand Refinery in bar form. The appellant generally refines the gold-containing material to a purity level of between 80 to 90%, to maximise the yield and minimise the penalties or additional fees.

[5] The lesser purity gold bars (refined and produced by the appellant from the gold-containing material) are transported from the appellant's premises to Rand Refinery, where they are deposited. Rand Refinery requires large quantities to operate effectively and efficiently, which no single depositor can satisfy. When Rand Refinery receives the appellant's lesser purity gold bars, they are melted and refined together with (co-mingled with) the gold of other depositors. Rand Refinery refines the gold received from the various depositors to a purity level of at least 99.5% to produce gold bars that meet the minimum LBMA standard in conformity with Absa's requirements. Rand Refinery thereafter delivers the gold bars to Absa.

[6] During the appellant's 2018 to 2020 tax periods, it supplied gold bars to Absa and zero-rated such supplies in terms of s 11(1)(f) of the VAT Act. As matters then stood, according to the appellant, refunds in the total amount of R51 036 867.34, together with interest thereon, was due to it by the respondent, the Commissioner for the South African Revenue Service (SARS). On 27 March 2020, SARS, acting in terms

of s 40 of the Tax Administration Act 28 of 2011 (the TAA), notified the appellant of a VAT verification for the relevant period pursuant to s 46. After an exchange of correspondence, on 19 June 2020, SARS notified the appellant of a VAT and Income Tax audit. SARS then requested the appellant to submit relevant material in terms of s 46. On 10 March 2021, the appellant was requested to attend in person on 18 March 2021 in terms of s 47 of the TAA, to enable SARS to obtain further clarification and to expedite the audit. Following the interview, on 30 March 2021, SARS sought an extension until 8 April 2021 for the issuance of a letter of audit findings.

[7] On 8 April 2021, SARS issued an ‘outcome of the audit conducted as envisaged in terms of section 42(2)(b) of the [TAA]’ (the letter of audit findings). SARS indicated that the audit findings do not concern the 2019 tax period and that further findings in that regard would issue in due course. According to SARS, the VAT declarations and tax invoices provided by the appellant reflected that, in total, zero-rated supplies of R4 059 018 550 had been made to Absa and Rand Refinery. SARS stated that it had reviewed the nature of the goods provided by suppliers to the appellant and determined that the gold purchased by it had previously been subjected to a manufacturing process.

[8] SARS took the view that s 11(1)(f) of the VAT Act prohibits the supply at a zero-rate to the South African Reserve Bank (SARB), the South African Mint Company (Pty) Ltd (Mintco) or any Bank registered under the Banks Act, of gold in any form that has undergone any manufacturing process ‘other than the refining thereof or production of such bars’. SARS accordingly expressed an intention to re-classify the zero-rated sales to Absa as standard-rated sales with VAT of 15% in terms of s 7(1)(a), read with s 11(1) and s 64 of the VAT Act. SARS also intimated that it was considering imposing an understatement penalty and raising interest on the appellant’s outstanding VAT liability.

[9] On 2 June 2021, the appellant responded to SARS’ letter of audit findings (the appellant’s response). The appellant’s response stated:

‘14.1. S 9(1) of the TAA provides that:

“A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act, excluding a decision given effect to in an assessment or a notice of assessment that

is subject to objection and appeal, may in the discretion of a SARS official described in paragraph (a), (b) or (c) or at the request of the relevant person, be withdrawn or amended by-

- (a) the SARS official;
- (b) a SARS official to whom the SARS official reports; or
- (c) a senior SARS official.” (Emphasis added)

14.2. With reference to the taxpayer’s contentions set out in this response letter, the taxpayer hereby requests in terms of s 9(1) of the TAA that SARS forthwith:

14.2.1. reconsiders its intention in terms of the letter of audit findings to negatively assess the taxpayer;

14.2.2. withdraws its decision to raise assessments and to reclassify the taxpayer’s zero-rated sales to standard rated sales; and

14.2.3. to pay the taxpayer its outstanding VAT refunds in the amount of R51, 036, 867.34 plus interest.’

[10] It concluded:

‘In the premises, the taxpayer’s gold sales to ABSA during the relevant tax periods were correctly zero rated in terms of s 11(1)(f) of the VAT Act and, accordingly, the intended VAT assessments should not be raised. As no VAT liability will arise in this regard, penalties, interest and/or understatement penalties cannot validly be imposed by SARS. Should SARS decide to impose understatement penalties despite the contentions advanced herein, SARS is requested to state the facts on which it bases the imposition thereof, as contemplated in s 102(2) of the TAA.’

[11] The appellant’s response was dated 2 June 2021. So too, its notice in terms of s 11(4) of the TAA of an intention to institute legal proceedings against SARS. The appellant issued the application, which forms the subject of this appeal, out of the high court on 24 June 2021. It sought the following relief:

‘1. Directing (in terms of section 105 of the Tax Administration Act, 28 of 2011 (as amended)), insofar as it may be required, that the dispute between the parties (as set forth in this application) be adjudicated by this Court;

2. That a declaratory order be issued in terms whereof it be declared that:

2.1. The word “gold” in section 11(1)(f) of the Value-Added Tax Act, 89 of 1991 (as amended) (“the VAT Act”) refers to, and only applies to: gold (in any of the eight unwrought forms permitted in the subsection) refined to the grade of purity required for acquisition by the

South African Reserve Bank (“SARB”), the South African Mint Company (Proprietary) Limited (“Mintco”), or any bank registered under the Bank Act, 1990 (Act No. 94 of 1990) (“bank”);

2.2. “Gold” in the form of “bars” supplied to the SARB, Mintco or a bank, in terms of section 11(1)(f) of the VAT Act, refers to gold of a purity equal to or greater than 99.5%;

2.3. The phrase “which has not undergone any manufacturing process other than the refining thereof or the manufacture or production of” in section 11(1)(f) of the VAT Act, precludes the zero rating of a supply of gold:

- (i) not being in one of the eight unwrought forms identified in the subsection; and
- (ii) that has undergone further manufacturing or production processes once it has reached the state of purity required for acquisition by SARB, Mintco or a bank;

2.4. The phrase “which has not undergone any manufacturing process other than the refining thereof or the manufacture or production of” in section 11(1)(f) of the VAT Act, refers to any manufacturing process(es) carried out by the vendor supplying gold to the SARB, Mintco or a bank, and does not refer to any process(es) to which gold may have been subjected historically, prior to being refined to the grade of purity required for acquisition by the SARB, Mintco or a bank.’

The application failed before the high court. Davis J dismissed it with costs, but granted leave to the appellant to appeal to this Court.

[12] Section 21(1)(c) of the Superior Courts Act 10 of 2013 provides a statutory basis for the grant of declaratory orders without removing the common law jurisdiction of courts to do so. It is a discretionary remedy. The question whether or not relief should be granted under this section has to be examined in two stages. In the first place, the jurisdictional facts have to be established. When this has been done, the court must decide whether the case is a proper one for the exercise of its discretion.<sup>3</sup> Thus, even if the jurisdictional requirements are met, an applicant does not have an entitlement to an order. It is for such applicant to show that the circumstances justify the grant of an order. I am by no means satisfied that those circumstances are present in this matter. Quite the contrary, there are several considerations that suggest that the high court ought to have exercised its discretion against the hearing of the application.

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<sup>3</sup> See *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another* 1995 (4) SA 120 (T) at 124E-F (*Family Benefit Friendly Society*) and the cases there cited.

[13] At the outset of the hearing of the appeal, Counsel were required to address whether absent a directive in terms of s 105 of the TAA,<sup>4</sup> the high court could enter into and pronounce on the merits of the application for declaratory relief. This, in the light of the relief sought in prayer 1 of the Notice of Motion. At the bar in this Court, the argument advanced by both counsel was that as there was neither an ‘assessment’ nor a ‘decision as described in s 104’, and as the nature of the relief sought was a declaration of rights, the default rule that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA, did not find application.

[14] The legislative scheme is designed to ensure that the objection and appeal process and the resolution of tax disputes by means of alternative dispute resolution and then the tax board or the tax court be exhausted, before the high court can be approached. It also contemplates that in the ordinary course the tax court deal with the dispute, by way of a trial, as the court of first instance before the high court can be approached. Nowhere is this clearer than from the language, context, history and purpose of s 105, which makes it plain that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA, unless a high court directs otherwise (*Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd*).<sup>5</sup>

[15] What Counsel’s argument boiled down to was not that s 105 did not find application at all in circumstances where declaratory relief was sought; but, properly construed, reduced itself essentially to one of timing. There seemed to be an acceptance that if the appellant had approached the high court for precisely the same relief after an assessment had issued, then s 105 would apply. However, because an assessment had not yet issued, but only a notice of intention to assess, the section did not apply. Why the one taxpayer would be better placed, when both sought precisely the same relief, could not be explained. The illogicality of such a differentiation appears to be compounded when one considers that a taxpayer (such as the appellant) on the receiving end of a decision that is capable of revision and

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<sup>4</sup> Section 105 provides: ‘A taxpayer may only dispute an assessment or ‘decision’ as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.’

<sup>5</sup> *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* [2023] ZASCA 28; 2023 (4) SA 488 (SCA).

reconsideration would have a lower bar to surpass as opposed to one with a final decision in the form of an assessment. The latter would have to establish exceptional circumstances for a high court to authorise a departure from the default rule.

[16] It is contended that authority for granting declaratory orders in tax matters is clearly established. In particular, much store was sought to be placed on two recent judgments of this Court, namely *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd (Langholm Farms)*,<sup>6</sup> and *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd*,<sup>7</sup> which followed it. The argument being, to borrow from *Langholm Farms*, ‘that is exactly the situation for which declaratory orders are made and seeking one in the context of a taxing statute was endorsed by the Constitutional Court in *Metcash*’.<sup>8</sup>

[17] In *Metcash Trading Limited v Commissioner for the South African Revenue Service (Metcash)*, Kriegler J had this to say:

‘Indeed, it has for many years been settled law that the Supreme Court has jurisdiction to hear and determine income tax cases turning on legal issues. Thus in *Friedman and Others NNO v Commissioner for Inland Revenue: In re Phillip Frame Will Trust v Commissioner for Inland Revenue* McCreath J was asked to resolve the legal question whether a testamentary trust was a person within the meaning of the Income Tax Act. Having referred to half a dozen reported cases, four of them in the Appellate Division, where the existence of such jurisdiction was accepted without discussion, and one Prentice Hall report where the point was specifically considered, McCreath J concluded as follows as to his competence to determine the case:

“I am in agreement with the finding of the Court in that case that where the dispute involved no question of fact and is simply one of law the Commissioner and the Special court are not only competent authorities to decide the issue – at any rate when a declaratory order such as that in the present case is being sought.”<sup>9</sup> (Footnotes omitted)

[18] As Kriegler J acknowledged in *Metcash*, in many of the earlier cases there was an acceptance without discussion of the existence of the jurisdiction of the high court

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<sup>6</sup> *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd* [2019] ZASCA 163 (*Langholm Farms*).

<sup>7</sup> *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA).

<sup>8</sup> *Langholm Farms* fn 6 above para 10.

<sup>9</sup> *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) para 44 (*Metcash*).



to hear and determine income tax cases turning on legal issues. In what is referred to in *Metcash* as the ‘one Prentice Hall report’, *Emary NO v CIR*, a point *in limine* was taken that the applicants should have submitted the returns demanded of them and that it was for the Commissioner to determine whether or not the applicants are liable for and should be assessed to tax, leaving to them their remedy by way of objection and appeal in terms of the Act. It was accordingly submitted that the court had no jurisdiction to hear and decide the application. In dismissing the point *in limine*, Harcourt AJ held: ‘where the dispute involves no question of fact and the question is simply one of law the Commissioner and the Special Court are not the only competent authorities.’<sup>10</sup> In that, reference was made by the learned Judge to the following reported decisions: *Whitfield v Phillips*;<sup>11</sup> *Gillbanks v Sigournay*;<sup>12</sup> *Bailey v Commissioner for Inland Revenue*;<sup>13</sup> *Commissioner for Inland Revenue v Delfos*;<sup>14</sup> *Parekh v Receiver of Revenue*;<sup>15</sup> *R v Kruger*;<sup>16</sup> *R v Sachs*;<sup>17</sup> *AG, Natal v Johnstone & Co. Ltd*;<sup>18</sup> and, *British Chemicals & Biologicals v SA Pharmacy Board*.<sup>19</sup>

[19] Of the nine cited references in *Emary NO v CIR*, the point appears not to have been touched on in *Bailey v Commissioner for Inland Revenue*, *Commissioner for Inland Revenue v Delfos*, *Parekh v Receiver of Revenue & Another* or *R v Kruger*, whilst *Attorney-General of Natal v Johnstone & Co Ltd*, *British Chemicals & Biologicals v SA Pharmacy Board* and *R v Sachs*, were concerned with the competency of the Court to grant a declaratory order that would have the effect of ensuring an applicant against successful prosecution was recognised. Thus, none of those decisions are directly on point. That leaves *Whitfield v Phillips* and *Gillbanks v Sigournay*: In the former, Steyn JA said:

‘In dealing with the question whether the award is for income tax purposes to be regarded as a capital accrual or as income, the very first difficulty which would be encountered would be that by Act of Parliament the determination of the merits of that question, as distinct from a

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<sup>10</sup> *Emary NO and Another v CIR* 1959 (2) PH T 16 (D).

<sup>11</sup> *Whitfield v Phillips & Another* 1957 (3) SA 318 at 345 (AD) (*Whitfield*).

<sup>12</sup> *Gillbanks v Sigournay* 1959 (2) SA 11 at 18-19 (N) (*Gillbanks*).

<sup>13</sup> *Bailey v Commissioner for Inland Revenue* 1933 AD 204 at 226.

<sup>14</sup> *Commissioner for Inland Revenue v Delfos* 1933 AD 243 at 252.

<sup>15</sup> *Parekh v Receiver of Revenue & Another* 1948 (4) SA at 954 (N).

<sup>16</sup> *R v Kruger* 1958 (2) SA 673 (C).

<sup>17</sup> *R v Sachs* 1953 (1) SA 392 (A) at 410.

<sup>18</sup> *AG, Natal v Johnstone & Co Ltd* 1946 AD 256 at 261-2.

<sup>19</sup> *British Chemicals & Biologicals v SA Pharmacy Board* 1955 (1) SA 184 (A) at 192.

question of law, has been entrusted entirely to the Commissioner for Inland Revenue and, on appeal from his decision, to the Special Court for hearing income tax appeals. Another court cannot usurp that function.<sup>20</sup>

In the latter, Henochsberg J expressed his disagreement with Steyn JA in these terms: 'I find myself, with very great respect, in a difficulty in trying to appreciate the reasoning of the learned Judge of Appeal. It seems to me that the question as to whether, in a case such as this, an award of damages for personal injuries in respect of loss of earning capacity is to be regarded as a capital accrual or as income, is purely one of law and therefore a matter which is competent for any Court to determine.'<sup>21</sup>

[20] As this survey of the authorities illustrates; that the high court has jurisdiction to hear and determine income tax cases turning on legal issues, can, so it would seem, be traced back to the unreasoned conclusion of Henochsberg J in *Gillbanks v Sigournay*, which found uncritical acceptance in *Emery NO v CIR* and thereafter appears to have taken root *In re Phillip Frame Will Trust v Commissioner for Inland Revenue*.

[21] That aside, it is important to recognise that the legislative landscape has changed significantly since the decision of the Constitutional Court in *Metcash*.<sup>22</sup> Prior to the amendment of s 105, the taxpayer could elect to take an assessment on review to the high court instead of following the prescribed procedure. That is no longer the case. The amendment was meant to make clear that the default rule is that a taxpayer had to follow the prescribed procedure, unless a high court directs otherwise. For the present, it suffices to say that the judgments relied upon appear to have far too readily and uncritically accepted that a taxpayer could, in general and without more, approach a high court for declaratory relief. Importantly, those judgments do not lay down that where declaratory orders are sought in tax matters, different principles apply.<sup>23</sup> In fact the question whether a declaratory order was appropriate was not considered by the high court in this case.

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<sup>20</sup> *Whitfield* fn 11 above at 345.

<sup>21</sup> *Gillbanks* fn 12 above at 19.

<sup>22</sup> *Metcash* fn 9 above.

<sup>23</sup> *Family Benefit Friendly Society* fn 3 above at 126F.

[22] Thus, even on the acceptance of Counsel's primary contention that s 105 was not implicated because there was neither an 'assessment' nor a 'decision as described in s 104', the purpose of s 105 (which was an innovation introduced by the TAA from 1 October 2011 and narrowed down by an amendment made in 2015) and, which accords with the overall scheme of the TAA, was not wholly irrelevant. At the very least, it represented an important pointer to legislative intent and, read together with the other provisions in the TAA, set the overall contextual scene. It was thus not a wholly irrelevant consideration in the determination of whether or not the circumstances were such that relief in the form of a declaratory order was appropriate. The enquiry was far more nuanced than one may at first blush apprehend. After all, a declaratory order is not appropriate if there are other specific statutory remedies available.<sup>24</sup>

[23] This is not to suggest that there will never be tax disputes for which declaratory orders can rightly be sought and made. However, their occurrence, in my view, is likely to be rare and their circumstances exceptional or at least unusual. In general, and without attempting to lay down any hard and fast rules, the exercise of what after all is a purely discretionary power, should be regarded as a reserve or occasional expedient. No doubt, each case would have to be judged on its own facts and circumstances. I have expressly refrained from formulating a test as I believe that each such case can confidently be left to the good sense of the judge concerned in the exercise of his or her broad general discretion. On any reckoning, this is certainly not such a case.

[24] In responding to the letter of audit findings, the appellant seems to have simply gone through the motions. It did not thereafter afford SARS the opportunity to reconsider or alter the proposed assessments in the light of the response. Having responded to SARS' notice of assessment with fairly detailed representations, the appellant then pre-empted a reconsideration by or reply from SARS by giving notice and launching the application for declaratory relief. On the very day that the appellant had written to SARS, with a view to persuading it (SARS) to reconsider its position,

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<sup>24</sup> *Director of Public Prosecutions v Mohamed NO and Others* [2003] ZACC 4; 2003 (1) SACR 56; 2003 (5) BCLR 476; 2003 (4) SA 1 (CC) para 56.

the appellant gave the requisite notice in terms of s 11(4) of its intention to institute proceedings before the high court and some three weeks thereafter proceeded to do so. That the appellant genuinely sought to engage with SARS seems doubtful; because the giving of notice without allowing a reasonable time for a reply, and meaningful engagement, were mutually incompatible. In simply ignoring the emphasis placed by the TAA on alternative dispute resolution and in disregarding the need to exhaust its internal remedies, the high court became the appellant's first port of call. The danger with such an approach is that high courts could potentially be flooded with like matters. There is little to commend an approach by a taxpayer to the high court, without awaiting a response from SARS, including perhaps one that may well be favourable. SARS would be placed in an invidious position if it were forced on a regular basis to defend such matters before the high court.

[25] This is not a matter where 'there is a set of clear, sufficient, uncontested, facts'.<sup>25</sup> On the appellant's own showing, the parties had adopted divergent views not only in relation to the law but also the facts. The appellant's response addressed a range of issues, including: the requirements of s 11(1)(f), the relevant principles of statutory interpretation and the application of international law; what constitutes gold and the gold supply chain; the manufacturing process; the definition of refining and the refining process; the distinction between manufacturing and production; co-mingling and a relevant class ruling; the reasonable care standard and understatement penalties; and, lawful, reasonable and procedurally fair administrative action. All of those were, in truth, matters for adjudication in accordance with the special machinery created by the TAA.<sup>26</sup> Nowhere is this more clearly illustrated than in the relief sought. From the range of orders sought in this matter it is clear that unlike, for example *In re Phillip Frame Will Trust v Commissioner for Inland Revenue*, the dispute in this matter is not simply one of law but also involves questions of fact. The orders sought are all thus inextricably linked to the facts.

[26] The circumstances here certainly did not favour a piecemeal consideration of the case and, as it transpires, failed to lead to a reasonably prompt resolution of any

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<sup>25</sup> *Mobile Telephone Networks (Pty) Ltd v Commissioner for the South African Revenue Service* [2022] ZASCA 142; [2023] (1) All SA 330 (SCA); 2023 (1) SA 420 (SCA); 85 SATC 235 para 27

<sup>26</sup> *Ibid* para 12.

of the real issues between the parties. If anything, the approach adopted opened ‘the door to the “fractional disposal” of actions and the “piecemeal hearing of appeals”’.<sup>27</sup> In *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd & another*, this court said the following:

‘Before concluding we are constrained to make the comments that follow. Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition, it might well be desirable to have that issue decided first.

This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately.’<sup>28</sup> (Footnotes omitted.)

[27] Likewise, it is generally considered inappropriate to allow an appeal when the entire dispute between the parties has yet to be resolved by the court of first instance.<sup>29</sup> In *Guardian National Insurance Co Ltd v Searle NO*, the following was stated:

‘As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time.’<sup>30</sup>

In this regard, it is important to emphasise that the business of a court, and in particular an appellate court such as this, is generally retrospective; it deals with situations or problems that have already ripened or crystallised and not with prospective or hypothetical ones.<sup>31</sup> No doubt, if a declaratory application avails the appellant now, it will still avail the appellant after the issues have crystallised.

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<sup>27</sup> *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921 (A) at 928H.

<sup>28</sup> *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd & another* [2009] ZASCA 130; [2010] 2 All SA 9 (SCA); 2010 (3) SA 382 (SCA) paras 89 and 90.

<sup>29</sup> *Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS* [2010] ZASCA 65 2010 (6) SA 469 (SCA); [2010] 4 All SA 175 (SCA) at para 16 (*Health Professions Council of South Africa*).

<sup>30</sup> *Guardian National Insurance Co Ltd v Searle NO* [1999] ZASCA 3; [1999] 2 All SA 151 (A); 1999 (3) SA 296 (SCA) at 301A-C; see also *Health Professions Council of South Africa* fn 29 above para 16.

<sup>31</sup> *Ferreira v Levin NO & others; Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) para 199; see also *Clear Enterprises (Pty) Ltd v Commissioner for South African Revenue Services and Others* [2011] ZASCA 164 paras 17 and 18.

[28] In *Luzon Investments (Pty) Ltd v Strand Municipality*,<sup>32</sup> the full court (per Friedman J (Howie J and Conradie J concurring)) referred to an article by Prof AH Hudson entitled 'Declaratory Judgments in Theoretical Cases: The Reality of the Dispute' (that was approved by the Supreme Court of Canada in *Solosky v The Queen*),<sup>33</sup> where the learned author stated:

'The declaratory action is discretionary and two factors which will influence the Court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.'<sup>34</sup>

Here, the declarator fails both tests – it lacks utility and fails to settle the questions at issue between the parties.

[29] In any event, we may well be precluded from entering into the substantive merits of the appeal. This is so because the matter was approached as if an appeal lies against the reasons for judgment. It does not. Rather, an appeal lies against the substantive order made by a court.<sup>35</sup> The order in this case reads: 'the application is dismissed with costs, including the costs of senior and junior counsel'. The high court was called upon to resolve the competing contentions of the parties in respect of s 11(1)(f) of the VAT Act, and although it evidently inclined against the appellant on that score, absent a counter application by SARS, it could do no more than dismiss the appellant's application with costs.

[30] The cumulative consequence of all of the factors that I have alluded to is that an application for declaratory relief was not appropriate in this matter. The nature of the dispute more properly lent itself to resolution by use of the special machinery of the TAA set up for that purpose. Thus, although the high court incorrectly entertained an application for declaratory relief, it was correct in dismissing it. I may add, that this Court could not interfere with the exercise of the high court's discretion to deal or not

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<sup>32</sup> *Luzon Investments (Pty) Ltd v Strand Municipality and Another* 1990 (1) SA 215 (C) at 229I–230A.

<sup>33</sup> *Solosky v The Queen* 105 DLR (3d) 745 at 754.

<sup>34</sup> A H Hudson 'Declaratory Judgments in Theoretical Cases: The Reality of the Dispute' (1976-77) 3 *Dalhousie Law Review* 706 at 708.

<sup>35</sup> *Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355; *Absa Bank Ltd v Mkhize and Another, Absa Bank Ltd v Chetty, Absa Bank Ltd v Mliphha* [2013] ZASCA 139; [2014] 1 All SA 1 (SCA); 2014 (5) SA 16 (SCA) para 64.

deal with a matter (as should have happened here), unless there was a failure to exercise a judicial discretion.<sup>36</sup>

[31] In the result, the appeal is dismissed with costs including those of two counsel.

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V M PONNAN  
JUDGE OF APPEAL

### **Molemela P**

[32] I have read the judgment of my brother, Ponnan JA (the majority judgment). Although I too conclude that the appeal must be dismissed, I however respectfully disagree with the majority judgment's finding that the high court incorrectly entertained the application for declaratory relief.

[33] The facts of this matter have been comprehensively set out in the majority judgment and it is therefore not necessary to rehearse them in this section of the judgment. It is trite that every case must be judged on its own facts and circumstances. As correctly set out in the majority judgment, s 105 of the TAA makes it plain that a taxpayer may only dispute an assessment by the objection and appeal procedure to the Tax Court under the TAA, unless a high court directs otherwise. The term 'assessment' means 'the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS',<sup>37</sup> while 'decision' is defined as 'a decision referred to in s 104(2)'<sup>38</sup> of the TAA, which includes the decision not to extend the period for lodging the objection, or a decision not to extend the period for the lodging of the appeal.

[34] In this matter, the appellant specifically pleaded in its founding affidavit that its application was not intended to dispute an assessment or decision as contemplated

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<sup>36</sup> D Harms *Civil Procedure in the Superior Courts Service Issue 77* (August 2023) at A4.18.

<sup>37</sup> Section 1 of the TAA.

<sup>38</sup> Section 101 of the TAA.

in s 104 of the TAA and went on to assert that the jurisdiction of the high court was consequently not ousted by the absence of a directive as contemplated in of s 105 of the TAA. SARS took no issue with that assertion in its answering affidavit. It is worth noting that both counsel confirmed that by the time the application was heard, SARS had still not issued any assessments. Having taken the pleadings and all the circumstances of this case into account, I am satisfied that there was neither an assessment nor decision within the contemplation of s 104 of the TAA. That being the case, s 105 was not implicated. Put differently, on the facts of this case, the s 105 directive did not find application. *Rappa* is clearly distinguishable on the facts because in that matter, an assessment had already been issued by SARS whereas no assessment had been issued in the matter under consideration; furthermore, the applicant in that matter had instituted a review application and not sought a declarator as is the case here.

[35] In terms of s 21(1)(c) of the Superior Courts Act the court has the power, *in its discretion* and at the instance of any interested person, to grant declaratory relief. It is trite that two main considerations occupy the presiding judge's mind when adjudicating an application in which declaratory relief is sought, namely (a) whether an applicant has an interest in an existing, future or contingent right or obligation and, if so, (b) whether the order ought to be granted,<sup>39</sup> all things considered. During the first leg of this two-stage enquiry the court focuses on the necessary condition precedent, namely, whether the applicant has shown an 'existing, future or contingent right or obligation'.<sup>40</sup> This is the jurisdictional requirement. If the court is satisfied that the existence of such conditions has been proven, the second leg of the enquiry is the consideration, within the court's discretion, whether to refuse or grant the order sought.<sup>41</sup>

[36] Given the common cause fact that an assessment or decision had not been made by SARS and that the narrow issue presented to the high court for determination was the interpretation of s 11(1)(f), *a fortiori*, no directive was required from the high

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<sup>39</sup> *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) para 16.

<sup>40</sup>In terms of s 21(1)(c) of the Superior Courts Act, the court has the power:

'In its discretion and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such a person cannot claim any relief consequential upon the determination.'

<sup>41</sup> *Ibid* para 18.



court for it to exercise its jurisdiction under s 21(1)(c) of the Superior Courts Act. In a nutshell, nothing barred the high court from entertaining the appellant's application for the declaratory relief. In coming to this conclusion, I am fortified by two judgments of this Court in which the bringing of an application for a declarator in respect of the interpretation of legislation pertaining to tax matters came up for consideration.

[37] In *Commissioner for South African Revenue Service v Langholm Farms (Pty) Ltd*<sup>42</sup>, *Langholm Farms* had submitted diesel refund claims to SARS, which prompted SARS to perform an audit. Based on SARS' interpretation of s 75(1C)(a)(iii) of the Customs and Excise Act 91 of 1964 (CEA), SARS subsequently issued a notice of intention to issue a revised assessment disallowing *Langholm Farms'* claim on the basis that the diesel refund claims were excessive. *Langholm Farms* was invited to submit representations. Instead of responding to SARS' notice of intent, *Langholm Farms* approached the high court for a declaratory order concerning the correct interpretation of s 75(1C)(a)(iii) of the CEA and obtained declaratory relief. On appeal, this Court remarked as follows:

'...SARS expressed a clear view as to the proper construction of s 75(1C)(a)(iii). *Langholm* disagreed and responded with the application, in an effort to resolve the dispute. It is true that *Langholm* could have waited and provided SARS with the documents it required for a revised assessment, and then challenged such an assessment, and argued the point of law at that stage. The issue is whether it was obliged to do so. In my view there was nothing objectionable in *Langholm* seeking clarity on an issue of statutory interpretation that would clearly influence the outcome of SARS' audit...There was little point in *Langholm* entering into a debate or providing further information when none of it would be at all relevant given SARS' legal view. That is exactly the situation for which declaratory orders are made and seeking one in the context of a taxing statute was endorsed by the Constitutional Court in *Metcash*.'<sup>43</sup>

[38] It is clear from the dictum above that this Court's approval for a taxpayer approaching a high court for declaratory relief in tax matters in the circumscribed circumstances of seeking clarity on a statutory interpretation was unequivocal. Given that *Metcash* held that a court would have jurisdiction to grant declaratory relief to a vendor if it were to be alleged that the Commissioner had inter alia misapplied the law

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<sup>42</sup> *Commissioner for South African Revenue Service v Langholm Farms (Pty) Ltd* [2019] ZASCA 163.

<sup>43</sup> *Ibid* para 10.

in holding a particular transaction to be liable to VAT or failed to apply the proper legal test to a particular set of facts,<sup>44</sup> this Court's reliance on *Metcash* was apposite.

[39] In *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd*<sup>45</sup> (*UMK*), *UMK* had approached the high court for a declaratory order in circumstances where SARS had differed from *UMK* on the correct manner of calculation based on s 6 of the Mineral and Petroleum Resources Royalty Act 28 of 2008. The audit process had not yet been finalised. The circumstances in which *UMK* approached the high court are similar to those in the matter under consideration. On appeal, the appellant decried the granting of a declaratory order by the high court and contended that the respondent should have awaited the outcome of the audit process and exhausted internal remedies under the TAA. Once this Court had brought the parties' attention to the *Langholm Farms* judgment, SARS abandoned the above contentions and confined its arguments to the legal issue concerning the proper interpretation of the relevant legislation.<sup>46</sup> Significantly, these two judgments were delivered well after the 2015 amendment pertaining to s 105 of the TAA. It must be accepted that this Court's remarks as quoted in the preceding paragraph were made in the context of an awareness about the 2015 amendment to s 105 of the TAA. Clearly, this Court did not consider the dictum in *Metcash* to have been impacted by the 2015 amendment.

[40] It is evident from these two judgments<sup>47</sup> that this Court considered the interpretation of legislative provisions to be within the realm of disputes of a legal nature in respect of which a high court could grant a declarator in tax matters. It follows

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<sup>44</sup> *Metcash* para 71.

<sup>45</sup> *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* Commissioner, *South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA).

<sup>46</sup> That this Court considered itself bound by *Langholm Farms*' judgment is evident from para 4 of that judgment, where the following was stated: 'In its opposing affidavit, in argument before the high court, and in its heads of argument in this court, SARS argued that *UMK*'s application was premature as the audit process had not yet been finalised. It contended that *UMK* should have awaited the outcome of that process and then pursued its internal remedies under the Tax Administration Act 28 of 2011, by way of objection and appeal against any assessment with which it did not agree. Alternatively, it contended that it was inappropriate for *UMK* to seek relief by way of a declaratory order. *However, after the parties' attention was drawn to a recent judgment of this court dealing with a similar argument, we were informed that SARS no longer persisted with these points and would confine its arguments to the legal issue raised by UMK concerning the proper interpretation of the relevant provisions of the Royalty Act*'. (Own emphasis.)

<sup>47</sup> It was not submitted before us that any of the two judgments were wrongly decided.

by parity of reasoning that in the present case, where the only issue for determination was the interpretation of a provision of the VAT Act, the high court indeed had the jurisdiction to entertain the application for declaratory relief. On that basis, nothing precluded the high court from entertaining that application for a declaratory order within the contemplation of s 21(1)(c) of the Superior Courts Act. Moreover, both counsel stated from the bar that the jurisdiction issue was not raised before the high court. Against the backdrop of the discussion canvassed above, it is hardly surprising that the high court's judgment did not make any pronouncements on the aspect of jurisdiction. That should really be the end of the matter insofar as the issue regarding whether the jurisdiction of the high court was engaged or not is concerned.

[41] From my point of view, considerations regarding the utility of the remedy and whether, if granted, it would settle the questions at issue between the parties (as alluded to in para 28 of the majority judgment) are aspects that arise during the exercise of the discretion whether to grant the declaratory relief. Thus, when declaratory relief is refused on account of the court not being satisfied on those two aspects, it simply means that the court, in its discretion, held the view that such a relief was not appropriate, given the circumstances of the particular case; this does not equate to the court not being competent to entertain the declarator. It bears noting that in *Langholm Farms*, this Court did not uphold the interpretation given by the high court to the relevant provision; instead, it held that the declaratory orders were granted on the mistaken view of the law. It replaced the high court's order with one dismissing the application for the declarator. It did not find that the high court had incorrectly entertained the application for a declarator.

[42] Lastly, it is evident from the papers that both parties held the view that the declarator pertained to the interpretation of s 11(1)(f) of the VAT Act and believed that the high court's interpretation would lead to greater certainty for all concerned. The majority judgment correctly asserts that on the appellant's own showing, the parties had adopted divergent views not only in relation to the law but also the facts. I am of the view that given the factual disputes alluded to in the majority judgment, the *granting* of declaratory relief was not appropriate under those circumstances (even though the

court did have the jurisdiction to entertain the application for the declarator).<sup>48</sup> That being the case, it follows that the high court's dismissal of the application for declaratory relief cannot be faulted. On this score, there is no basis for tampering with the high court's decision to dismiss the application for declaratory relief, precisely because ultimately an appeal lies against an order and not the reasons.

[43] For all the reasons mentioned in this separate concurrence, I agree that the appropriate order is to dismiss the appeal with costs, including those occasioned by the employment of two counsel.

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MB MOLEMELA

PRESIDENT OF THE SUPREME COURT OF APPEAL

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<sup>48</sup> See *Mobile Telephone Networks (Pty) Ltd v Commissioner for the South African Revenue Service* [2022] ZASCA 142; [2023] 1 All SA 330 (SCA); 2023 (1) SA 420 (SCA); 85 SATC 235 paras 17 and 27.

## Appearances

For the appellant: PA Swanepoel SC and CA Boonzaier  
Instructed by: Edward Nathan Sonnenbergs Inc., Pretoria  
McIntyre van der Post Inc., Bloemfontein.

For the respondent: EC Coetzee SC and S Maritz  
Instructed by: VLZ Inc., Pretoria  
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